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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

175, 176, 177, 178 U. S.

BOOK 44,
LAWYERS' EDITION,
CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY
THE PUBLISHERS' EDITORIAL STAFF

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ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF
THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotment, Feb. 21, 1898, see Appendix VII. Book 42.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1898-1900.	COMMI- SIONED.	SWORN IN.
ASSOCIATE JUSTICE HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)
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ASSOCIATE JUSTICE GEORGE SHIRAS, JR., Pennsylvania.	President HARRISON.	THIRD. NEW JERSEY, PENN., DEL.	1892. (July 26.)	1892. (Oct. 10.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,

HON. GEORGE SHIRAS, JR.,

HON. HORACE GRAY,

HON. EDWARD DOUGLASS WHITE,

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THE DECISIONS

OF THE

Supreme Court of the United States

AT
OCTOBER TERM, 1899.

[1] *RAY W. JONES, *Appt.*,
v.
PATRICK MEEHAN and James Meehan.
(See S. C. Reporter's ed. 1-32.)

Suit to quiet title—lands derived from Indian chief—effect of treaty as grant.

1. A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress or any patent from the executive authority of the United States, if such is the intention of the treaty.
2. A treaty with Indians must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.
3. The omission of the words "any Indian" from the prohibition of purchases and leases "from any nation or tribe of Indians," as contained in the act of Congress of June 30, 1834, chap. 161, § 12, while the former statutes had extended the prohibition to purchases or leases from "any Indian," shows an intention of Congress to remove the general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States.
4. A reservation to a chief or other member of a tribe of Indians, of a specified number of sections of land, whether already identified or to be surveyed and located in the future, when made by the United States in a treaty with the tribe and as part of the consideration for a cession by the tribe of a tract of country to the United States, converts the reserved sections into individual property, and, if unaccompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple, which is alienable at the pleasure of the grantee, unless the United States, by provision of the treaty or of an act of Congress, has expressly or impliedly prohibited or restricted its alienation.

5. A reservation of lands "set apart" by the treaty of October 2, 1863, art. 9, between the United States and the Chippewa Indians, made "upon the urgent request of the Indians," for their chief, constituted a present grant to the chief of an alienable title in fee, subject only to the selection of the land in due form and to the definition of its boundaries by survey and patent.
6. An amendment of the pleadings may be allowed, even on appeal, if justice appears to require it.
7. The right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the laws, usages, and customs of the tribe, and not by the law of the state in which the land is situated, nor by any action of the Secretary of the Interior.
8. An affidavit by an Indian, signed by mark, in which he states that others besides himself are heirs of his father and entitled to share with him in the estate, is not conclusive against his right to be the sole heir, when the affidavit was procured from him by the Indian agent, under direction of the Secretary of the Interior, to show who were entitled to the distribution of certain rents, and was evidently considered by him when he made it as a mere matter of form, with which he was obliged to comply in order to get any part of the rent.
9. The rights of lessees of the heir of an Indian to whom title to land was granted by an Indian treaty cannot be divested by any subsequent action of the lessor or of Congress or of the executive departments.

[No. 7.]

Argued April 27, 28, 1898. Decided October 30, 1899.

APPEAL from a decree of the Circuit Court of the United States for the District of Minnesota in favor of the plaintiffs in a suit to quiet title to lands claimed un-

der conflicting leases from an Indian chief. *Affirmed.*

See same case below, 70 Fed. Rep. 453.

The facts are stated in the opinion.

Mr. James A. Kellogg argued the cause and filed a brief for appellant:

The title of the Indians in the land they occupy is the right of possession in perpetuity, and the government of the United States has the sole right to acquire from them this right.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. ed. 681; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283.

The Indian right is that of occupancy; and a mere reservation of this right to a certain part within described boundaries leaves the right reserved as it stood before the cession.

Godfrey v. Beardsley, 2 McLean, 412, Fed. Cas. No. 5,497; *Wheeler v. Mc-shing-go-mcia*, 30 Ind. 402.

The manner in which the dead and living chiefs and the general government have regarded this reservation is of the utmost importance in determining the proper construction of the treaty.

Coleman v. Grubb, 23 Pa. 393; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Jackson v. Perrine*, 35 N. J. L. 137; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Nickerson v. Atchison, T. & S. F. R. Co.* 3 McCrary, 455, 17 Fed. Rep. 408; *Foster v. Goldschmidt*, 22 Blatchf. 287, 21 Fed. Rep. 70.

Where a construction and interpretation of a treaty have been adopted by the executive department, that construction will be followed by the judicial department when it is not repugnant to the language or the purpose of the treaty.

Castro v. De Uriarte, 16 Fed. Rep. 93; *Latimer v. Poteet*, 14 Pet. 15, 10 L. ed. 333; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182.

The provision of article 9, that "there should be set apart a reservation out of the lands ceded," conveys no more than the right of occupancy and possession, with the ultimate title retained in the general government.

Boccher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634.

It is simply an authorization to hold in severalty.

Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681.

The general resolution of Congress authorizing the approval of the Jones lease supplies the basis of authority for the action of the department relative thereto, and, at least by implication, forbids any other lease.

Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933.

The prohibition against leases or purchases from Indian nations, contained in the act of June 30, 1834, § 12, inhibits purchases from the individuals of those nations, except it

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be with the consent of the government and under its supervision.

Jackson ex dem. Smith v. Goodell, 20 Johns. 193.

Mr. C. K. Davis argued the cause and, with Messrs. Frank B. Kellogg and C. A. Severance, filed a brief for appellees:

There can be no doubt of the right of the treaty-making power to alienate portions of the national domain.

Johnson v. McIntosh, 8 Wheat. 598, 5 L. ed. 694; *Holden v. Joy*, 17 Wall. 247, 21 L. ed. 535.

The understanding of the words of the treaty by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 6 Pet. 582, 8 L. ed. 508; *Choctaw Nation v. United States*, 119 U. S. 28, 30 L. ed. 315, 7 Sup. Ct. Rep. 75.

The term "reservation" was equivalent to an absolute grant.

Niles v. Anderson, 5 How. (Miss.) 365; *Best v. Polk*, 18 Wall. 116, 21 L. ed. 807.

The Secretary of the Interior has no authority to establish a rule of inheritance binding on the courts.

Richardville v. Thorp, 28 Fed. Rep. 52.

Where the tribal organization was recognized by the political department of the United States government, the descent is cast, not under the state law, but in accordance with the law of the tribe.

Dole v. Irish, 2 Barb. 639; *Brown v. Steele*, 23 Kan. 673.

Land granted to an Indian by treaty in severalty is, under the provisions of the ordinance of 1787 for the government of the Northwest Territory, not subject to the operation of state laws.

Wau-pe-man-qua v. Aldrich, 28 Fed. Rep. 498.

Congress has no constitutional power to settle or interfere with the rights under treaties, except in cases purely political.

Holden v. Joy, 17 Wall. 247, 21 L. ed. 535.

*Mr. Justice **Gray** delivered the opinion [2] of the court:

This was a bill in equity, filed in the circuit court of the United States for the district of Minnesota by Patrick Meehan and James Meehan, citizens of Wisconsin, against Ray W. Jones, a citizen of Minnesota, to quiet title in a strip of land 10 feet wide along the westerly shore of the Red Lake river, in the county of Polk and state of Minnesota, extending from the northeasterly intersection of the plat of the village of Thief River Falls with the shore at a point near the junction of the two rivers, and being a part of lot 1 in section 34, township 154, and range 43.

For convenience the parties will be designated, throughout this opinion, according to their position in the court below; the Meehans, now appellees, as the plaintiffs; and Jones, now appellant, as the defendant.

*Each party derived title under the "res- [3] ervation of six hundred and forty acres near the mouth of the Thief river for the chief

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Moose Dung," in article 9 of the treaty made at the Old Crossing of Red Lake river in the state of Minnesota, on October 2, 1863, between the United States, by their commissioners, Alexander Ramsey, a senator of the United States for the state of Minnesota, and Ashley C. Morrill, agent for the Chippewa Indians, of the one part, and the Red Lake and Pembina bands of Chippewa Indians, by their chiefs, headmen, and warriors, of the other part, and afterwards ratified by the Senate, with amendments assented to by the Indians. 13 Stat. at L. 667-671. The material provisions of that treaty were as follows:

By article 2 those bands of Chippewas ceded to the United States all their right, title, and interest in a large tract of country to the west of Thief river in the state of Minnesota, including all the American valley of the Red River of the North.

By article 3: "In consideration of the foregoing cession, the United States agree to pay to the said Red Lake and Pembina bands of Chippewa Indians the following sums, to wit: Twenty thousand dollars per annum for twenty years; the said sum to be distributed among the Chippewa Indians of the said bands in equal amounts *per capita*."

By article 5: "To encourage and aid the chiefs of said bands in preserving order and, inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life, there shall be paid to each of the said chiefs annually, out of the annuities of the said bands, a sum not exceeding one hundred and fifty dollars, to be determined by their agents according to their respective merits. And for the better promotion of the above objects, a further sum of five hundred dollars shall be paid at the first payment to each of the said chiefs to enable him to build for himself a house."

By article 8: "In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant to each male adult half-breed or mixed blood who is [4] related *by blood to the said Chippewas of the said Red Lake or Pembina bands, who has adopted the habits and customs of civilized life, and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official surveys when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same."

By one of the amendments made by the Senate, with the assent of the Indians, there was inserted at the end of article 8 the following: "Provided, that no scrip shall be issued under the provisions of this article, and no assignments shall be made of any right, title, or interest at law or in equity until a
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patent shall issue, and no patent shall be issued until due proof of five years' actual residence and cultivation, as required by the act entitled 'An Act to Secure Homesteads on the Public Domain.'"

By article 9 of the treaty: "Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief river for the chief Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of Pembina river."

Moose Dung or Monsimoh was one of the principal chiefs of the Red Lake band of Chippewa Indians, and his name was the first of the Indian signatures to the treaty, all of which were by marks only.

The plaintiffs, against the defendant's objection, introduced in evidence certified copies of extracts from the journal of the proceedings at the negotiation of the treaty, annexed to the report made by Mr. Ramsey to the Commissioner of Indian Affairs in October, 1863. That journal stated that "Moose Dung, who was really the most influential of all the chiefs, stood at the head of a party embracing the large majority of all the bands who were favorable to and even anxious for *a treaty." It also showed [5] that part of the discussion was as follows: Moose Dung said: "I have taken the mouth of Thieving river as my inheritance. I do not ask the chiefs here where I shall go. I make my home there. I wanted it for a reservation for myself. . . . I used to think that this was the proper place for me to settle; that it would be an inheritance for my children—where all my children could have enough to live on in the future." Mr. Ramsey answered, "Tell him I don't care anything about the mouth of Thieving river. He can have it if he wants it." Moose Dung replied, "I accept of the proposition, because I see that I am going to be raised from want to riches,—to be raised to the level of the white man. . . . You and the government have used every exertion for a great many years to bring about a treaty. I do not want you to exert yourselves in vain. I now give up the tract of country." The journal further stated that "at the end of a session of three and a half hours' duration Moose Dung, who has stood for an hour weighing and deliberating on every separate provision of this treaty, asking for this explanation and that modification, appearing to labor under a serious sense of the great responsibility he was taking, at last touched the pen which was to affix his vicarious sign-manual to the treaty," and the other chiefs followed his example.

The plaintiffs also, against the like objection, introduced testimony of the secretary of the commission, of the official interpreter and of other persons, Indians as well as white persons, who were present at the negotiation of the treaty, to the same effect.

Moose Dung selected as his reservation, under the ninth article of the treaty, six

hundred and forty acres, a part of which was lot 1 in section 34, including the strip now in controversy; and he lived on that land at the mouth of Thief river, and made it his home, and had a log house, a garden, and a fish trap there. He died in 1872, before the lands were surveyed, and was succeeded as chief by his eldest son, who had been born at Red Lake in 1828, and who was known to the whites by the same name of Moose Dung or Monsimoh, and to the Indians as Mayskokonoyay, meaning "The one that wears the *red robes;" and, ever since the making of the treaty, his father and himself, in succession, sustained tribal relations with the Red Lake band of Chippewa Indians, and that band continued to be recognized as an Indian tribe by the government of the United States.

[6] wears the *red robes;" and, ever since the making of the treaty, his father and himself, in succession, sustained tribal relations with the Red Lake band of Chippewa Indians, and that band continued to be recognized as an Indian tribe by the government of the United States.

On June 27, 1879, the United States Indian agent at White Earth, Minnesota, wrote to the Commissioner of Indian Affairs at Washington that Moose Dung the younger, the only surviving son of Moose Dung named in the treaty, requested that the land selected by his father might be set aside for his benefit. On July 25, 1879, the Commissioner of Indian Affairs answered that Moose Dung the younger should at once locate the desired lands in accordance with the description in the treaty; and that it must be shown to the satisfaction of the Office of Indian Affairs that his father left no other children. On September 10, 1879, the agent replied that "the heirs of Moose Dung" had selected the lands (describing them particularly) that had been selected by the elder Moose Dung before his death. On September 30, 1879, the Secretary of the Interior, on the recommendation of the Commissioner of Indian Affairs, approved "the selection made by the heirs of Moose Dung," and directed the Commissioner of the General Land Office to "take the necessary steps for the protection of the said lands so reserved for the benefit of those entitled, as contemplated by the treaty stipulations;" and they were thereupon set apart accordingly, and were designated on all government maps as "Moose Dung's reservation."

From the time of this selection Moose Dung the younger lived upon, exercised dominion over, and claimed to own, the land so selected, and cultivated part of it, leased other parts of it for pasturage, and sold sand off it.

On November 7, 1891, Moose Dung the younger, describing himself as "Moose Dung, of Thief River Falls, Polk county, Minnesota," made a lease to the plaintiffs, for ten years, at an annual rent of twenty-five dollars, of this strip of land and all shore rights for storing logs, erecting piles and booms, and for all purposes connected with lumbering; and he affixed to it his mark and seal, and [7] acknowledged it before a notary public, *after its contents had been fully explained to him through an interpreter. On November 10, 1891, this lease was recorded in the registry of deeds for the county. The plaintiffs ac-

cepted the lease, and paid the rent according to its terms; and in 1892 they erected a large saw mill on the bank of Thief river, a short distance below the strip leased, and entered upon this strip, drove piles and strung booms in the river opposite, and stored logs there, and thenceforth used the strip as one shore of the mill-pond appurtenant to their saw mill.

The land selected by Moose Dung was near the village of Thief River Falls, which, when this lease was made, contained some fifty inhabitants and had no railroad and no important industry, and land there was of little value. But in 1892, after the erection of the plaintiffs' saw mill, the Great Northern Railway Company built a railroad to the village, a large settlement sprang up there, and the land increased in value.

On July 20, 1894, Moose Dung the younger, describing himself as "Monsimoh (commonly called Moose Dung), heir and successor of his father Monsimoh (also commonly called Moose Dung)," made a lease of the whole of lot 1 in section 34, and of all appurtenances and riparian rights thereto belonging, for twenty years, to the defendant, at an annual rent of two hundred dollars; and on July 23, 1894, this lease was recorded in the registry of deeds. The defendant at the time of obtaining this lease knew of the prior lease and possession of the plaintiffs. On August 4, 1894, Congress passed a joint resolution authorizing the Secretary of the Interior "to approve, if in his discretion he deems the same proper and advisable, and upon such terms as he may impose," this lease to the defendant. 28 Stat. at L. 1018. On December 27, 1894, the Secretary of the Interior approved this lease, upon condition (to which both the lessor and the lessee assented) that the annual rent should be four hundred dollars, and "be paid to the agent in charge of the Chippewa Indians in Minnesota, and by him paid to the parties found to be entitled thereto by this Department," and should be readjusted every five years, and "the said premises, nor any part thereof, shall not be sublet *without the written [8] consent of the lessor, his heirs or assigns, and the approval of the Secretary of the Interior."

The circuit court held that the reservation in the treaty to the elder Moose Dung was in the nature of a grant of title to him, burdened with no restriction or condition save that of selection and identification; that upon the selection and location the title in the selected lands vested in Moose Dung the younger as his eldest son and successor; that the latter's lease of November 9, 1891, to the plaintiffs was a valid and subsisting lease of the strip in controversy, and needed no approval by the Secretary of the Interior; that the lease made on July 20, 1894, to the defendant, and approved by the Secretary of the Interior, was subordinate to the lease to the plaintiffs, and, as against them, conveyed no right to the occupancy or use of the strip; and that the plaintiffs were entitled to have

the rights and privileges under the earlier lease vested and quieted in them as against the claims of the defendant. 70 Fed. Rep. 453. The defendant appealed to this court.

The fundamental question in the case is, What was the nature of the title which the elder chief Moose Dung took under the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians? Was it a mere right of occupancy, with no power to convey the land except to the United States, or by their consent? Or was it substantially a title in fee simple with full power of alienation?

Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States, without the consent of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31; *Worcester v. Georgia*, 6 Pet. 515, 544, 8 L. ed. 483, 495; *Doe, Mann, v. Wilson*, 23 How. 457, 463, 16 L. ed. 584; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *United States v. Kagama*, 118 U. S. 375, 381, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 67, 30 L. ed. 330, 335, 7 Sup. Ct. Rep. 100. In the leading case of *Johnson v. McIntosh* (1823) it was therefore held that grants of [9] lands *northwest of the river Ohio, made in 1773 and 1775 by the chiefs of certain Indian tribes constituting the Illinois and the Pinkeshaw nations, to private individuals, conveyed no title which could be recognized in the courts of the United States; and Chief Justice Marshall, in delivering judgment, said: "The usual mode adopted by the Indians for granting lands to individuals has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated." 8 Wheat. 598, 5 L. ed. 694

Accordingly, by several early treaties between the United States of the one part, and the Chippewas and other Indian nations of the other part, the said Indian nations acknowledged themselves to be under the protection of the United States, and of no other sovereign whatever; the United States relinquished and quitclaimed to the said nations respectively all the lands lying within certain limits, to live and hunt upon, and otherwise occupy as they saw fit; but the said nations, or either of them, were not to be at liberty to dispose of those lands, except to the United States. Treaties of January 21, 1785, art. 2; January 9, 1789, art. 3; August 3, 1795, arts. 4, 5; 7 Stat. at L. 16, 29, 52.

Soon after the adoption of the Constitution, the same doctrine was repeatedly recognized and enforced by Congress in temporary acts regulating trade and intercourse with the Indian tribes. By the act of July 22, 1790, chap. 33, § 4, it was "enacted and de-

clared that no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the United States." 1 Stat. at L. 138. In the act of March 1, 1793, chap. 19, § 8, the corresponding provision was that "no purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 1 Stat. at L. 330. In the acts of May 19, 1796, chap. 30, *§ 12, and [10] March 3, 1799, chap. 46, § 12, this provision was re-enacted, substituting for the words "purchase or grant" the words "purchase, grant, lease, or other conveyance," and for the words "any Indians," in the plural, the words "any Indian," in the singular, so as to read: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention entered into pursuant to the Constitution." 1 Stat. at L. 472, 746. And this language of the temporary acts of 1796 and 1799 was repeated in the first permanent enactment upon the subject, being the act of March 30, 1802, chap. 13, § 12. 2 Stat. at L. 143.

It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States. *Johnson v. McIntosh*, 8 Wheat. above cited; *Mitchel v. United States*, 9 Pet. 711, 748, 9 L. ed. 283, 296; *Doe, Godfrey, v. Beardsley*, 2 McLean, 417, 418; *United States v. Brooks*, 10 How. 442, 460, 13 L. ed. 489, 496; *Doe, Mann, v. Wilson*, 23 How. 457, 463, 16 L. ed. 584; *Crews v. Burcham*, 1 Black, 356, 17 L. ed. 91; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. ed. 523, 535; *Best v. Polk*, 18 Wall. 112, 116, 21 L. ed. 805, 807; *New York Indians v. United States*, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531. The question in every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named.

The Indian tribes within the limits of the United States are not foreign nations; though distinct political communities, they are in a dependent condition; and Chief Justice Marshall's description, that "they are in a state of pupillage," and "their relation to the United States resembles that of a ward to his guardian," has become more and more appropriate as they have grown less powerful and more dependent. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31; *Elk*

v. Wilkins, 112 U. S. 94, 99, 28 L. ed. 643, 645, 5 Sup. Ct. Rep. 41; *United States v. Kagama*, 118 U. S. 375, 382, 384, 30 L. ed. 228, 230, 231, 6 Sup. Ct. Rep. 1109; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 43 L. ed. 1041, 1055, 19 Sup. Ct. Rep. 722.

[11] In construing any treaty between the United States and an *Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *The Kansas Indians*, 5 Wall. 737, 760, *sub nom. Blue Jacket v. Johnson County Comrs.* 18 L. ed. 667, *Wan-Zop-E-Ah v. Miami County Comrs.* 18 L. ed. 674; *Choctaw Nation v. United States*, 119 U. S. 1, 27, 28, 30 L. ed. 306, 314, 315, 7 Sup. Ct. Rep. 75. In the leading case of *Worcester v. Georgia* (1832) Chief Justice Marshall, speaking of article 4 of the treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined "the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States" (7 Stat. at L. 19), said: "There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that everyone makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them." "Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out'?" 6 Pet. 551, 552, 8 L. ed. 497, 498. And Mr. Justice McLean, concurring, said: "The language used in treaties with the Indians should never be construed to their prejudice." "To contend that the word 'allotted,' in reference to the lands guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, *would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical mean-

ing, should form the rule of construction." 6 Pet. 582, 8 L. ed. 508.

The defendant's counsel at the argument relied on an opinion given by Chief Justice Taney, when Attorney General, under the following circumstances: By the treaty made at Camp Tippecanoe in the state of Illinois on October 20, 1832, between the United States and the Pottawatomie tribe of Indians of the Prairie and Kankaukee (while the act of March 30, 1802, chap. 13, was in force), that tribe ceded a large tract of land in Illinois to the United States, and it was provided that "from the cession aforesaid the following tracts shall be reserved, to wit," a certain number of sections to each of particular Indians named. 7 Stat. at L. 378. On September 20, 1833, Attorney General Taney gave an opinion to the Secretary of War that "these reservations are excepted out of the grant made by the treaty, and did not therefore pass by it; consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title;" and therefore "the Indian occupants cannot convey them to individuals, and no valid cession can be made of their interest but to the United States." 2 Ops. Atty. Gen. 587.

But within a year after that opinion was given, and perhaps in consequence thereof, Congress in framing a new act regulating trade and intercourse with the Indian tribes, omitted the prohibition, contained in former statutes, of purchases or leases from "any Indian," and put the provision invalidating Indian conveyances in this altered form: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Act of June 30, 1834, chap. 161, § 12 (4 Stat. at L. 730). The declaration, retained in this act, of the invalidity of purchases and leases "from any nation or tribe of *Indians," [13] might include a purchase or lease from any Indian acting by authority derived from his tribe only. *Johnson v. McIntosh*, 8 Wheat. 543, 593, 5 L. ed. 681, 693; *Smith v. Stevens*, 10 Wall. 321, 323, 19 L. ed. 933; *Goodell v. Jackson, Smith*, 20 Johns. 693, 723, 11 Am. Dec. 351. But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. And this view is confirmed by the re-enactment of the provision, in the very words of the act of 1834, in § 2116 of the Revised Statutes, and by the course of decision in this court in a series of opinions which may conveniently be considered in their chronological order.

The supplementary articles of September 28, 1830, to the treaty of Dancing Rabbit Creek of September 27, 1830, between the United States and the Choctaw Nation of In-

dians, making provision for "various Choctaw persons," used, as synonymous expressions, the phrases "shall be entitled to a reservation of," "is allowed a reservation of," "there shall be granted," "there is given," or "is granted," sections of land, either including the present residence and improvement of such persons, or to be located on any unimproved and unoccupied land. 7 Stat. at L. 340. In *Gaines v. Nicholson* (1850) 9 How. 356, 13 L. ed. 172, Mr. Justice Nelson, in delivering the opinion of the court, did say of such a reservation: "It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title confirmed by the government in the act of agreeing to the reservation." 9 How. 365, 13 L. ed. 176. But that treaty was made before the act of Congress of 1834; the only question in the case was of the effect of the reservation as against a previous grant of land by Congress to a state for the support of schools; the court had no occasion to define, and did not undertake to define, the exact nature of the title granted or confirmed by the treaty; and the suggestion, in accordance with Attorney General Taney's opinion, above cited, that the treaty rather confirmed the Indian right than

[14] granted a new *title, can hardly be reconciled with the later judgments of the court, to be presently considered, one of which was delivered by the same learned judge. *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91.

In concluding the treaty of July 1, 1835, between the United States and the Caddo nation of Indians, in Louisiana, supplementary articles were added, by which, after a recital that that nation had in 1801 granted to one Francois Grappe (who was a half-blood Caddo) and to his three sons a league of land each, "it is agreed" that Grappe's legal representatives and his said three sons "shall have their right to the said four leagues of land reserved to them and their heirs and assigns forever. The said land to be taken out of the lands ceded to the United States by the said Caddo nation of Indians as expressed in the treaty to which this article is supplementary. And the said four leagues of land shall be laid off in one body," at a place described, in conformity with the boundaries "expressed in the original deed of gift" from the Caddo nation to Grappe and his three sons. 7 Stat. at L. 473. In *United States v. Brooks* (1850) 10 How. 442, 13 L. ed. 489, it was argued for the United States that the effect of this agreement was simply that the Grappes should retain their right, whatever it might be, under the reservation of 1801, and that that reservation was not authorized by the laws then in force there. But it was adjudged that its effect was to vest in the Grappes an absolute title in fee simple, which they might convey to anyone; the court, speaking by Mr. Justice Wayne, saying: "We think that the treaty gave to the Grappes a fee-simple title to all the rights which the

Caddoes had in these lands, as fully as any patent from the government could make one. The reservation to the Grappes, 'their heirs and assigns forever,' creates as absolute a fee as any subsequent act upon the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title. Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienors would have done." 10 How. 460, 13 L. ed. 496. In that case, therefore, an agreement that the persons named "shall have their right" *to "certain [15] lands reserved," and the lands "shall be laid off," was given the same effect as a present grant or patent. It is true that the treaty there in question reserved the right to those persons, "and their heirs and assigns forever." But the like construction has since been given to reservations unaccompanied by any words of inheritance.

By the first article of a treaty made on the Tippecanoe river in the state of Indiana on October 27, 1832, between the United States and the Pottawatomies of that state and of Michigan territory, that tribe of Indians ceded their title and interest to lands in Indiana, Illinois, and Michigan to the United States. By article 2, "from the cession aforesaid, the following reservations are made" to certain bands of Indians. And by article 3, "the United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys." 7 Stat. at L. 399-401.

In *Doe, Mann, v. Wilson* (1859) 23 How. 457, 16 L. ed. 584, it was held, in an action of ejectment, that a warranty deed made by Petchico (a Pottawatomie chief, one of the persons named in the third article of that treaty), in February, 1833, to citizens of Indiana, before the lands had been surveyed or a patent granted, passed a good title as against a deed made by his heirs after the issue of the patent and his death. The court, speaking by Mr. Justice Catron, said: "The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made in the manner prescribed." This sentence has sometimes been supposed to indicate that by the treaty the reservees took directly from the Indian nation its possessory right only, defined as "the right to occupy, use, and enjoy the lands in common with the United States." But this was qualified by *the con-

cluding words of the same sentence, "until partition was made in the manner prescribed;" that is to say, by the treaty. And

the court went on to say, in the most distinct terms: "The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but, as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added, and it matters not which for the purposes of this controversy for possession. The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession in the Indian nation, with the exclusive power in the government of acquiring the right. Although the government alone can purchase lands from an Indian nation, it does not follow that, when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable unless the treaty had prohibited its sale. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain." 23 How. 463, 464, 16 L. ed. 586.

[17] In *Crews v. Burcham* (1861) 1 Black, 352, 17 L. ed. 91, a warranty deed made by Francis Besion, another person named in the third article of that treaty, under like circumstances, to one Armstrong, was accordingly held to vest the legal title in him; and the scope and effect of the decision in *Doe, Mann, v. Wilson* were clearly brought out in the opinion delivered by Mr. Justice Nelson, as follows: "It was there held that the reservation created an equitable interest in the land to be selected under the treaty; that it was the subject of sale and conveyance; that Petchico was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee. It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, *and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding because entered into by the government. The equitable right, therefore, to the lands, in the grantee of Besion, when selected, was perfect, and the only objection of any plausibil-

ity is the technical one as to the vesting of the legal title." "We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent, within the meaning of this act of Congress. [Act of May 20, 1836, chap. 76; 5 Stat. at L. 31.] The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime." "Some expressions in the opinion delivered in the case of *Doe, Mann, v. Wilson*, the first case that came before us arising out of this treaty, were the subject of observations by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession and until the survey and patent. It will be seen, however, that the tenancy in common there mentioned *referred to the right to oc- [18] cupy, use, and enjoy the land in common with the government, and had no relation to the legal title." 1 Black, 356, 357, 17 L. ed. 92.

By those two decisions it was determined that the "reservations," created by the treaty with the Pottawatomies of October 27, 1832, in favor of individual Indians, by the words "the United States agree to grant" to each of them sections of land, "which lands shall be conveyed to them by patent," had the effect of granting a present and alienable interest to each. In both those decisions Chief Justice Taney concurred—which is worthy of special notice in view of the different opinion, above cited, which he had given, when Attorney General, upon the effect of similar reservations in a treaty made with another band of Pottawatomies seven days earlier, but promulgated by the President at the same time as this treaty. 7 Stat. at L. 378, 399. And the two decisions were cited and approved by this court, speaking by Mr. Justice Matthews, in *Prentice v. Stearns* (1885) 113 U. S. 435, 446, 447, 28 L. ed. 1059, 1063. See also the opinion delivered by Mr. Justice Miller in the circuit court in *Prentice v. Northern P. R. Co* (1890) 43 Fed. Rep. 270, 275.

In the treaty of June 3, 1825, between the United States and the Kansas nation of Indians, it was provided, by article 6, that from the lands thereby ceded to the United States there should be made reservations of 1 mile square for each of the half-breeds named; and, by article 11, that "the said Kansas nation shall never sell, relinquish, or

in any manner dispose of the lands herein reserved, to any other nation, person, or persons whatever, without the permission of the United States for that purpose first had and obtained." 7 Stat. at L. 245, 247. The act of Congress of May 26, 1860, chap. 61, after reciting that the lands so reserved had been surveyed and allotted to each of the half-breeds in accordance with article 6 of the treaty, enacted that "all the title, interest, and estate of the United States is hereby vested in the said reservees, who are now living, to the land reserved, set apart, and allotted to them," and in the heirs of those deceased, "but nothing herein contained shall

[19] be construed to give any *force, efficacy, or binding effect to any contract, in writing or otherwise, for the sale or disposition of any lands named in this act, heretofore made by any of said reservees or their heirs;" and it was further enacted that if any of the reservees, or the heirs of anyone deceased, should not desire to occupy the lands to which they were entitled by the provisions of this act, the Secretary of the Interior, upon their request, should be authorized to sell the lands for their benefit, and to issue patents to the purchasers. 12 Stat. at L. 21. In *Smith v. Stevens* (1870) a deed made by one of those half-breeds, shortly after the passage of that act, without the authority or assent of the Secretary of the Interior, was adjudged by this court, speaking by Mr. Justice Davis, to be void, upon the single ground "that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way." 10 Wall. 321, 326, 19 L. ed. 933, 935.

By the treaty with the Chickasaws of May 24, 1834, it was agreed, in article 5, that "the following reservations be granted in fee: To heads of families, being Indians or having Indian families," a certain number of sections of land; and, by article 6, "also reservations of a section to each shall be granted to" other members of the tribe, of the age of twenty-one years and upwards, according to a list to be made out by seven chiefs named in the treaty, and filed with the agent, "upon whose certificate of its believed accuracy the register and receiver shall cause said reservations to be located upon lands fit for cultivation." 7 Stat. at L. 451, 452. It may be observed that article 6, differing in these respects from article 5, used the future tense, "shall be granted," and omitted the words "in fee." Yet in *Best v. Polk* (1873) 18 Wall. 112, 21 L. ed. 805, this court held that the treaty itself conferred a full title upon an Indian to whom lands were reserved by article 6, and, again speaking by Mr. Justice Davis, said: "Can it be doubted that it was the intention of both parties to the treaty to clothe the reservees with the full title? If it were not so, there would have been some words of limitation indicating a contrary intention. Instead of this, there is nothing to show that a further grant, or any additional evidence

[20] of title, were *contemplated. Nor was this 175 U. S.

necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them." 18 Wall. 116, 21 L. ed. 807. "The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect, as much so as if the grant had been directly executed to the reservee." 18 Wall. 118, 21 L. ed. 808. In support of that conclusion, this court cited decisions of the highest court of the state of Mississippi, in which, after quoting the words of article 6 of the treaty, it was said: "By this language, a title in fee passed to such persons as were above the age of twenty-one. The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if a grant had been executed." "The treaty has not contemplated a further grant, or other evidence of title, showing conclusively that by the terms used it was intended that a perfect title was thereby intended to be secured. The Indian, then, under whom complainants claim, had in herself an absolute and unconditional title in fee simple. The title was conferred by the treaty; it was not, however, perfect until the location was made; location was necessary to give identity. The location it seems was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated." *Niles v. Anderson* (1841) 5 How. (Miss.) 365, 383; *Wray v. Doe, Ho-ya-pa-nubby* (1848) 10 Smedes & M. 452, 461.

In the treaty of June 24, 1862, between the United States and a tribe of Ottawa Indians, article 3 provided as follows: "It being the wish of said tribe of Ottawas to remunerate several of the chiefs, councilmen, and headmen of the tribe for their services to them many years without pay, it is hereby stipulated that five sections of land is [are] reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen, and headmen as the members of the tribes shall in full council determine; and it shall be the duty of the Secretary *of the Interior to issue patents in fee simple of said lands, when located and apportioned, to said Indians." 12 Stat. at L. 1238. In *Libby v. Clark* (1886) 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045, this court, approving and affirming the judgment of the supreme court of Kansas, delivered by Mr. Justice Brewer, in 14 Kan. 435, held that a deed to a white person from one of those chiefs, of land patented to him pursuant to the treaty, but executed before he had become a citizen of the United States, was void, for the single reason that the treaty itself, as construed by the court, expressly provided, in article 7, that no Indian should alien or encumber the land allotted to him

until he had, according to the terms of the treaty, become a citizen of the United States.

In the treaty of Prairie du Chien of July 29, 1829, between the United States and certain nations of Chippewa, Ottawa, and Potawatomie Indians, article 4, by which "there shall be granted by the United States" to each of the persons named, being descendants from Indians, sections of land, it was provided that "the tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States." 7 Stat. at L. 321. Of course, under such a provision, no alienation could be valid without the approval of the President. *Pickering v. Lomax* (1892) 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; *Lomax v. Pickering* (1899) 173 U. S. 26, 43 L. ed. 601, 19 Sup. Ct. Rep. 416.

The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation.

[22] *The letters of the Commissioner of Indian Affairs, referred to in the supplemental brief of the defendant, expressing the views entertained in his office at sundry times as to the effect of a reservation in an Indian treaty to particular Indians without words of present grant, or of inheritance, were for the most part written before the subject had been considered by this court; and they fall far short of establishing such a uniform practical construction of the term by the Executive Departments as would warrant the court in overruling its own opinions as expressed in the cases above stated.

The treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chickasaw Indians, now before the court, contains in itself peculiarly strong evidence that it was intended to vest in the elder chief Moose Dung a full and complete title in the land reserved to him.

According to the decisions above cited, such would be the construction of the ninth article, taken by itself, by which "upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief river for the chief Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of

Pembina river." And this construction is fortified by other provisions of the treaty quoted at the beginning of this opinion.

By the 8th article, it is "agreed that the United States shall grant to" each male adult half-breed or mixed-blood who is related by blood to these Indians, who has adopted the habits and customs of civilized life, and who is a citizen of the United States, a homestead of one hundred and sixty acres, to be selected out of the tract ceded, and in conformity with the official surveys when made. That article was amended by the Senate by providing that no scrip should be issued under its provisions, and no assignment should be made of any right, title, or interest before the issue of a patent, and no patent should be issued until due proof of five years' actual residence and cultivation, as required by the homestead act. Act of May 20, 1862, chap. 75; 12 Stat. at L. 392; Rev. Stat. §§ 2289, 2291.

*The reservations of four times as much [23] land to each of the chiefs Moose Dung and Red Bear under the ninth article were not made subject, by any provision of the original treaty, or of the Senate amendments, to the condition of adopting the habits and customs of civilized life, or of becoming a citizen of the United States, or of five years' actual residence and cultivation. But by the fifth article, with the avowed objects "to encourage and aid the chiefs of said bands in preserving order, and inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life," each chief was to be paid, not only a certain sum annually out of the annuities payable to the bands by the treaty, but also, at the time of the first payment, a further sum of five hundred dollars "to enable him to build for himself a house."

The provisions of that article are wholly inconsistent with the theory that the title of the chiefs Moose Dung and Red Bear respectively in the reservation of six hundred and forty acres each, unconditionally set apart for them, was to be less absolute than the title of the half-breeds in their homesteads would be after the conditions of the treaty respecting them had been complied with.

The only reasonable construction of all the provisions of the treaty, taken together, is that the ninth article, by which "there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of the Thief river for the chief Moose Dung," and a reservation of a like quantity of land at another place designated for the chief Red Bear, was intended by the United States and was understood by the Indians, and took effect, as a present grant to each of these two chiefs of an alienable title in fee in that quantity of land at the designated place, subject only to its selection in due form, and to the definition of its boundaries by survey and patent.

Such being in our opinion the construction and effect of the terms of the treaty itself, it is unnecessary to consider the competency of the extrinsic evidence, offered by

[24] the plaintiffs, of what took place between the representatives of the parties *at the negotiations which preceded its execution; for, whether that evidence be admitted or rejected, the conclusion must be the same.

Nor is it necessary to consider particularly the argument of the plaintiffs, founded upon the citizenship acquired by Moose Dung the younger under that provision of the act of February 8, 1887, chap. 119, § 6, by which "every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty," is "declared to be a citizen of the United States, whether said Indian had been or not by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property." 24 Stat. at L. 390. That provision might not enable individual Indians to alienate lands which were not before alienable. *Beck v. Flournoy Live Stock & Real Estate Co.* 27 U. S. App. 618, 65 Fed. Rep. 30, 12 C. C. A. 497; *Eells v. Ross*, 29 U. S. App. 59, 64 Fed. Rep. 417, 12 C. C. A. 205; *Coombs, Petitioner*, 127 Mass. 278. But it certainly does not take away a power of alienation conferred by the treaty under which the allotment was made.

Another question of importance, fully argued at the bar, is whether Moose Dung the younger inherited all his father's rights in the reservation. This question is presented by the record in a peculiar aspect.

In the amended bill (which is the only one in the record transmitted to this court) the plaintiffs claimed title under the lease made to them by Moose Dung the younger on November 7, 1891, and alleged that at the date of that lease he was the owner in fee simple of the lands in question.

In the answer filed January 15, 1895, to that bill, the defendant denied its allegations; and claimed title under the reservation to Moose Dung the elder in the treaty, his selection of lands and the setting apart of them by the government as such reservation, and the lease executed by Moose Dung the younger (so the answer alleged, in substantial accord with the form of the lease itself) "as his oldest son, heir at law, and successor as chief of the Red Lake band of Chippewa [25] Indians," *to the defendant, on July 20, 1894, as afterwards amended and approved by the Secretary of the Interior; and alleged that the government, ever since its setting apart of the reservation, "conceded, treated, and designated said selection as a reservation which said Moose Dung was entitled to possess and control, subject, however, to the control of the overseers and agents of the government of the United States." The plaintiffs filed a general replication to the answer.

The testimony in the case was taken, under order of the court, by a special examiner, before whom (as appears by the record) the 175 U. S.

following proceedings were had, at the dates mentioned below:

On May 21, 1895, the plaintiffs introduced the deposition of John George Morrison, who testified that he was fifty-five years old, was a Scotch half-breed and had a quarter of Chippewa blood, had lived with the Red Lake band of Chippewa Indians all his life, spoke both English and Chippewa, was a special interpreter at the negotiation of the treaty, and was acquainted with the laws, customs, and usages of the Chippewa Indians; and that, according to those laws, customs, and usages, a chief like the elder Moose Dung had the right to select a piece of land and to use it as his home, and upon his death his eldest son would inherit all his land, and succeed to his office and powers as chief of the band; and the witness was not cross-examined on this point.

On June 8, 1895, while the defendant was putting in evidence in support of his title as alleged in the answer, "it was admitted by complainants' solicitor that the living chief Monsimoh was the eldest son and successor to all rights of his father under the treaty of October 2, 1863, and the son of the chief Monsimoh who signed that treaty."

On July 15, 1895, the plaintiffs put in evidence the complaint in an action brought by this defendant against them on February 15, 1895, containing an allegation that, upon the death of the old chief Moose Dung, "his son, Monsimoh, commonly called and known as Moose Dung, survived him and became the sole heir at law and successor of the said Moose Dung, deceased, and thereby succeeded to, has ever since held *and does now hold all [26] the right, title, and interest in and privileges pertaining to said premises, as such heir at law and successor of the said deceased chief Moose Dung."

On July 23 and 24, 1895, the defendant introduced testimony of Moose Dung the younger, and of other Indians, showing that his father had two wives, both living at the same time, and left six surviving descendants: three children, (1) Moose Dung the younger, the eldest son by the first wife, (2) a daughter by the first wife, and (3) a daughter by the second wife; and three grandchildren, (4) a son of a deceased daughter by the first wife, (5) a daughter of a deceased daughter by the first wife, and (6) a son of a deceased son by the second wife.

Moose Dung the younger, when so examined as a witness for the defendant, testified, on cross-examination, that he owned the land in question; that his father, when he died, left the land to him alone; and that by the customs of the Red Lake Indians he, upon the death of his father, being his eldest son by his first wife, succeeded him as chief, and was entitled to succeed to all his land; and, being asked, "Who first spoke to you about these other sisters and children having some interest in the land?" answered, "No one said anything to me about it."

On August 1, 1895, the defendant introduced, against the plaintiffs' objection that they were incompetent and immaterial, and

not within the issues in the case, certified copies, from the records of the Department of the Interior, of certain documents respecting the disposition of \$100 deposited with the Indian agent at White Earth, Minnesota, by the defendant, as rent due under the lease to him from Moose Dung the younger, as amended and approved by the Secretary of the Interior, which documents were as follows: 1st. A letter, dated February 4, 1895, from the Commissioner of Indian Affairs to the Indian agent, directing the agent "to fully investigate the subject as to who are the legal heirs of old chief Moose Dung, for the purpose of ascertaining to whom said rent should be paid;" to submit all the evidence in the matter in the form of affidavits, with a full report and recommendation; to [27] permit *Moose Dung the younger, if he so desired, to be present in person or by attorney at the hearing; to take his affidavit as part of the evidence; and to hold the money paid by the defendant in the agent's hands to await the determination of the Commissioner. 2d. The report, dated March 30, 1895, of the Indian agent to the Commissioner of Indian Affairs, enclosing an affidavit, taken on that day, of Moose Dung the younger, stating that he and the two daughters, and three grandchildren above mentioned were the only legal heirs of his father, and that they were entitled to share equally with him in the estate, and were all of legal age; affidavits, taken March 5, 1895, of those daughters and grandchildren respectively, stating their relationship and ages, and that they were entitled to share equally with him in the estate; and an affidavit, of the same date, of chiefs and headmen of the tribe to the relationship of the other deponents to Moose Dung the elder, but saying nothing as to their rights of inheritance. Each of these affidavits was signed with the mark of the deponent, and taken by a notary public. The agent reported that he considered this evidence reliable, and had no doubt that these six descendants of the old chief Moose Dung were his only living heirs, and were entitled to share equally in his estate. 3d. A letter dated April 9, 1895, from the Commissioner of Indian Affairs to the Secretary of the Interior, recommending that these six persons "be determined to be the heirs of old chief Moose Dung for the purposes of this lease, and that the rents arising from leasing the land granted him by said treaty be divided among them equally." 4th. A letter, dated April 23, 1895, from the Secretary of the Interior to the Commissioner of Indian Affairs, concurring in the recommendation, and returning the papers. 5th. A letter, dated May 4, 1895, from the Commissioner of Indian Affairs to the Indian agent, informing him of the decision of the Secretary of the Interior, and directing him to distribute the proceeds of the lease in his hands in accordance with that decision.

The defendant, at the same time, against the like objection, introduced six receipts, [28] dated May 25, 1895, respectively *signed by the mark of Moose Dung the younger, and of

each of the five other descendants of Moose Dung the elder, acknowledging the receipt from the Indian agent of one sixth of \$200, "being my share for two quarters rental on lands leased to Ray W. Jones;" and a lease, executed July 19, 1895, by Moose Dung the younger and the five other descendants of his father to the defendant, for twenty years from July 20, 1894, of the lot described in the lease to the defendant of that date, the defendant paying rent according to the conditions of that lease, as amended and approved by the Secretary of the Interior.

On the coming in of the court on September 3, 1895, the defendant's solicitor—pursuant to a notice given by him to the plaintiffs' solicitor on August 3, 1895, after all the evidence in the case had been taken—moved the court for leave to file a supplemental answer, alleging that Moose Dung the younger and the five other descendants of his father, above mentioned, were each entitled to one sixth of the land in controversy; and had, in accordance with the lease made by Moose Dung the younger to the defendant in 1894 and its approval by the Secretary of the Interior, been paid their shares of the rent provided for in that lease and approval; and had likewise themselves executed a lease ratifying and confirming that lease.

On September 9, 1895, the court denied the motion for leave to file the supplemental answer; on September 17, 1895, the cause was argued and submitted; and on November 9, 1895, the court entered the final decree for the plaintiffs.

The present contention of the defendant that the right of the elder Moose Dung in the reservation passed, upon his death, not to his eldest son alone, but to the other children and grandchildren jointly with the eldest son, was clearly inadmissible under the allegations of the original answer. The question whether a supplemental answer should be allowed was a matter within the discretion of the court, largely depending upon the circumstances of the particular case. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; *Smith v. Babcock*, 3 Sumn. 583. The reasons for denying the motion in this case are *not stated in the [29] record. They may have been the late stage of the case at which the motion was made, and a failure to satisfy the court that the facts now attempted to be set up were not known, or, at least, easily accessible, to the defendant or his solicitor long before. But as this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of those facts would have been, had they been duly pleaded. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 447, 32 L. ed. 788, 794, 9 Sup. Ct. Rep. 469; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 413, 414, 35 L. ed. 1055, 1061, 12 Sup. Ct. Rep. 188.

The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in

his land descended by law to his heirs general, and not to his eldest son only.

But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior.

In *United States, Davis, v. Shanks* (1870) 15 Minn. 369, it was adjudged by the supreme court of Minnesota that a probate court of the state had no jurisdiction over the estate of a chief of a tribe of Chippewa Indians to whom a section of land, to be located by the Secretary of the Interior, had been "granted in fee simple" by the treaty between the United States and that tribe of May 7, 1864 (13 Stat. at L. 693), and had accordingly been located and a patent therefor issued to him. See also *Dole v. Irish* (1848) 2 Barb. 639; *Hastings v. Farmer* (1850) 4 N. Y. 293, 294.

[30] In one of the cases reported under the name of *The Kansas Indians* (1866) 5 Wall. 737, *Blue Jacket v. Johnson County Comrs.* 18 L. ed. 667, this court, reversing the judgment of the supreme court of Kansas in *Blue Jacket v. Johnson County Comrs.* 3 Kan. 299, held that lands which, pursuant to the treaty of May 10, 1854, between the United States and the Shawnee nation of Indians (10 Stat. at L. 1053), had been patented to a chief of that nation, were not subject to taxation by the state of Kansas so long as the tribal organization remained and was recognized by the political department of the government; and Mr. Justice Davis, in delivering judgment, said: "This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common." "As long as the United States recognize their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws." 5 Wall. 756, 757, 18 L. ed. 673. See also the opinion delivered by Judge Woods, with the concurrence of Mr. Justice Harlan, in the circuit court, in *Wau-pe-man-qua v. Aldrich* (1886) 28 Fed. Rep. 489, 495.

Following that decision of this court, it was held by the supreme court of Kansas, in an opinion delivered by Mr. Justice Brewer, that land patented to an Indian woman of the Shawnee tribe under the treaty of 1854 descended, upon her death, according to the law of her tribe, and not according to the Kansas statute of descents. *Brown v. Steele* (1880) 23 Kan. 672.

In *Richardville v. Thorp* (1886) 28 Fed. 175 U. S.

Rep. 52, which concerned the inheritance of land patented by the United States to a member of the confederated tribes of Kaskaskia, Peoria, Pinkeshaw, and Wea Indians, and in which there was no evidence of any particular law or custom of those tribes, it was held that the rightful heirs of the patentee might maintain their title in the circuit court of the United States for the district of Kansas against one claiming under a deed from two of those heirs, approved by the Secretary of the Interior upon a certificate of two chiefs of the tribe that the two grantors were the sole heirs of the patentee; Mr. Justice *Brewer, then circuit judge, saying [31] that the Secretary of the Interior "had no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent."

Upon the evidence contained in this record, it is quite clear that, by the laws, usages, and customs of the Chippewa Indians, old Moose Dung's eldest son and successor as chief inherited the land of his father, to the exclusion of other descendants. Both the half-breed Morrison and the younger Moose Dung, being fully examined on this point, so testified; and there was no direct testimony to the contrary. Morrison had lived with the Red Lake band of Chippewas all his life, spoke their language, and knew their laws, customs, and usages; and there is nothing whatever in the case that throws any doubt on the trustworthiness of his testimony. The only matters that can be supposed to lessen the weight of Moose Dung's testimony are an affidavit, a receipt, and a lease, each signed with his mark in 1895, more than three years after the lease to the plaintiffs, and wholly incompetent as independent evidence against them. That affidavit, in which he stated that the two daughters and the three grandchildren were the only legal heirs of his father beside himself and were entitled to share with him in the estate, was procured from him by the Indian agent under direction of the Secretary of the Interior, and, as well as the receipt, was evidently considered by him as mere matter of form with which he was obliged to comply in order to get any part of the rent under the lease of 1894. That it made little impression on his mind is evident from the fact that, when afterwards examined as a witness in this case, in the presence of the counsel for both parties, he testified that no one had ever said anything to him about the daughters and grandchildren having some interest in the land. And it is not without significance that the other chiefs and headmen of the tribe, from whom, under the direction of the Secretary of the Interior, affidavits were likewise obtained to the relationship between old Moose Dung and his six descendants, said nothing, and do not appear to have been asked anything, as to the right of inheritance, or *as to the laws, customs, and usages [32] of the Indians upon that subject.

The title to the strip of land in controversy, having been granted by the United

States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. ed. 727, 729; *Reichart v. Felps*, 6 Wall. 160, 18 L. ed. 849; *Smith v. Stevens*, 10 Wall. 321, 327, 19 L. ed. 933, 935; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. ed. 523, 535.

The congressional resolution of 1894, and the subsequent proceedings in the Department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief; and the decree is affirmed.

JOHN H. SCUDDER, Administrator of the Estate of John F. Houdayer, Deceased,
Plff. in Err.,

v.

BIRD S. COLER, Comptroller of the City and County of New York.

(See S. C. Reporter's ed. 32-36.)

Writ of error to state court—failure to raise Federal question.

Failure to raise a Federal question until after a case has been finally decided in the highest court of a state will preclude a writ of error to review that decision from the Supreme Court of the United States.

[No. 55.]

Argued October 18, 1899. Decided October 30, 1899.

IN ERROR to the Surrogate's Court of the County of New York, State of New York, to review a decision holding that certain bank deposits belonging to the estate of a deceased nonresident of the state are subject to the New York act of 1892, chap. 399, taxing transfers of property by will or by the intestate laws. *Dismissed for want of jurisdiction.*

See same case below, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718.

The facts are stated in the opinion.

Mr. J. Culbert Palmer argued the cause and filed a brief for plaintiff in error:

A Federal question being necessarily involved, and the case being incapable of de-

termination without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of the question here.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Raising the question of jurisdiction over a citizen of another state, or over property located in another state, for the purpose of taxation, necessarily involves a Federal question.

Dobbins v. Eric County Comrs. 16 Pet. 435, 10 L. ed. 1022; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

Mr. Emmet R. Olcott argued the cause and filed a brief for defendant in error:

The Federal question sought to be raised here, not having been presented in the state court, the case should be dismissed for want of jurisdiction.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; *Moore v. Mississippi*, 21 Wall. 638, 22 L. ed. 653; *Winona & St. P. Land Co. v. Minnesota*, 150 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Union Nat. Bank v. Louisville, N. A. & C. R. Co.* 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039; *Levy v. San Francisco Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Kipley v. Illinois*, 170 U. S. 186, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550.

*Mr. Justice Gray delivered the opinion [33] of the court:

This was a proceeding commenced September 27, 1895, in the surrogate's court, by the comptroller of the city and county of New York, for the taxation of property of John F. Houdayer, deceased, under the statute of New York of 1892, chap. 399, entitled "An Act in Relation to Taxable Transfers of Property," the material provisions of which were as follows:

"Sec. 1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of \$500 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:

"1. When the transfer is by will or by the intestate laws of this state from any person dying seised or possessed of the property while a resident of the state.

"2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death."

"Sec. 22. The words 'estate' and 'property,' as used in this act, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those not here-
in specifically exempted from the provisions

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267.

of this act, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation. The word 'transfer,' as used in this act, shall be taken to include the passing of property or any interest therein in possession or enjoyment,

[34] *present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale, or gift in the manner herein prescribed." 1 N. Y. Laws 1892, pp. 814, 815, 822.

The case, as stated by the court of appeals, was this: "On May 21, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876 he opened an account with the Farmers' Loan & Trust Company of the city of New York as trustee under the will of Edward Husson, deceased, in which he made deposits from time to time of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of \$73,715, of which \$2,000 belonged to him as trustee, and the remainder to himself as individual. The appraiser deducted \$3,500 for the payment of debts and expenses, and included \$68,215 in the appraisal, which was affirmed by the surrogate, but reversed by the supreme court." 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718, 3 App. Div. 474, 38 N. Y. Supp. 323.

On October 6, 1896, the court of appeals reversed the order of the supreme court, and affirmed the order of the surrogate.

On April 4, 1898, the administrator of Houdayer sued out a writ of error from this court, as against the comptroller, and assigned the following errors:

"First. That the property in question being situated in the state of New Jersey, of which state also the decedent was a resident at the time of his decease, the laws of the state of New York have no application thereto, nor have the courts of New York jurisdiction thereof.

"Second. That by the law, as interpreted by the decision and judgment herein, the legislature of the state of New York attempts to exercise jurisdiction beyond the state, and to affect contracts and rights of a citizen of another state, which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the state of New Jersey.

[35] "Third. That the act of the legislature of the state of New York, herein referred to, as applied to the facts and circumstances of this case, or the act done under the authority of the state of New York here complained of, is unconstitutional and void as being repugnant to section 10 of article 1 of the Constitution of the United States, in that it impairs the obligation of the contract between

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a nonresident depositor and the Farmers' Loan & Trust Company of New York.

"Fourth. That the said act of the legislature, as interpreted by the decision herein, is repugnant to the 5th Amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

"Fifth. That the said act of the legislature, as interpreted by the decision herein, is repugnant to section 1 of the 14th Amendment of the Constitution of the United States, by which states are forbidden to deprive citizens of life, liberty, or property without due process of law."

But the difficulty which lies at the threshold of the consideration of this writ of error is that none of the points taken in the assignment of errors appear by the record to have been made in any of the courts of the state.

The only statements of the grounds of the administrator's objections to the proceedings below are these two: 1st. His affidavit filed before the appraiser appointed by the surrogate, averring "that he objects to such proceedings, and opposes a levy of any such tax upon such amount so on deposit, and claims that said deposit is exempt under the laws and not subject to taxation." 2d. His appeal to the surrogate from the formal order of assessment, taken "on the ground that the deposit in the Farmers' Loan & Trust Company of \$71,715, standing at the time of the decedent's death in his name as trustee, was a chose in action belonging to a nonresident decedent, and not property within this state subject to taxation under the provisions of the act in relation to taxable transfers of property; that the situs of the claim of the decedent against such deposit was at the domicile of the decedent, and not at the domicile of the said depository, and such property being the property of a nonresident decedent, *and situated out of this state, the

[36]

same does not fall within the purview of said act."

Both these statements clearly refer to the laws of New York, and not to the Constitution of the United States. And the opinion of the supreme court, as well as that of the court of appeals, turns upon the question whether the sum due from the Farmers' Loan & Trust Company of the city of New York to the intestate at the time of his death was "property within the state," within the meaning of the statute of 1892.

No mention of the Constitution of the United States, or of any provision thereof, by the plaintiff in error, or by the court, is to be found at any stage of the case while it was pending in the courts of the state of New York; and it is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the state.

In order to give this court jurisdiction of a writ of error to review a judgment which

the highest court of a state has rendered in favor of the validity of a statute of or an authority exercised under a state, the validity of the statute or authority must have been "drawn in question . . . on the ground of their being repugnant to the Constitution, laws, or treaties of the United States." When no such ground has been presented to or considered by the courts of the state, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction. *Rev. Stat. § 709; Murdock v. Memphis*, 20 Wall. 590, 633, 634, 22 L. ed. 429, 433, 444; *Levy v. Superior Court of San Francisco*, 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Columbia Water Power Co. v. Columbia Electric Street Railway, Light, & P. Co.* 172 U. S. 475, 488, 43 L. ed. 521, 526, 19 Sup. Ct. Rep. 247, and cases there cited.

Writ of error dismissed for want of jurisdiction.

[37] **ANGLO-CALIFORNIAN BANK, Limited,**
Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 37-40.)

Jurisdiction on appeal to review classification of imported articles.

A suit to review a decision of the board of general appraisers in the matter of the classification of imported articles is one "arising under the revenue laws," in which, by the judiciary act of March 3, 1891, the decision of the circuit court of appeals is final, so that no appeal can be taken to the Supreme Court.

[No. 31.]

Submitted October 11, 1899. Decided October 30, 1899.

APPEAL from a decree of the Circuit Court of Appeals for the Ninth Circuit affirming a decree of the Circuit Court which reversed the decision of the board of general appraisers in the matter of the classification of imported steel rails. *Dismissed.*

See same case below, 48 U. S. App. 27, 76 Fed. Rep. 742, 22 C. C. A. 527.

The facts are stated in the opinion.

Mr. William Pinkney Whyte submitted the cause for appellant.

Assistant Attorney General Hoyt and **Mr. Felix Brannigan** submitted the cause for appellee:

So far as the present appellant is concerned, the final judgment of the circuit court of appeals ended the litigation, and there is no appeal to this court from that final judgment or decree, and no mode of review except by certiorari.

Lau Ow Biv, Petitioner, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Re Heath*, 144 U. S. 92, 36 L. ed.

358, 12 Sup. Ct. Rep. 615; *Hunt v. United States*, 166 U. S. 424, 41 L. ed. 1063, 17 Sup. Ct. Rep. 609.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a petition filed in the circuit court of the United States for the northern district of California by the Secretary of the Treasury, under the act of June 10, 1890 (26 Stat. at L. 131, chap. 407), commonly known as the customs administrative act, for the review of a decision of the board of general appraisers in the matter of the classification of certain steel T rails imported at San Francisco by the Bank of California and withdrawn on its authority by the Anglo-Californian Bank, Limited. The duties levied by the collector were paid under protest, and the protest sustained by the board of general appraisers. The circuit court reversed the decision of the board (71 Fed. Rep. 505), and the Anglo-Californian Bank carried the case by appeal to the circuit court of appeals for the ninth circuit, which affirmed the decree of the circuit court. 48 U. S. App. 27, 76 Fed. Rep. 742, 22 C. C. A. 527. After an unsuccessful application *to [38] this court for a writ of certiorari (166 U. S. 722, 41 L. ed. 1188, 17 Sup. Ct. Rep. 991), the bank prayed the pending appeal, and the cause, coming on for argument, was submitted on printed briefs.

The proceedings were carried on below in the name of the Secretary of the Treasury, but in this court, by agreement, the United States were properly substituted as a party. *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *United States v. Hopewell*, 5 U. S. App. 137, 51 Fed. Rep. 798, 2 C. C. A. 510.

The judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), provides for the review of the final decisions of the circuit courts by this court and by the circuit courts of appeals. Section 5 specifies the classes of cases which may be brought directly to this court, and section 6 confers appellate jurisdiction in all other cases on the circuit courts of appeals, whose judgments or decrees in certain enumerated classes of cases are made final by the statute. At the same time the section provides that the circuit courts of appeals may certify to this court any questions or propositions of law concerning which instruction is desired for the proper decision of pending cases, and that these may be answered or the whole cause required to be sent up for consideration. And it is also provided that those cases in which the judgments or decrees of the circuit courts of appeals are made final may be required by this court, by certiorari or otherwise, to be certified to it for review and determination.

This is not an appeal from the circuit court directly to this court, nor does the case fall within either of the classes of cases enumerated in § 5, in which such an appeal would lie.

No question or proposition of law concern-

ing which the circuit court of appeals desired the advice of this court was certified, and, on the contrary, the decree of the circuit court was affirmed by the judgment of the circuit court of appeals, with costs.

[39] The case is not before us on certiorari, but on appeal, and an appeal does not lie in those cases in which the judgments or decrees of the circuit courts of appeals are made final by the statute. Among those cases are cases "arising under the *revenue laws," and as this is such a case the appeal cannot be maintained.

It is true that under the act of June 10, 1890, an appeal would lie directly from the circuit courts to this court if the circuit court should be of opinion that the question involved was of such importance as to require a review of its decision by this court, and that in the order allowing this appeal the circuit court of appeals stated "that the question involved is of such importance as to require a review of said decision and decree by the Supreme Court of the United States;" but this is not an appeal from the circuit court, and, moreover, the judiciary act of March 3, 1891, prescribes a different rule as to the prosecution of appeals.

In *United States v. American Bell Teleph. Co.* 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69, it was held that this court had jurisdiction by appeal over a decree of a circuit court of appeals in a suit brought by the United States in the circuit court to cancel a patent for an invention.

The argument was pressed that the appeal could not be maintained because the decrees of the circuit courts of appeals were made final by the act in cases "arising under the patent laws," and that that was such a case. In view of the fact, however, that the United States instituted the suit as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such, it was thought that considerations of public policy forbade imputing to Congress the intention to include the case in that category.

We observed that actions at law for infringement, and suits in equity for infringement, for interference, and to obtain patents, being brought for the vindication of rights created by the patent laws, were clearly cases arising under those laws, and came strictly within the avowed purpose of the act of March 3, 1891, to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. But there was nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnished foundation for the belief that Congress intended to [40] place a limitation on our appellate *jurisdiction in a suit in which the United States were plaintiffs and appellants, and which was brought in effectuation of the superintending authority of the government over the public interests.

We do not think the present appeal comes within the ruling in that case.

Appeal dismissed.

175 U. S. U. S. BOOK 44.

DE LA VERGNE REFRIGERATING MACHINE COMPANY, *Petitioner*,

v.

GERMAN SAVINGS INSTITUTION *et al.*

(See S. C. Reporter's ed. 40-60.)

Power of corporation to purchase stock of rival corporation to suppress competition.

1. A conveyance of all the assets of a corporation is not within the power of the stockholders, even though they all sign it, without formal action at a meeting held for that purpose.
2. It is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management, unless express permission be given them to do so.
3. Authority to purchase "other property necessary for their business," given to manufacturing corporations by N. Y. act June 7, 1853, does not extend to the purchase of stock of similar corporations.
4. The purchase by a manufacturing company of the stock of an insolvent rival concern which has ceased to do business, and whose stock is bought for the evident purpose of preventing a reorganization and of obtaining its patronage, is not authorized by N. Y. act April 28, 1866, chap. 838, making it lawful for a manufacturing company to hold stock in the capital of any corporation engaged in the business of mining, manufacturing, or transporting such matters as are required in the prosecution of the business of the former company, so long as they shall furnish or transport such materials for the use of such company and for two years thereafter, and no longer.
5. No action can be maintained against a corporation on a contract prohibited by its charter.
6. A contract with stockholders of a corporation for its assets and goodwill is without consideration, if there is no corporate action authorizing the transfer, since the assets are the property of the company, and not of its stockholders.

[No. 45.]

Argued April 7, 11, 1899. Decided October 30, 1899.

ON WRIT OF CERTIORARI to review a judgment of the Circuit Court of Ap-

NOTE.—As to estoppel of corporation to set up plea of *ultra vires*,—see notes to *Central Transp. Co. v. Pullman's Palace Car Co.* 35 L. ed. U. S. 55; *Wood v. Corry Waterworks Co.* (C. C. W. D. Pa.) 12 L. R. A. 168, and *Miller v. American Mut. Acci. Ins. Co.* (Tenn.) 20 L. R. A. 765.

As to power of corporations to deal in the stock of other corporations or their own,—see note to *Buckeye Marble & Freestone Co. v. Harvey* (Tenn.) 18 L. R. A. 252.

Power of corporation to purchase stock of other corporations for purpose of controlling their management.

A corporation engaged in business of a public character will not be allowed to gain control of the stock of other corporations engaged in the same business, and so create a monopoly. *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798.

A railroad company has no implied power to purchase stock in another railway company for the purpose of controlling its management. Cen-

peals for the Eighth Circuit, which by equal division affirmed the decision of the Circuit Court in favor of plaintiffs in an action for breach of a contract to deliver stock in a corporation. *Reversed.*

See same case below, 49 U. S. App. 777, 84 Fed. Rep. 1016, 28 C. C. A. 681.

Statement by Mr. Justice **Brown**:

[40] *This is a consolidation of eight actions brought by the German Savings Institution and seven other plaintiffs, in the circuit court of the city of St. Louis, against the De la Vergne Refrigerating Company and John C. De la Vergne, its president and principal stockholder, personally, for a failure to deliver to plaintiffs certain stock in the Refrigerating Company.

Certain personal property was seized upon attachment issued, a forthcoming bond given therefor, and the several actions were afterwards removed to the circuit court for the eastern district of Missouri upon the joint petition of the defendants. In that court the several actions were consolidated and submitted *upon an agreed statement of facts upon which judgment was entered for the defendants.

[41] Pending the proceedings in the state court, and on May 12, 1896, John C. De la Vergne died, and on November 5, 1896, his death was suggested to the court, when William C. Richardson, public administrator of the city of St. Louis, entered his appearance, and with his consent an order was entered reviving each of such actions against him.

From the judgment so entered in the circuit court, a writ of error was taken from the circuit court of appeals, the judgment of the court below reversed, and the cause remanded with directions to grant a new trial. 36 U. S. App. 184, 70 Fed. Rep. 146, 17 C. C. A. 34.

Amended answers were filed in the lower court, much testimony taken, the cause submitted to the court without a jury, and a judgment entered in favor of the plaintiffs for \$126,849.96.

From this judgment a writ of error was

prosecuted by the Refrigerating Company, one of the defendants. The judgment was affirmed by the court of appeals by an equal division. 49 U. S. App. 777, 84 Fed. Rep. 1016, 28 C. C. A. 681. Whereupon the Refrigerating Company applied for and was allowed a writ of certiorari from this court.

Messrs. Frederick W. Lehmann and Charles H. Aldrich argued the cause and, with *Mr. Charles Nagel*, filed a brief for petitioner:

The assets of the consolidated company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois, and in due process of administration, the stock owned by the respective respondents was the only thing attempted to be delivered under the contract, and must therefore be deemed the subject of the contract.

Humphreys v. McKissock, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19 L. ed. 117; *Whistler v. Forster*, 14 C. B. N. S. 248; *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278; *Burton v. Curyea*, 40 Ill. 320; *Story, Sales*, 3d ed. §§ 188, 423; *Lunn v. Thornton*, 1 C. B. 379; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Low v. Pew*, 108 Mass. 349, 11 Am. Rep. 357.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De la Vergne Company to pay \$100,000 in its own stock or in cash. The contract was *ultra vires* of the vendee company, and therefore illegal and void.

N. Y. Laws 1848, chap. 40, § 8; N. Y. Laws 1890, chap. 564, § 40; Boone, Corp. § 107; Green's Brice, *Ultra Vires*, p. 91, note b; Morawetz, *Priv. Corp.* §§ 431, 433; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20; *Talmage v. Pell*, 7 N. Y. 328; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed.

tral R. Co. v. Collins, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Pearson v. Concord R. Corp.* 62 N. H. 537.

To the same effect is *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20, in which it was held that a railway company which has acquired by purchase the majority of all the stock issued by another railroad company has no right to vote thereon, and thus acquire control of the latter corporation.

A purchase of shares of a domestic corporation by a foreign corporation engaged in a similar business, for the express purpose of controlling and managing the domestic corporation, is *ultra vires*, and therefore unlawful and void. *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 116, 18 L. R. A. 252, 20 S. W. 427.

A manufacturing corporation has no implied power to purchase the stock of an insolvent rival concern which has ceased to do business, with the evident purpose of thereby preventing a reorganization and of obtaining its patronage. *DE LA VERGNE REFRIGERATING MACH. CO. V. GERMAN SAV. INST.*

Even where a corporation has the statutory right to purchase stock of another company, it has no right, as the owner of a majority of the stocks and bonds of such company, to manage its affairs so as to cause a default on a mortgage, and obtain control of the property by foreclosure at less than its value, to the injury of the minority stockholders. *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L. R. A. 76, 44 N. E. 1043.

A corporation cannot become an incorporator by subscribing for capital stock of a proposed corporation, with the intention of conducting the same as its own private enterprise. Nor can it accomplish this purpose indirectly through its officers or employees as pretended incorporators and subscribers for the stock. *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475.

A timber company has no authority to purchase bank shares for the avowed purpose of obtaining the virtual control of the bank, and thus effect loans to the company by conducting the bank through its agents. *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609.

55, 11 Sup. Ct. Rep. 478; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 116, 18 L. R. A. 252, 20 S. W. 427; *Union P. R. Co. v. Chicago, M. & St. P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; *Alexander v. Cauldwell*, 83 N. Y. 480; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221.

All the shareholders of a corporation cannot, by uniting in a contract or deed, transfer the property of the corporation without corporate action.

Sellers v. Greer, 172 Ill. 549, 40 L. R. A. 589, 50 N. E. 246.

The assignment under the Illinois statute regulating assignments by insolvent debtors left no title, legal or equitable, in the insolvent consolidated company, which was the subject of conveyance.

Weber v. Mick, 131 Ill. 520, 23 N. E. 646; *Burrill*, Assignm. 10; *Spindle v. Shreve*, 111 U. S. 545, 28 L. ed. 513, 4 Sup. Ct. Rep. 522; *Walker v. Ross*, 150 Ill. 56, 36 N. E. 986; *Stoddard v. Gilbert*, 163 Ill. 131, 45 N. E. 542.

In the absence of express statutory authority, a corporation cannot purchase stock of another corporation.

Boone, Corp. § 107; *Green's Brice, Ultra Vires*, p. 91; *Morawetz, Priv. Corp.* §§ 431, 433; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20; *Talmage v. Pell*, 7 N. Y. 328; *Mechanics & Workmen's Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159; *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475; *Pearson v. Concord R. Corp.* 62 N. H. 537; *Denny Hotel Co. v. Schram*, 6 Wash. 134; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 46, 28 Am. Rep. 9.

A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 116, 18 L. R. A. 252, 20 S. W. 427; *McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *Hamor v. Taylor Rice Engineering Co.* 84 Fed. Rep. 392; *Durkee v. People ex rel. Askren*, 53 Ill. App. 396, 155 Ill. 354, 40 N. E. 626.

Messrs. Leo Rassieur and J. M. Wilson argued the cause and, with *Mr. Eleneious Smith*, filed a brief for respondents:

The subject-matter of the contract was not stock of the consolidated company, but its tangible assets, its outstanding accounts and its goodwill, subject to the payment of its debts, and the custody thereof, until such payment, by the Illinois assignee.

German Sav. Inst. v. De La Vergne Refrigerating Mach. Co. 36 U. S. App. 184, 70 Fed. Rep. 146, 17 C. C. A. 34.

erating Mach. Co. 36 U. S. App. 184, 70 Fed. Rep. 146, 17 C. C. A. 34.

The contract was not *ultra vires* the consolidated company, because it was not a mere combination or coalition for the purpose of creating a monopoly or trust, but it was a legitimate business undertaking.

Morawetz, Priv. Corp. § 212; *Herriman v. Menzies*, 115 Cal. 16, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Gasquet v. Crescent City Brewing Co.* 49 Fed. Rep. 496; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 567, 7 Atl. 523.

The defendant corporation should not be permitted to plead that it exceeded its charter power in acquiring the assets of the consolidated company, or that the latter company exceeded its powers in disposing of the same.

Bradley v. Ballard, 55 Ill. 413, 7 Am. Rep. 656; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160; *Gasquet v. Crescent City Brewing Co.* 49 Fed. Rep. 496; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 567, 7 Atl. 523; *Morawetz, Priv. Corp.* § 689.

Even if the contract required an increase of capital stock and the De la Vergne Company had no power to contract therefor and for the payment in such form, it will nevertheless be compelled to make compensation in some other form,—in money.

Hitchcock v. Galveston, 96 U. S. 351, 24 L. ed. 662; *Fort Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *State Bd. of Agri. v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Parish v. Wheeler*, 22 N. Y. 494; *Edwards v. Fairbanks*, 27 La. Ann. 449; *Morawetz, Priv. Corp.* § 86; *Missouri P. R. Co. v. Sidell*, 35 U. S. App. 152, 67 Fed. Rep. 464, 14 C. C. A. 477; *Bensiek v. Thomas*, 27 U. S. App. 765, 66 Fed. Rep. 104, 13 C. C. A. 457.

*Mr. Justice **Brown** delivered the opinion [48] of the court:

The principal question in this case is whether, under the laws of New York providing for the organization of manufacturing corporations, such corporations are authorized to purchase the stock of a rival corporation for the purpose of suppressing competition and obtaining the management of such corporation.

The facts of the case are substantially as follows: The Consolidated Ice Machine Company (hereinafter referred to as the Consolidated Company) was a corporation organized under the laws of Illinois, and was engaged in the business of manufacturing and selling refrigerating and ice-making machines. The entire amount of issued stock of such corporation was \$100,000, held in various proportions by the plaintiffs in this consolidated cause. Having become insol-

vent, the company, on October 14, 1890, made an assignment under the general laws of Illinois, for the benefit of creditors, to one Jenkins, who, at the date of the contract sued upon, was engaged in winding up its business. The assignment on its face purported to convey to Jenkins and his successors in trust the entire real and personal "property and effects of every kind and description" belonging to the corporation, "or in which it has any right or interest," the same being fully and particularly enumerated and described in an inventory, which, however, does not appear in the record. Its assets consisted mainly of a plant for the manufacture of refrigerating and ice-making machines in Chicago; of patent rights, outstanding accounts, and the goodwill of its business which appears to have been an extensive one.

It is asserted by the plaintiffs, who are stockholders in this company, that the assets exceeded in value the liabilities of the company, and that the company was not in reality insolvent, but had assumed contracts to such an extent that, with its limited capital, it was unable to carry them out.

[49] *However this may be, subsequently to the assignment, and on April 16, 1891, the company itself, by its president as party of the first part, and its stockholders as parties of the second part, entered into an agreement with the De la Vergne Refrigerating Machine Company, a corporation organized under the laws of New York (hereinafter called the Refrigerating Company), as party of the third part, and John C. De la Vergne, of the state of New York, president of that company, party of the fourth part. This agreement is the basis of the action. After reciting that the Refrigerating Company was willing to acquire such right as the Consolidated Company and its stockholders could assign in and to the assets of such company; that under the laws of Illinois the Consolidated Company was not entitled to the possession of its assets in the hands of the assignee until its obligations had been discharged; that the Refrigerating Company was incorporated with a stock of \$350,000 when its assets were worth \$1,400,000; and that its stockholders were considering a plan of increasing the stock to \$2,000,000, of which \$1,000,000 was to be turned over to the Consolidated Company under the terms of the agreement.

Therefore, in view of these facts, the Consolidated Company and its stockholders covenanted with the Refrigerating Company and its president, De la Vergne, to sell and convey unto the Refrigerating Company all their right, title, and interest in and to the assets of the party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid.

The second clause contained a covenant to issue to the stockholders of the Consolidated Company fully paid-up stock in the Refrigerating Company to the amount of \$100,000

in certain specified proportions to each stockholder.

By the fourth clause, the stockholders agreed within ten days from the date of the agreement to assign to De la Vergne, for the benefit of the Refrigerating Company, all stock of the insolvent company which had been issued, and which they guaranteed had been paid in full; and within sixty days thereafter the Refrigerating Company and its president *agreed to issue and deliver to the stockholders of the Consolidated Company stock in the Refrigerating Company to the amount of \$100,000. [50]

By the fifth clause, the stockholders in the Consolidated Company covenanted to accept, in lieu of the stock of the Refrigerating Company, \$100,000 in cash, at the option of De la Vergne, the president of the company.

By the seventh clause, the stockholders of the Consolidated Company agreed that for a period of ten years they would not enter into or become engaged in the selling or making of refrigerators or ice machines, directly or indirectly, within the United States, excepting the state of Montana.

Within the ten days provided by the agreement, certificates representing one thousand shares of the stock of the Consolidated Company, with written assignments executed by the parties who held the certificates, were delivered to De la Vergne, although ninety-five of these shares were held by P. J. Lingensfelder and Leo Rassieur as executors, and ninety were held by them as trustees under the will of one Jungenfeld, deceased. These shares were assigned by the parties without an order authorizing them to do so from the probate court of St. Louis, in the state of Missouri, in which the estate of Jungenfeld was in the process of administration. Two days after the receipt of these certificates De la Vergne's attorney wrote to Mr. Rassieur, calling his attention to certain technical defects, which were immediately remedied by suitable instruments of further assurance. No objection was then made that the assignments of the executors and trustees were insufficient for want of an order of the probate court authorizing the same.

In the following July demands were several times made by Mr. Rassieur for himself and his associates for the \$100,000 in stock or money stipulated by the contract, but no response was received until September, when Mr. Fitch, acting for the Refrigerating Company, announced for the first time that the defendants declined to carry out their part of the contract. The reasons for the refusal do not seem to have been substantial ones. The letter contained an announcement that Mr. *De la Vergne's counsel was ready to return the papers sent to him to whomsoever was legally entitled to their custody. There was no reconveyance to the Consolidated Company of whatever was covered by the contract, the covenant of its stockholders to refrain from transacting business for ten years was never released, and none of the certificates and assignments of stock were [51]

ever delivered back. It appeared, however, that in the meantime the Refrigerating Company had secured the former New York office of the Consolidated Company; had employed its agent in making contracts with former customers of that company, which contracts were taken in the name of such agent. He was, however, furnished with the means by which they were carried out, and assignments were taken from him, which practically secured the goodwill of the company, although the Chicago assets were allowed to go to sale by the assignee. At this sale Mr. De la Vergne was present and offered for the tangible assets the sum of \$25,000.

In their answer as amended, defendants set up as justification for a refusal to perform the contract that no assets of the Consolidated Company ever came into the possession of the defendants, since all, including the goodwill, had been transferred to Jenkins, the assignee, for the benefit of its creditors, and remained in his possession and control until they were disposed of under the direction of the probate court for the benefit of creditors, and that they were insufficient to discharge the liabilities; that the contract sued upon purporting to be executed on behalf of the Refrigerating Company by De la Vergne, its president, was executed without authority; that no benefit of any kind ever accrued to the company under the contract; that the company never received any of the consideration moving to it under the contract; that it never received any of the assets of the Consolidated Company, nor any of the stock; that it never in any manner ratified or approved the contract, but, on the contrary, rejected the same, and that the plaintiffs well knew at the time of making the contract that De la Vergne had no power or authority to bind the Refrigerating Company; that the defendants notified the plaintiffs that they would not be bound by the contract, and *that such rejection of the contract was acquiesced in by the plaintiffs, and that, relying upon such acquiescence, the defendants abandoned all interests in the Consolidated Company; that the contract was in reality for the stock of the Consolidated Company, and that the Refrigerating Company was not authorized by its charter, by the laws of New York or of Illinois, to purchase such stock, and that the agreement was *ultra vires*; and, further, that the Refrigerating Company had no authority to stipulate for an increase in its capital stock, as was attempted under the contract, and that the contract was against public policy and wholly void.

1. The main defense pressed upon our consideration is one which does not seem to have been called to the attention of the circuit court, and one upon which the judges of the circuit court of appeals were equally divided in opinion. It is that the president of the Refrigerating Company had no authority to sign the contract in question, and that the agreement itself was *ultra vires* the corporation.

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As the general assignment to Jenkins, executed October 14, 1890, was most sweeping in its terms, and included all the real and personal property and effects of every kind and description belonging to the corporation, or in which it had any right or interest, it was doubtless sufficient to pass the goodwill of the business, which was an incident either to the premises, to the name of the corporation, or to the tangible property with which the business was carried on. *Churton v. Douglas*, Johns. V. C. (Eng.) 174, 188; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *Metropolitan Bank v. St. Louis Dispatch Co.* 149 U. S. 436, 37 L. ed. 799, 13 Sup. Ct. Rep. 944; *Willett v. Blanford*, 1 Hare, 253; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Bradbury v. Dickens*, 27 Beav. 53; *Williams v. Wilson*, 4 Sandf. Ch. 379; *Sheppard v. Boggs*, 9 Neb. 257; *Wallingford v. Burr*, 17 Neb. 137.

This was evidently the view taken by the assignee, since he subsequently advertised the goodwill of the business for sale, and sold the same under an order of the court to Clarence A. Knight and Otto C. Butz, who afterward sold the same, including certain of the assets, to John Featherstone's Sons.

*It is difficult, even if the contract were [53] legally executed, to see what assets of value belonging to the Consolidated Company passed to the Refrigerating Company under it, except perhaps the possibility that the assets would prove more than sufficient to pay the debts; or that a settlement might be effected with a majority in number and amount of the creditors, when, under the laws of Illinois, the assignor would be entitled to a reconveyance and redelivery of the assigned assets. In such case the goodwill would doubtless return with the other assets to the assignor, *i. e.*, the corporation, but not to the stockholders, and the right to sue for a breach of the contract would belong to the corporation, or its assignee. There was also a covenant that the Consolidated Company would not engage in a similar business within ten years from the date of the contract. The Refrigerating Company, however, did not avail itself of this opportunity to compromise with the creditors of the Consolidated Company, but allowed the assignee to dispose of the assets, which, on a forced sale, lacked \$150,000 of being sufficient to pay the debts of the Consolidated Company.

In addition to this, however, there was no corporate action taken authorizing any such conveyance by the corporation, and such conveyance would not, under the laws of Illinois which conform in this particular to the general law, be within the power of the stockholders, even though they all signed it without formal action at a meeting held for that purpose. *Sellers v. Greer*, 172 Ill. 549, 40 L. R. A. 589, 50 N. E. 246; *Hopkins v. Roseclare Lead Co.* 72 Ill. 373; *Humphreys v. McKissock*, 140 U. S. 304, 312, 35 L. ed. 473, 475, 11 Sup. Ct. Rep. 779; *Allemong v. Simmons*, 124 Ind. 199, 23 N. E. 768; *Smith v. Hurd*, 12 Met. 371, 385, 46 Am. Dec. 690;

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England v. Dearborn, 141 Mass. 590, 6 N. E. 837; *Cook, Stockholders*, § 709.

It is true that the president of the Consolidated Company assumed to sign the contract as president, and to bind the company, but it is scarcely necessary to say that the president of a corporation has no power as such to make a general conveyance of the assets of the corporation without at least the assent of the board of directors. *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Titus*

[54] *v. Cairo & F. R. Co.* 37 N. J. L. 98, 102; *McCullough v. Moss*, 5 Denio, 567; *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 129, 134; *Walworth County Bank v. Farmers' Loan & T. Co.* 14 Wis. 325; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237; *Morawetz, Priv. Corp.* § 537; 4 *Thomp. Corp.* § 4622.

The stockholders not only assumed to convey the property of the corporation without title thereto as well as without the requisite authority so to do, but, acting as individuals, they sold "all their right, title, and interest in and to the assets" of the corporation, "subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid." As this transfer was no broader in its terms than those employed in the assignment by the company to Jenkins, and as the stockholders in any event would not have the power to transfer the assets of the corporation, this sale could operate only upon their stock; and that this was the intention is evident from the fourth clause of the contract, by which the stockholders agreed, within ten days from the date of the contract, to assign to De la Vergne all the stock of the Consolidated Company which had been issued, and which they guaranteed had been paid in full, and also by the fact that the certificates for such stock were all assigned by the holders and forwarded to De la Vergne. But again, it is difficult to see what the Refrigerating Company gained by this transfer of stock. Doubtless it gave them the control of the Consolidated Company, but as that company had assigned everything to Jenkins, including the goodwill, there was nothing left of value in the ownership of the stock. Apparently it could only operate upon the possibility that, by some favorable turn of fortune, the assets might prove more than sufficient to pay the debts, and thus the stock would become of some real value. However this may be, it is quite evident that one of the main objects of the transfer was to get possession of the stock and the right to use the name of the Consolidated Company, assuming that this did not pass to the assignee as part of the goodwill of the business.

[55] But as the powers of corporations, created by legislative act, are limited to such as the act expressly confers, and the enumeration of these implies the exclusion of all others, it follows that unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of con-

trolling their management. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 128, 23 L. ed. 679, 681; *Sumner v. Marcy*, 3 Woodb. & M. 105; *Morawetz, Priv. Corp.* § 431; 1 *Thomp. Corp.* § 1102; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20; *Mechanics' & W. M. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159.

Not only is this true as a general rule, but by the law of the state of New York, under which this corporation was organized, i. e., "An Act to Authorize the Formation of Corporations for Manufacturing, Mining, Mechanical, or Chemical Purposes," passed Feb. 17, 1848 (Laws 1848, chap. 40), it was declared in § 8 that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." This language is clear and explicit, and evidently covers purchases of stock in other corporations, whether engaged in the same or different business.

In this connection, however, our attention is called to an act passed by the legislature of New York June 7, 1853 (Laws 1853, chap. 333), amendatory of the act of 1848, the 2d section of which enacts that "the trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor." The position of the plaintiffs in this connection is that, under the authority to purchase "other property necessary for their business," it was competent for manufacturing corporations to purchase the stock of other similar corporations. But we do not so read the act. Its evident object was to permit manufacturing corporations to purchase mines from which they could extract their own ore, or manufactories of raw material, such as pig iron or lumber, which could furnish to them material to be worked up into their own products; and in case such purchases involved a larger outlay than their present resources would *justify, to issue new stock "to the amount of the value thereof in payment therefor." But there is nothing to indicate that the legislature intended to authorize them to purchase the stock of competing corporations, or corporations engaged in other business. It is only property necessary for their own current business they were authorized to purchase.

Another act amending the general corporation act of 1848, passed April 28, 1866 (chap. 838), was intended for a similar purpose. By section three it was enacted that "it shall be lawful for any manufacturing company heretofore or hereafter organized under the provisions of this act, or the act hereby amended, to hold stock in the capital of any corporation engaged in the business of mining, manufacturing, or transporting such materials as are required in the prosecution of the business of such company, so long as they shall furnish or transport such materials for the use of such company, and for two years thereafter and no longer;

and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given bylaw with respect to the purchase of mines, manufactories, and other property necessary to the business of manufacturing companies. But the capital stock of such company shall not be increased without the consent of the owners of two thirds of the stock, to be obtained as provided by sections twenty-one and twenty-two of the act hereby amended." N. Y. Laws 1866, chap. 838.

The object of this act was evidently much the same as that of the prior act of 1853, that is, to enable manufacturing corporations to produce their own ore and manufacture their own raw materials. To meet the exigencies of this statute it is necessary that the company whose stock is purchased should at the time of the purchase be engaged in the business of mining, manufacturing, or transporting such materials as are required in the prosecution of the business of the purchasing company; and the right is limited to such time as they shall furnish or transport such materials for the use of such company, and for two years thereafter. It clearly has no application to a case where a manufacturing

[57] company purchases *the stock of an insolvent rival concern which has ceased to do business, and whose stock is bought for the evident purpose of preventing a reorganization, and of obtaining its patronage.

In the Revised Statutes of New York of 1889 (vol. 3, p. 1959), there is also an act, to which our attention is called by a supplemental brief, permitting manufacturing companies to increase or diminish their capital stock to any amount which may be sufficient and proper for purposes of the corporation, and also to extend their business to any other manufacturing business subject to the provisions of the act.

That neither of these acts were intended to give authority to corporations to purchase stock of other corporations engaged in the same business is evident from a subsequent act approved June 7, 1890, to take effect May 1, 1891, the 40th section of which provides that ". . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been bona fide pledged, hypothecated, or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders, or decrees which shall be obtained for such debts, or in the prosecution thereof. But any domestic corporation transacting business in this state, and also in other states or foreign countries, may invest its funds in the stocks, bonds, or securities of other corporations owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default, and such stock, bonds, or securities shall be continuously of a market

value 20 per cent greater than the amount loaned or continued thereon." N. Y. Laws 1890, chap. 564, art. 3, p. 1073.

Had the former acts given the unlimited authority to purchase insisted upon by the plaintiffs this act would have been entirely unnecessary, and, instead of enlarging the power previously possessed, would have operated as a restriction upon it. That this act of 1890 does not assist the plaintiffs is evident not only from the fact that the act did not take effect *until after the contract was made, [58] but from the further fact that it merely authorizes corporations to *invest their funds* in the stocks, bonds, or securities of other corporations if dividends have been paid for three years before the loans are made, or if the interest on their securities is not in default, and such securities are worth 20 per cent greater than the amount loaned thereon. This act evidently refers to loans and not to purchases, since the section expressly provides that no corporation shall use its funds in the purchase of any stock, either of its own or any other corporation, unless by way of security for antecedent debts.

The truth is, that the legislature of New York, instead of repealing the prohibitory clause in the original act of 1848, concerning the purchase of stock in other corporations, has modified it but slightly, by slow degrees, and in special cases, to enable a manufacturing corporation to control more perfectly its own legitimate business operations, and has thereby manifested the more clearly its intention to preserve the original inhibition.

Our conclusion upon this branch of the case is that, as the main, if not the sole, object of the purchase from the plaintiffs was to acquire their stock in the Consolidated Company, such purchase was *ultra vires* the Refrigerating Company.

2. Is this defense available to the Refrigerating Company? Whatever doubts might have been once entertained as to the power of corporations to set up the defense of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit* it may be compelled to respond for the benefit actually received.

The earliest case in which this doctrine is distinctly laid down is that of *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184, in which it appears that two railroad companies, which had been consolidated, gave their promissory notes in payment for a steamboat to run in connection with the railroads. It was held that, as there was no authority in the *railroad companies to engage in [59] running steamboats, there could be no recovery on the notes, and that as the plaintiff was not the owner of the boat and had sued upon the notes as an indorsee, there could be no recovery. The same doctrine has been applied to leases *ultra vires* a corporation, and it has

been uniformly held that there could be no recovery upon the lease itself, though there might be in an action for use and occupation of the property. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 384, 33 L. ed. 157, 161, 9 Sup. Ct. Rep. 770; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 48, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478; *S. C. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808*; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 550, 41 L. ed. 817, 822, 17 Sup. Ct. Rep. 433; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 116, 18 L. R. A. 252; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized. *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 398, 16 L. ed. 488, 497; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, and 630, 30 L. ed. 83, and 284, 6 Sup. Ct. Rep. 1094, and 7 Sup. Ct. Rep. 24; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 25, 32 L. ed. 837, 841, 9 Sup. Ct. Rep. 499; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 384, 33 L. ed. 161, 9 Sup. Ct. Rep. 770.

As the action in this case is upon the contract, and as the contract was prohibited by the charter of the Refrigerating Company, there can be no recovery upon it.

The difficulty with the position of the plaintiffs in this case is this: If the purchase of the stock was the main object of the contract the consideration was an illegal one, and the promise of the Refrigerating Company to furnish its own *stock in payment was *ultra vires*. If, upon the other hand, the object of the contract was to obtain the assets and goodwill of the Consolidated Company upon payment of its debts, then the promise of the Refrigerating Company to pay the plaintiffs therefor was without consideration, since the assets were the property of the Consolidated Company and not of its stockholders, and anything realized by the sale of such assets belonged to the company or its assignee, and should be devoted first to the payment of its debts. If there were anything of value beyond the control of the stock which passed to the Refrigerating Company under the contract, the assignee could not be dispossessed of it until all the debts were paid or compromised, when it

would revert to the corporation but not to the plaintiffs. Their title to sue must rest upon their ownership of the stock, and if the defense of *ultra vires* be sustained, we know of no theory upon which the plaintiffs can recover. It certainly cannot be true that the plaintiffs can take to themselves the \$100,000 stipulated by this contract and leave creditors of the corporation unpaid to the extent of \$150,000.

The judgment of the Circuit Court of Appeals and of the Circuit Court must therefore be reversed, and the case remanded to the Circuit Court for the Eastern District of Missouri with directions to grant a new trial.

Mr. Justice **Brewer** and Mr. Justice **McKenna** dissented.

UNITED STATES, Appt.,

v.

MARIA DE LA PAZ VALDEZ DE CONWAY *et al.*

(See S. C. Reporter's ed. 60-71.)

Confirmation of private land claim—grant of lands by act of Congress.

1. Lands previously confirmed by act of Congress to Indian pueblos should be excepted from a decree of confirmation of a Spanish grant, even if the previous grant by Congress to the pueblos may be void, as the effect of the confirmation is only to release all claim of title by the United States, and it is not incumbent upon the court of private land claims to determine the priority of right as between the claimant and another grantee.
2. An appeal may be taken by the United States from a decision by the court of private land claims in favor of a petitioner, although the government may have no interest in the result of the litigation.
3. An Indian claim or title that has been confirmed by Congress is a "just and unextinguished" one, within the meaning of the private land claim act, § 13, subd. 2, providing that no claim shall be allowed that shall interfere with or overthrow any such title.

[No. 13.]

*Argued and Submitted January 12, 1899.
Decided October 30, 1899.*

APPEAL by the United States from a decree of confirmation by the Court of Private Land Claims of a claim to lands almost entirely within the limits of lands previously confirmed to pueblos by act of Congress and patented to them. *Reversed.*

Statement by Mr. Justice **Brown**:

*This was a petition filed by Maria de la Paz Valdez de Conway and twenty-one others in the court of private land claims for the confirmation of a tract of land known as the Cuyamungue grant, or private land claim, situated in the county of Santa Fé, territory of New Mexico, and alleged to contain in excess of 5,000 acres.

It appears from an examination of the ex-

pediente, offered in evidence as the basis of the claim, that on January 22, 1731, Bernardino de Sena, Tomas de Sena, and Luis Lopez presented a petition to Governor Juan Domingo Bustamante to grant them the surplus land in the abandoned pueblo of Cuyamungue as royal, public, and uninhabited, and described it as being situated on both sides of the river Tesuque (formerly Cuyamungue), and extending from a bluff of the pueblo of Cuyamungue to the hills of the Nambé road.

The governor made the grant on the same day, directed the chief alcalde of the new village of Santa Cruz to notify the Indians of the pueblo of Tesuque, the heirs of certain adjoining property owners, and all other citizens of the vicinity to show cause, if any they had, why the tract should not be granted to the petitioners, and, if there were no objection, to put them in possession.

Such notice having been given, the alcalde on January 22, 1731, put the petitioners in juridical possession of the lands, describing the boundaries, and, after executing such act, returned the proceedings to the governor, by whom they were approved and placed in the royal archives of the city of Santa Fé, a *testimonio* thereof being delivered to the grantees, the original of which is now a part of the archives of the United States in the custody of the surveyor general of the territory. The grantees, their heirs and assigns, have been in possession of the land grant up to the present time, a period of one hundred and sixty-four years. [62]

The petition further alleged that the claim had been examined and approved by the surveyor general of the territory, returned by him favorably to Congress with a recommendation that the same be confirmed to the legal representatives of the original petitioners; but that it had never been acted upon by Congress, or the authorities of the United States.

The government made no answer to the petition, but the court proceeded to hear the cause upon petition and proofs under the last clause of section 6 of the court of private land claims act, notwithstanding the failure of the government to file an answer. Petitioners produced certain witnesses to the effect that portions of the land granted had been occupied and cultivated by persons claiming under the original grantees; while the government showed that Indians of the pueblos of Nambé and Pojoaque had many years before instituted proceedings before the surveyor general of New Mexico under the act of July 22, 1854, for 4 leagues of land each; that the surveyor general had recommended that the lands thus demanded be granted to them, and Congress had confirmed the grant to each of said pueblos for 4 leagues as recommended (11 Stat. at L. 374); that the grants to said pueblos were surveyed and patents for them issued; that such surveys covered the larger portions of the land of the old pueblo of Cuyamungue, which petitioners alleged were granted to the original grantees in this case.

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The oral testimony tended to show that the pueblo of Pojoaque had been in existence since 1710, and the pueblo of Nambé from a time immemorial.

Upon motion made by the government and upon the consent of all the parties to the proceeding, it was ordered on October 11, 1895, that these pueblos be made parties, and that the petition of the claimants be deemed amended accordingly. It did not appear that any copy of the petition was served upon these pueblos, or that they appeared or waived service; but the court on October 24, 1885, entered a decree against the United States confirming the entire grant as complete *and perfect as of the date of the treaty of Guadalupe Hidalgo, in 1848, and further decreed that the confirmation should in no wise affect the rights of the pueblos of Pojoaque and Nambé, if any they have, as between them and the confirmees under their patents issued by the United States government. [63]

Subsequently to this decree, and on November 9, the Indians of the two pueblos above named entered their appearance, stated that the lands confirmed to the petitioners were almost entirely within the limits of the lands confirmed by the act of Congress to these pueblos, and patented to them, and that, while they were made parties defendant to the petition, they were never served with process, and had no opportunity of making a defense, and therefore moved the court to vacate the decree of confirmation and allow them to be heard in opposition to the claim. This motion was subsequently, and on December 2, 1896, denied, whereupon the United States appealed to this court.

Mr. Matthew G. Reynolds argued the cause and, with Solicitor General John K. Richards, filed a brief for appellant.

Mr. John H. Knaebel submitted the cause for appellees.

*Mr. Justice Brown delivered the opinion [63] of the court:

This case involves the proper disposition by the court of private land claims, under the act of Congress constituting the court, of overlapping grants. The facts are extremely simple: Petitioners derived their title by purchase or inheritance from the original grantees, who held under a royal grant made in 1731 by the then governor of New Mexico, and through which they had been in possession of portions of the land ever since. Their grant had been examined, surveyed, and approved by the surveyor general of the United States in 1871, but had never been confirmed by Congress. It was not true, as stated in the petition, however, that "no person or *persons, natural or artificial, are in possession of the said land, or any part thereof, or claim the same or any part thereof adversely to your petitioners, or otherwise than by their lease or permission," since it appears there were two Indian pueblos within the limits of the grant, from a time whence the memory of man and the [64]

traditions of the several tribes ran not to the contrary. It was shown that one of them, Pojoaque, had a bell originally cast for its church, which bore the date of 1710. These pueblos had instituted proceedings before the surveyor general under the act of July 22, 1854, for 4 leagues of land, which he recommended to be granted, and in compliance therewith Congress confirmed a grant to each of said pueblos, which grants were subsequently surveyed and patents issued. 11 Stat. at L. 374. These surveys covered all the land of the abandoned pueblo of Cuyamungue, granted to the petitioners, except about 100 acres. It was insisted in the court below that the land covered by these patents should be excepted out of the decree of confirmation in this case; but it was held that the pueblos had no just right or claim at the date of the treaty to any part of the land covered by the petitioners' grant; that the United States acquired no right or interest in the land of a citizen in the ceded territory held by a complete and perfect title at the date of the treaty; that Congress did not undertake to decide who was the rightful owner of the land confirmed to the pueblos, but, on the contrary, expressly stated that the patents were not to interfere with any prior right to the land which might be held by other parties. Said the court: "If the petitioners in this case have a complete and perfect title to the land in question under the grant of 1731, it necessarily follows that the pueblos of Nambé and Pojoaque have no right or title to any of the land within the boundaries of such complete and perfect grant. But the decree of this court does not in any way affect the right and title (if any) that the pueblos acquired by their patents from the United States, as between them and petitioners."

The court declined to except out of the decree of confirmation the lands covered by the pueblos' patents, but did adjudge that the confirmation should in no wise affect the [65] rights of *the pueblos as between them and the petitioners under their patents.

The case depends largely upon the construction given to the sections and parts of sections of the act constituting the court of private land claims. 26 Stat. at L. 854.

By section 6 the petitioner is required to set forth, among other things, "the name or names of any person or persons in possession of or claiming the same [the lands] or any part thereof, otherwise than by the lease or permission of the petitioner; . . . and a copy of such petition, with a citation to any adverse possessor or claimant, shall . . . be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper state or territory, and in like manner on the attorney of the United States," whose duty it is "to enter an appearance, and plead, answer, or demur, . . . and in no case shall a decree be entered otherwise than upon full legal proof and hearing."

By section 7 the court has "full power to hear and determine all questions in cases

before it relative to the title to the land the subject of such case; the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, . . . and all other questions properly arising between the claimants, or other parties in the case, and the United States."

By section 8 persons claiming lands under a Spanish or Mexican title "that was complete and perfect at the date when the United States acquired sovereignty therein shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for in other cases for confirmation of such title;" but the confirmation of such title "shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall *have been disposed of by the United States*, and always subject to and not to affect any conflicting private interests, rights, or *claims held or claimed ad- [66] versely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person, as between himself and other claimants or persons in respect of any such lands, shall be in any manner affected thereby." It was under this section that the petition in this case was presented and a "complete and perfect title" claimed.

By section 13, defining the character of claims that shall be allowed as those that, "if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States," it is provided in the 2d subdivision that "no claim shall be allowed that shall interfere with or overthrow any just or unextinguished Indian title or right to any land or place;" and, by subdivision 4, that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon or decided by Congress or under its authority."

Subdivision 5 provided: "No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be preserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such land."

Subdivision 6 provides: "No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor

shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as in this act provided."

[67] 1. The decisive question in the case is whether the lands *confirmed by the act of Congress of December 22, 1858, pursuant to the recommendation of the surveyor general (11 Stat. at L. 374) to the Indian pueblos of Pojoaque and Nambé should have been excepted from the decree of confirmation. This act also contains a proviso similar to that contained in the court of private land claims act, that "this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights should such exist."

This act operated, then, to release to the Indians all the title of the United States to the land covered by it, and passed the title of the United States as effectually as if it contained in terms a grant *de novo*. *Ryan v. Carter*, 93 U. S. 78, 82, 23 L. ed. 807, 809. Nor is the action of Congress confirming such private land claim subject to judicial review. As was said by this court in *Tameling v. United States Freehold & E. Co.* 93 U. S. 644, 662, 23 L. ed. 998, 1002: "No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim reserved to Congress is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this court to sit in judgment upon either the recital of the matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action." See also *Maxwell Land Grant Case*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015.

The government having thus exhausted its power with reference to the land in dispute by granting all its title as sovereign proprietor to the pueblos, it is difficult to see upon what principle it is called upon to make or confirm another grant to a different person. Nothing can be plainer from the language of the private land claim act than that lands "that shall have been disposed of by the United States" should be excepted from the decree of confirmation (sec. 8); that no claim shall be allowed which shall interfere with or overthrow any just or unextinguished Indian title (sec. 13); that no claim shall be allowed for any land the right to which has been lawfully acted upon and decided by Congress (sec. 13); and that no proceeding under the act shall conclude or affect the private rights of persons as between each other (sec. 13). Under these provisions, if the court were to confirm this grant for lands already granted, such confirmation would be void, as nothing is better settled by this court than that a patent issued by the United States to lands which they do not

own is a simple nullity. *Polk's Lessee v. Wendell*, 9 Cranch, 99, 3 L. ed. 669; *S. C.* 5 Wheat. 293, 5 L. ed. 92; *Sabariego v. Maverick*, 124 U. S. 261, 281, 31 L. ed. 430, 438, 8 Sup. Ct. Rep. 461; *Wright v. Roseberry*, 121 U. S. 488, 520, 30 L. ed. 1039, 1049, 7 Sup. Ct. Rep. 985; *Doolan v. Carr*, 125 U. S. 618, 625, 31 L. ed. 844, 847, 8 Sup. Ct. Rep. 1228; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 174, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271.

It is true that the act of December 22, 1858, confirming these lands to the pueblos, may have been itself void by reason of petitioner's prior title thereto; but that is a question which is not necessarily involved in this case and upon which we express no opinion. It will occasionally happen that the government through accident or inadvertence will patent the same land a second time; but when its attention is called to the fact that the land has been previously patented it cannot patent the same land a second time without virtually stultifying itself. A patent assumes that a patentor has certain rights to convey, and that, if those rights have already been conveyed with the knowledge of the grantor, a second patent carries with it a suspicion of a want of good faith.

Nor is the confirmation of this patent essential to the protection of the petitioner. The title set forth is one which was complete and perfect at the date of the treaty, and while he had the right, under section 8, he was clearly not bound to apply to the court for a confirmation of such title, but was at liberty to resort to the local courts for its establishment.

It is possible that the surveyor general, in recommending the grant of 4 square leagues to each pueblo, measured from the church as a center, allowed more than was proper; yet, as he acted according to the opinion at one time prevailing, and as Congress confirmed the grant to that amount, the propriety of such grant cannot be attacked here upon that or *any other ground. [69] As was said in the case of *Tameling v. United States Freehold & E. Co.* 93 U. S. 644, 663, 23 L. ed. 998, 1003: "Congress acted upon the claim as recommended for confirmation by the surveyor general. The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract."

Nor is this the proper time to adjudicate upon the respective merits of the two titles. We have only to consider whether the government can properly be called upon to confirm that which it has already confirmed to another party. The court of private land claims seems to have assumed that the grant by Congress to the pueblos was absolutely void by reason of the fact that, the petitioners having a complete and perfect title, the United States had nothing to convey. This may be entirely true, but it is not perceived how the petitioners' title can be aided by the government divesting itself for a second time of a title which it

had already released. The duty of the court under section 8, "to hear, try, and determine the validity of the same" (the grant) "and the right of the claimant thereto, its extent, location, and boundaries," is discharged by determining the extent and validity of the grant as between the United States and the grantee, and it is not incumbent upon the court of private land claims to determine the priority of right as between him and another grantee. Such private rights are carefully preserved in the 8th and 13th sections.

2. The appeal in this case was properly taken by the United States. While the government may have no interest in the result of the litigation, it is a proper and necessary party to the suit, and it would be a strange conclusion to hold that it could not follow the litigation through all the courts that are given jurisdiction of the case. Upon such appeal the government is at liberty to show that the petitioner is not entitled to a confirmation of his claim. Indeed, an appeal is expressly given by section 9, which enacts that "the party against whom the court shall in any case decide—the United States in case of the confirmation of the claim in whole or in part, and the claimant [70] in case of a rejection of a claim in whole *or in part—shall have the right of appeal to the Supreme Court of the United States."

3. That the Indian claim or title is a "just and unextinguished" one within the meaning of section 13, subdivision 2, of the act, is shown by the fact that such title was confirmed by Congress. By the word "just" in this connection is meant only a title which is good upon its face, or not manifestly frivolous,—not one which shall ultimately turn out to be valid. As already observed, it was not the object of the act to permit private titles to be litigated in the court of private land claims (although perhaps this may be done incidentally), but merely to determine if and to whom the United States ought to release its rights as sovereign proprietor of the soil. As was said by this court in *Adams v. Norris*, 103 U. S. 591, 26 L. ed. 583:

"But the United States, in dealing with the claimants of lands under Mexican grants, which had come into the political control of our government by the treaty of Mexico, never made pretense that it was the owner of the lands so granted by Mexico. When, therefore, guided by the action of the tribunals which the government had established to pass upon the validity of these alleged grants, it issued a patent to the claimant, it was in the nature of a quitclaim, an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Henshaw v. Bissell*, 18 Wall. 268, 21 L. ed. 840; *Miller v. Dale*, 92 U. S. 478, 23 L. ed. 738.

"Such a patent was therefore conclusive

only as between the United States and the grantee, and was evidence that, as to them, the claimants had established the validity of the grant. . . . We do not think, therefore, that if defendant's survey and patent are based upon a superior Mexican grant, their rights are concluded by the prior survey of the plaintiffs."

We do not wish to be understood as holding that two claimants to the same land may not litigate, as between themselves, which of the two is entitled to a confirmation, and *the [71] question thus becomes *res judicata*; but when the title has once been confirmed by Congress it should be respected by the court of private land claims as if it were a confirmation by the court itself, and conflicting claimants are at liberty to resort to the ordinary remedies at law or in equity, according to the nature of the claim.

The main object of the court of private land claims is to ascertain and determine whether the land claimed as private property under the treaty is in fact private property, or, on the contrary, is public property. In the latter case, of course, a confirmation is refused; in the former case a confirmation is made if the claimant appears to have, as between himself and the United States, the right to it, but subject to the rights of others who are at liberty to assert their superior title in the local courts.

We are therefore of opinion that the decree of confirmation should have excepted the pueblo lands, and such decree is accordingly *reversed* and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice Shiras and Mr. Justice White dissented.

TOWN OF REAL DE DOLORES DEL ORO,
Hipolito Montoya, *et al.*, *Appts.*,

v.

UNITED STATES *et al.*

(See S. C. Reporter's ed. 71-76.)

Petition for confirmation of private land claim—prior confirmation by Congress and patent to other claimant.

1. A claim for lands within the limits of a grant which has been confirmed by Congress, and for which a patent has been issued to another party, is properly rejected by the court of private land claims.
2. An indemnity under the private land claim act, § 14, cannot be adjudged when no such claim is made by the petitioner.
3. A personal judgment against the United States for the indemnity provided by the private land claim act, § 14, in case the lands decreed to a claimant have been sold or granted by the United States to any other person, is authorized only when such lands have been sold or granted as public lands for a consideration which equitably belongs to the owner of the land, and not where the government has merely released its interest to one apparently holding a good title under a Spanish or Mexican grant, which subsequent-

ly turns out to be invalid by reason of an older or better title.

[No. 17.]

*Argued and Submitted January 12, 1899.
Decided October 30, 1899.*

APPEAL by petitioners from a decree by the Court of Private Land Claims refusing confirmation of their claim. *Affirmed.*

Statement by Mr. Justice **Brown**:

[72] *This was a petition filed by the town of Real de Dolores del Oro and Guadalupe Montoya against the United States, the New Mexico Mining Company, and a large number of other defendants, for the confirmation of a tract of land containing 4 square leagues, having for its center the center of the old Real de Dolores del Oro,—being the church situated therein,—with a prayer that the tract may be confirmed to the town, or to the petitioner Montoya in his own right, and in trust for the benefit of the other owners of lands within its limits.

The petition set forth in substance that, in the year 1830, the governor of New Mexico founded the town of Real de Dolores del Oro according to the laws of New Mexico; that such town continued its existence from that time to the cession of said territory to the United States, having not less than forty residents, including not less than twenty householders and heads of families; that a church had been erected and maintained, and all of the requirements of the laws of the Republic of Mexico had been observed, and that the town had been fully recognized by public authority; that by virtue of such laws the town, in addition to the several allotments to its inhabitants, became and was entitled under the laws of Mexico to lands for the common use of the town, and in default of a grant for a larger quantity was entitled by law to a tract, including the lands held in severalty, of 4 square leagues from the center of the town, namely, the church; that there was no direct evidence or record of such grant to the town; that the town was not incorporated, but that the petitioner Montoya brought the petition on behalf of the town and himself, and of all other owners of land within the boundaries of the tract, and as the successors in part to the rights and title of the original grantee; that shortly after the acquisition of New Mexico by the United States the town ceased to exercise the powers and functions of a municipal government, or to elect municipal officers; that the tract is

[73] *now held and claimed by a large number of persons under such grant, and it is not known that any of the possessors or claimants thereof are adverse to the petitioners, though they are informed that the New Mexico Mining Company claims some title or interest therein by virtue of a private land grant, which is subordinate to their title; that no claim for such tract has ever been submitted to the authorities, and no survey of the tract has ever been made.

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Subsequently an order was made by the court requiring petitioners to bring before the court, as parties defendant, certain adverse possessors and claimants to portions of the land claimed under what was known as the San Antonio de las Huertas grant, then pending before the court.

The United States answered this petition, traversing the petitioners' allegations as to the origin, existence, and right of the town to the grant claimed, and denied generally all the other allegations. The answer further averred that, even if such grant had been made as set forth in the petition, the land claimed thereunder was entirely within the limits of a tract of land known as the Ortiz Mine grant, which, by virtue of the laws, usages, and customs, and mining ordinances of Mexico, was, on the 28th of December, 1833, made to José Francisco Ortiz and Ignacio Caño; that the claim for such land was presented by the successors in interest of the original grantees to the surveyor general of New Mexico, under the provisions of the act of Congress of June 27, 1854, for his approval. That the surveyor general subsequently approved the claim; transmitted the same to Congress, recommended its confirmation; and that afterwards Congress, by act approved March 1, 1861, confirmed said claim. That subsequently a survey was made by the public authorities, and on May 20, 1876, letters patent for such confirmed grant were duly issued to the New Mexico Mining Company as owner thereof. That such patent included the lands claimed in the petition, and that the action of Congress was and is conclusive and binding upon this court.

To the allegation of the answer setting up the Ortiz Mine grant, the petitioners excepted upon the ground that the answer did not allege that the right of the petitioners to said land described in their amended petition had ever been lawfully acted upon or decided by Congress, or under its authority, and that said matter in said amended answer was insufficient in law to constitute a defense. [74]

These exceptions were overruled by the court upon the ground that the claims of the petitioners were imperfect at the time the sovereignty and jurisdiction were acquired by the United States, and that it appeared by the answer that the government had confirmed another grant and patented all the lands included in petitioners' claim.

The petitioners elected to stand upon the exceptions, and introduced no evidence; and a decree was thereupon entered to the effect that petitioners' grant "was not a perfect and complete grant thereof at or prior to the date of the cession of New Mexico to the United States under and by virtue of the laws, usages, and customs of the Republic of Mexico, in force at the alleged date thereof, and that the lands embraced within the said alleged grant to the petitioners lie wholly within the exterior boundaries of the Ortiz mining grant; . . . and that the right to the said land having been thereby lawfully acted upon and decided by Congress, and

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the government of the United States having divested itself of the title to said property by the said act of confirmation, and the said patent issued in pursuance thereof, this cause cannot be maintained in this court for the confirmation of the claim of petitioners, alleged in said amended petition." Whereupon petitioners appealed to this court.

Mr. H. L. Warren submitted the cause for appellants.

Mr. Matthew G. Reynolds argued the cause and, with *Solicitor General John K. Richards*, filed a brief for appellees.

[74] ***Mr. Justice Brown** delivered the opinion of the court:

As it appears in this case that these lands were within the limits of the Ortiz Mine grant—which had been confirmed *by Congress, and a patent therefor issued to the principal defendant—it follows, without adverting to other defenses, that under the opinion in *United States v. Conway*, just decided (175 U. S. 60, *ante*, p. 72, 20 Sup. Ct. Rep. 13), the claim was properly rejected.

[75] Nor can the petition be sustained for an indemnity under section 14 of the private land claim act, as no such claim is made by the petition. We are also of opinion that section 14 (printed in full in margin†), which provides for a personal judgment against the United States in cases where the land decreed to any claimant, under the provisions of the act, shall have been sold or granted by the United States, applies only to cases where such lands have been sold or granted as public lands, for a consideration which equitably belongs to the owner of the land, and not to cases where the government has merely released its interest to one apparently holding a good title under a Spanish or Mexican grant, which subsequently turns out to be invalid by reason of an older or better title. In the one case there is a moral obligation on the part of the government to protect the real owner. In the other, there is a mere quitclaim of its rights to one who apparently has a better title thereto. There is no warranty, direct or indirect, that the title is a valid one, and no reason why the government should be called upon to protect it.

[76] This was the ruling of the court *of private land claims in a prior case, and we think it is correct.

The decree of the court below is therefore affirmed.

Mr. Justice Shiras and **Mr. Justice White** dissented.

†Sec. 14. That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of better-

SANTIAGO AINSA, Administrator with Will Annexed of Frank Ely, Deceased, *Appt.*,

v.

NEW MEXICO & ARIZONA RAILROAD COMPANY.

(See S. C. Reporter's ed. 76-91.)

Jurisdiction of suit to quiet title under perfect Mexican grant.

A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, may be asserted, as against any adverse private claimant, in the ordinary local courts of justice, without having been confirmed or rejected by Congress, when no proceedings for its confirmation are pending before Congress or before the surveyor general; and it is not necessary for the owner to present it to the court of private land claims for confirmation under the act of Congress of 1891, although that act gives him the right to do so.

[No. 1.]

Submitted January 10, 1896. Submission set aside March 30, 1896. Submitted March 16, 1898. Decided October 30, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming a judgment of the District Court of Pima County refusing to take jurisdiction of a suit to quiet title under a Mexican grant. *Reversed.*

See same case below, 36 Pac. 213.

The facts are stated in the opinion.

On the submission made January 10, 1896, and afterwards set aside—

Mr. Rochester Ford for appellant.

Mr. William Herring for appellee.

On final submission—

Mr. Rochester Ford, for appellant:

Under the Gadsden treaty, complete or perfect titles needed no legislative confirmation; and owners of such titles may assert them in the ordinary forms of law, upon the documents under which they claim.

United States v. Pillerin, 13 How. 9, 14 L. ed. 28; *United States v. McCullagh*, 13 How. 216, 14 L. ed. 118; *United States v. Roselius*, 15 How. 36, 14 L. ed. 590; *Fremont v. United States*, 17 How. 542, 553, 15 L. ed. 241, 244; *Maguire v. Tyler*, 8 Wall. 650, 19 L. ed. 320; *Trenier v. Stewart*, 101 U. S. 797, 25 L. ed. 1021; *United States v. D'Auterieve*, 15 How. 14, 14 L. ed. 580; *Dent v. Emmeger*, 14 Wall. 308, 20 L. ed. 838; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *United States v. Arredon-*

ments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States. Either party deeming himself aggrieved by such judgment may appeal in the same manner as provided herein in cases of confirmation of a Spanish or Mexican grant. For the purpose of ascertaining the value and amount of such lands surveys may be ordered by the court, and proof taken before the court, or by a commissioner appointed for that purpose by the court.

do, 6 Pet. 691, 8 L. ed. 547; *Murdock v. Gurley*, 5 Rob. (La.) 457; *Prevost v. Greneaux*, 19 How. 1, 15 L. ed. 572; *Jewell v. Porche*, 2 La. Ann. 148; *Hancock v. McKinney*, 7 Tex. 384.

The grant under which plaintiff claims title is such a complete and perfect title, and vested the fee in the grantee.

United States v. Turner, 11 How. 663, 13 L. ed. 857; *United States v. Watkins*, 97 U. S. 219, 24 L. ed. 952; *Carpentier v. Montgomery*, 13 Wall. 480, 493, 494, 20 L. ed. 698, 700, 701; *United States v. Moorehead*, 1 Black, 227, 17 L. ed. 76; *Phelan v. Poyoreno*, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241; *United States v. Pico*, 5 Wall. 538, 18 L. ed. 696; *United States v. Pacheco*, 22 How. 225, 16 L. ed. 336; *Cameron v. United States*, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; *Malarin v. United States*, 1 Wall. 282, 17 L. ed. 594.

Solicitor General Richards and Mr. Matthew G. Reynolds submitted the cause for the United States, by special leave.

[76] *Mr. Justice Gray delivered the opinion of the court:

This was a complaint, filed June 1, 1892, in a district court of the territory of Arizona and county of Pima, by Santiago Ainsa, administrator with the will annexed of Frank Ely, against the New Mexico & Arizona Railroad Company, to quiet the plaintiff's title in a tract of land in that county, known as the rancho San José de Sonoita, under a grant made by the Mexican government to [77] Leon Herreros on *May 15, 1825, which was alleged to have vested a complete and perfect title in fee in the grantee.

The defendant denied the plaintiff's title, and asserted a right of way over the land, under condemnation proceedings against persons who had entered thereon as pre-emption or homestead settlers, claiming that it was public land of the United States.

The parties waived a trial by jury, and submitted the case to the judgment of the court upon an agreed statement of facts, which set forth what was admitted to be a correct translation of the "title deeds of a grant of one sitio, and three fourths of another sitio, surveyed on behalf of Don Leon Herreros, resident of Tubac, situated in a place called San José de Sonoita,"—consisting of the petition of Herreros to the intendente of the province of Sonora and Sinaloa; an order of the intendente for an official survey and valuation of the land; its survey and location by metes and bounds; the delivery of juridical possession to Herreros; a valuation of the land; a reference of the expediente to the promoter fiscal for examination, and his report recommending a sale by auction; a sale by auction to Herreros, after due publication of notice; the intendente's approval of the proceedings; payment by Herreros of the amount of the valuation, with fees and costs; a grant to him by the commissary general in the usual form; and a record of the grant in the Mexican archives. It was agreed that these papers were executed and delivered according to their

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purport, and that the plaintiff was the vendee and assignee of all the right, title, and interest of Herreros.

It was also agreed that a petition for the confirmation by Congress, under the acts of July 22, 1854, chap. 103, § 8 (10 Stat. at L. 309), and July 15, 1870, chap. 292, § 1 (16 Stat. at L. 304), of the Mexican grant, was filed on December 29, 1879, in the office of the United States surveyor general for the territory of Arizona, but was never acted on by Congress; and that, at the time of the commencement of this suit, no proceedings for the confirmation of the grant were pending before Congress, or before any surveyor general of the United States, or before the court *of private land claims created by the [78] act of March 3, 1891, chap. 539. 26 Stat. at L. 854.

It was also agreed that, before the commencement of this suit, certain persons named had entered upon the several tracts of the granted land, as pre-emption or homestead settlers, claiming them to be public lands of the United States; and that thereafter, and before the commencement of this suit, the defendant, by condemnation proceedings against, and mesne conveyances from, those persons, acquired and now claimed a right of way through those tracts and within the limits of the grant.

The parties further stipulated that "this statement of facts is for the purpose of this suit only, and nothing herein agreed upon shall be taken as admitted for or against either of the parties hereto in any other proceeding whatever."

The district court held that it had no jurisdiction, because the plaintiff claimed title under a Mexican grant which had not been confirmed by Congress, and therefore dismissed the suit; and its judgment was affirmed by the supreme court of the territory. 36 Pac. 213. The plaintiff appealed to this court.

The case was originally submitted to this court upon a brief for the appellant only, without any opposing brief. But it was afterwards submitted anew upon the appellant's brief, as well as a brief which the court allowed to be filed in behalf of the United States, because of their interest in the question involved, and of their being a party to a suit involving the validity of the same Mexican grant, brought by the United States against this appellant in the court of private land claims, and since decided by this court and reported. *Ely v. United States* (1898) 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840.

The question of jurisdiction presented by the record depends upon the effect of the treaty between the United States and Mexico of December 30, 1853 (known as the Gadsden treaty), and of the acts of Congress above cited, and may be conveniently approached by first referring to the decisions of this court under various treaties by which the United States have acquired territory from France, Spain, and Mexico.

*Private rights of property in land lying [79]

within a territory ceded by one independent nation to another by a treaty between them are not affected by the change of sovereignty and jurisdiction, and are entitled to protection, whether they are complete and absolute titles, or merely equitable interests needing some further act of the government to perfect the legal title. The duty of securing such rights, and of fulfilling the obligations imposed upon the United States by the treaty, belongs to the political department; and Congress may either itself discharge that duty, or delegate its performance to a strictly judicial tribunal or to a board of commissioners. *United States v. Percheman* (1833) 7 Pet. 51, 86, 87, 8 L. ed. 604, 617; *Delassus v. United States* (1835) 9 Pet. 117, 133, 9 L. ed. 71, 77; *Strother v. Lucas* (1838) 12 Pet. 410, 438, 9 L. ed. 1137, 1148; *Astiasaran v. Santa Rita Land & Min. Co.* (1893) 148 U. S. 80-82, 37 L. ed. 376, 377, 13 Sup. Ct. Rep. 457, and cases there cited; *Stoneroad v. Stoneroad* (1895) 158 U. S. 240, 248, 39 L. ed. 966, 968, 15 Sup. Ct. Rep. 822; *Rio Arriba Land & Cattle Co. v. United States* (1897) 167 U. S. 298, 309, 42 L. ed. 175, 178, 17 Sup. Ct. Rep. 875. As was said by this court, speaking by Mr. Justice Trimble, in a leading case: "It may be admitted that the United States were bound, in good faith, by the terms of the treaty of cession by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet it would not follow that the legal title would be perfected until confirmation. The government of the United States has throughout acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. While the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained that the legal title remained in the United States until, by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity." *De la Croix v. Chamberlain* (1827) 12 Wheat. 599, 601, 6 L. ed. 741, 742. Even grants which were complete and perfect at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before *they can be held to be valid. But where no such proceedings are expressly required by Congress, the recognition of grants of this class in the treaty itself is sufficient to give them full effect.

The treaty of April 30, 1803, between the United States and the French Republic, by which the province of Louisiana was ceded to the United States, provided, in article 3, as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the

Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." 8 Stat. at L. 202. By the act of March 2, 1805, chap. 26; § 1, it was provided that persons who before October 1, 1800, being of full age and actually inhabiting and cultivating lands within the territories ceded by that treaty, had obtained a "duly registered warrant or order of survey" from the Spanish or French government while in possession of those territories, should "be confirmed in their claims to such lands in the same manner as if their titles had been completed." Section 4 provided that before March 1, 1806, persons claiming lands by virtue of a completed grant might file it, and persons claiming under an incomplete title should file all papers relating to it, with the register of the local land office. And by § 8 commissioners were to be appointed by the President, with power to hear evidence and to decide in a summary way upon the validity of the claims, and to report to Congress all claims confirmed or rejected, and with the latter the evidence adduced in their support. 2 Stat. at L. 324-327. The act of March 26, 1824, chap. 173, enacted that it should "be lawful for any person" claiming lands in the state of Missouri "by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued by the proper authorities" before March 10, 1804, "and which was protected or secured by the treaty" aforesaid, "and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs *of the govern- [81] ment under which the same originated, had not the sovereignty of the country been transferred to the United States," to present a petition, within two years from the passage of the act, to the district court of the United States for the district of Missouri, for the confirmation of such claim; that court was given authority to hear evidence and pass upon the claim; and from its decision an appeal might be taken within a year to this court. 4 Stat. at L. 52. The provisions of that act were extended to the states of Louisiana and Arkansas, and to parts of Mississippi and Alabama, by the act of June 17, 1844, chap. 95, § 1. 5 Stat. at L. 676. Under those statutes it was uniformly held by this court that the jurisdiction of the district court of the United States was limited to suits by persons who had only an inchoate and equitable title, to obtain an absolute and legal one, and did not extend to a title which was complete and perfect when the treaty took effect; and the reason of those decisions, as declared by Chief Justice Taney speaking for the whole court, was that such a title "is protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity." *United States v. Pillerin* 175 U. S.

(1851) 13 How. 9, 14 L. ed. 28; *United States v. McCullagh* (1851) 13 How. 216, 14 L. ed. 118. So, in *United States v. D'Au-terieve* (1853) 15 How. 14, 14 L. ed. 580, Mr. Justice Nelson, delivering the opinion of the majority of the court, said that the title of the petitioners, "if still a subsisting one in them, is a complete and perfect one, and consequently not within the first section of that act [of 1844] which confers the jurisdiction upon this court. The place to litigate it is in the local jurisdiction of the state, by the common-law action of ejectment, or such other action as may be provided for the trial of the legal titles to real estate." 15 How. 23, 24, 14 L. ed. 584. And Mr. Justice Curtis and three other dissenting justices concurred in the judgment on that ground only. 15 How. 29, 14 L. ed. 587. See also *United States v. Roselius* (1853) 15 How. 36, 38, 14 L. ed. 590, 591; *Maguire v. Tyler* (1869) 8 Wall. 650, 652, 19 L. ed. 320; *Dent v. Emmeger* (1871) 14 Wall. 308, 312, 20 L. ed. 838, 839; *Trenier v. Stewart* (1879) 101 U. S. 797, 802, 25 L. ed. 1021. And the courts of the state of Louisiana habitually exercised jurisdiction [82] to *try and determine such titles. *Lavergne v. Elkins* (1841) 17 La. 220, 230; *Murdock v. Gurley* (1843) 5 Rob. (La.) 457, 466; *Jewell v. Porche* (1847) 2 La. Ann. 148; *Riddle v. Ratliff* (1853) 8 La. Ann. 106.

The treaty of February 22, 1819, by which the King of Spain ceded East and West Florida to the United States, provided, in article 8, as follows: "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." 8 Stat. at L. 258. In *United States v. Percheman* (1833) 7 Pet. 51, 8 L. ed. 604, this court, speaking by Chief Justice Marshall, said: "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world." "This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article." 7 Pet. 86, 87, 8 L. 175 U. S. U. S., Book 44.

ed. 617. And it was accordingly held that a Spanish grant which was complete before the date mentioned in the treaty was confirmed by the treaty itself, needed no confirmation by Congress, and was not impaired by its rejection by the commissioners appointed by the President under authority of Congress to examine claims to lands in Florida. See also *United States v. Arredondo* (1832) 6 Pet. 691, 8 L. ed. 547; **United States v. Wiggins* (1840) 14 Pet. 334, 349, 10 L. ed. 481, 488. [83]

The treaty of Guadalupe Hidalgo of February 2, 1848, by which the United States acquired California, as well as much of the present territories of New Mexico and Arizona, from Mexico, provides, in article 8, that the property of Mexicans within the territory ceded "shall be inviolably respected," and they and their heirs and grantees "shall enjoy, with respect to it, guaranties equally ample as if the same belonged to citizens of the United States;" and, in article 9, that "Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." 9 Stat. at L. 929, 930.

By the act of March 3, 1851, chap. 41, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," it was provided, in section 8, that "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" should present the same to commissioners, to be appointed by the President under the 1st section of the act; and, by subsequent sections, that the commissioners should decide upon the validity of each claim, and certify their decision, within thirty days, to the district court of the United States; that the district court, on the petition of either the claimant or the United States, might review the decision of the commissioners; that an appeal might be taken from the decision of the district court to this court; that any final decision should be conclusive between the claimant and the United States only, and should not affect third parties, unless they should intervene in the district court, for which provision was made; *and that "all lands, the claims [84] to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed held and considered as part of the public domain of the United States." 9 Stat. at L. 631-633. This court held that this provision included perfect as well as inchoate

titles, and that consequently no suit could be maintained in a court of the state of California on any Spanish title whatsoever, if it had not been presented to the commissioners in accordance with the act of Congress. *Botiller v. Dominguez* (1889) 130 U. S. 238, 252-254, 32 L. ed. 926, 930-931, 9 Sup. Ct. Rep. 525, and cases there cited. As was observed by Chief Justice Taney, in *Fremont v. United States* (1854) 17 How. 542, 553, 554, 15 L. ed. 241, 244, 245, and repeated by Mr. Justice Miller, in *Botiller v. Dominguez*, above cited. "The 8th section embraces, not only inchoate or equitable titles, but legal titles also, and requires them all to undergo examination, and to be passed upon by the court." "In this respect it differs from the act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court, in these cases, was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed."

The treaty of December 30, 1853 (known as the Gadsden treaty), by which the Mexican Republic ceded to the United States additional territory now within the territories of New Mexico and Arizona, including the land in controversy in this case, provides, in article 5, that all the provisions of the eighth and ninth articles of the treaty of Guadalupe Hidalgo should apply to the territory thus ceded, "and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth;" and, in article 6, that "no grants of land within the territory ceded," bearing date since September 25, 1853, "will be considered valid or be recognized by the United States, or will any [85] grants made *previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." 10 Stat. at L. 1035. This last clause has been held by this court to require an authentic survey and final determination of the location and boundaries of the claim. *Ainsa v. United States* (1896) 161 U. S. 208, 222, 40 L. ed. 673, 678, 16 Sup. Ct. Rep. 544. But in the case at bar the plaintiff set up a completed grant, surveyed and located by definite boundaries long before September 25, 1853.

The act of Congress of July 22, 1854, chap. 103, provided for the appointment of a surveyor general for New Mexico (which then included what is now the territory of Arizona), and, by § 8, made it his duty, "under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico;" authorized him, for this purpose, to issue notices, summon witnesses, administer oaths, and do all other necessary acts; and directed that he

should make a full report, according to a form to be prescribed by the Secretary of the Interior, "on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same, under the laws, usages, and customs of the country before its cession to the United States;" that his report should "be laid before Congress, for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of 1848;" and that, "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government." 10 Stat. at L. 308, 309. And by the sundry civil appropriation act of July 15, 1870, chap. 292, it was enacted that the surveyor general of the territory of Arizona, as to land in that territory, should have all the powers conferred and perform all the duties enjoined upon the surveyor general of New Mexico by the act of 1854; and that his report should be laid before Congress, for such action thereon as should be deemed just and proper. 16 Stat. at L. 304.

*Under those provisions of the acts of 1854 [86] and 1870, it was held by this court that a claim reported by the surveyor general to Congress, and which had been confirmed by Congress, or upon which Congress had not acted, was not within the jurisdiction of the ordinary courts of justice. *Tameling v. United States Freehold & Emigration Co.* (1876) 93 U. S. 644, 23 L. ed. 998; *Astiazaran v. Santa Rita Land & Min. Co.* 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457, above cited.

But this court has never decided the question whether a claim under a Mexican grant, which was complete and perfect before the treaty of Guadalupe Hidalgo took effect, and no claim for which was pending either before the surveyor general or before Congress, could be asserted in the ordinary courts of justice while those provisions of the acts of 1854 and 1870 were in force. Nor is it necessary now to consider that question, because those provisions have been superseded and repealed by the act of March 3, 1891, chap. 539, establishing the court of private land claims. 26 Stat. at L. 854.

By § 6 of this act, "it shall and may be lawful for any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico, and now embraced within the territories of New Mexico, Arizona, or Utah, or within the states of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not

already complete and perfect, in every such case to present a petition in writing to the said court," which is authorized, after notice to any adverse possessor or occupant, and to the attorney for the United States, and full legal proof and hearing, to enter a decree confirming or rejecting the claim.

[87] By § 7, "all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States;"*and the court is authorized "to hear and determine all questions arising in cases before it, relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations," the stipulations of the treaties between the United States and Mexico of 1848 and 1853, "and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States."

By § 8, "any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court, in the manner in this act provided for other cases, for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same, and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned." "And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person, as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

[88] That section further provides that the United States may "file in said court a petition against the holder or possessor of any claim or land in any of the states or territories mentioned in this act, who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court,*are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try, and determine

the questions stated in such petition or arising in the matter, and determine the matter according to law, justice, and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor."

By § 9, either party against whom the court of private claims decides may appeal to this court.

By § 13, all the foregoing proceedings and rights are to be conducted and decided subject to several provisions, among which are the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land, and one that, if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect, had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

"Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority.

"Fifth. No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

"Eighth. No concession, grant, or other authority to acquire *land, made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land." [89]

The only authority given by this act to the surveyor general of a territory or state is by § 10, which requires him, after a final decree of confirmation by the court of private land claims, and under the directions of the Commissioner of the General Land Office, to make a survey and return it to said commissioner, by whom it is to be transmitted to that court for its approval or correction. And § 15 expressly repeals § 8 of the act of July 22, 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act."

The effect of these provisions of the act of 1891 is that all prior acts of Congress providing for the assertion, whether in a judi-

cial tribunal or before a surveyor general and Congress, of either complete or incomplete Mexican grants, are repealed, except as to claims previously acted upon and decided by Congress or under its authority; that all incomplete claims against the United States, coming within the provisions of the act, must be presented to the court of private land claims; that anyone claiming land under a Mexican grant, which was complete and perfect at the time of the cession of sovereignty "shall have the right (but shall not be bound) to apply to said court," as in cases of incomplete grants; that the United States, however, may file a petition in that court "against the holder or possessor of any claim or land," which would doubtless include titles claimed to be complete, as well as those which were incomplete, at the time of the cession; and that all decisions under this act shall be conclusive between the claimants and the United States only, and shall not affect the private rights of any person, as between himself and any other claimant.

[90] In short, the United States, at their election, may have the validity of any Mexican grant, whether complete or incomplete, *determined by the court of private land claims, so far as concerns the interest of the United States; and proceedings to establish against the United States private titles claimed under incomplete Mexican grants are within the exclusive jurisdiction of that court; but the private holder of any complete and perfect Mexican grant may, but is not obliged to, have its validity as against the United States determined by that court; and no rights of private persons, as between themselves, can be determined by proceedings under this act.

The result is that the United States, by the act of 1891, have prescribed and defined the only method by which grants incomplete before the cession can be completed and made binding upon the United States, but have neither made it obligatory upon the owner of a title complete and perfect before the cession to resort to this method, nor declared that his title shall not be valid if he does not do so.

A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California, and may be asserted, as against any adverse private claimant, in the ordinary courts of justice.

In the present case, the Mexican grant in question being asserted by the plaintiff to have been complete and perfect by the law prevailing in New Mexico before the cession of the country to the United States, and it being agreed that this grant had neither been confirmed nor rejected by Congress, and that no proceedings for its confirmation were pending before Congress or before the surveyor general at the time of the commencement of this suit, this court, for the reasons

above stated, is of opinion that the courts of the territory of Arizona had jurisdiction, as between these parties, to determine whether the grant was complete and perfect before the cession by Mexico to the United States.

Those courts having held otherwise, *the judgment of the Supreme Court of the Territory of Arizona, affirming the judgment of the District Court of Pima County, is reversed*, and the case remanded for further proceedings. [91]

Mr. Chief Justice **Fuller** dissented.

In No. 2, *Ainsa, Administrator of Ely, v. New Mexico & Arizona Railroad Company and others*, a similar case submitted by the same counsel at the same time, judgment was likewise reversed, Mr. Chief Justice **Fuller** dissenting.

HARTFORD FIRE INSURANCE COMPANY *et al.*, Petitioners,

v.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

(See S. C. Reporter's ed. 91-108.)

Contract to exempt from negligence in setting fire—lease for warehouse on railroad right of way.

1. A stipulation in a lease of a strip of land on a railroad right of way for a storage warehouse, by which the railroad company is exempted from any liability for damage by fire from its locomotive engines, even though caused by the negligence of the company or its servants, is not void as against public policy, where the lease contains no provisions which in any way involve any relation of the railroad company as a common carrier to the lessee or to the public.
2. Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application, are governed by the law of the state as expressed in its own Constitution and statutes or declared by its highest court.
3. A decision of the highest court of a state, holding that a contract exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way is not against public policy, is conclusive upon a Federal court sitting in that state.

[No. 5.]

NOTE.—That stipulations similar to the one in this case do not violate public policy has been decided in several recent cases. See *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843; *Stephens v. Southern P. Co.* 109 Cal. 86, 29 L. R. A. 751, 41 Pac. 783.

Such a stipulation does not bind an agent of the lessee in charge of the property, a stranger to the lease, who stores his own property in the warehouse. *King v. Southern P. Co.* 109 Cal. 96, 29 L. R. A. 755, 41 Pac. 786.

Argued November 11, 12, 1897. Decided November 6, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a decision of the Circuit Court in favor of the validity of a contract exempting a railroad company from liability for negligence in setting fire to a warehouse on its right of way. *Affirmed.*

See same case below, 62 Fed. Rep. 904; 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62.

The facts are stated in the opinion.

Messrs. **Charles A. Clark** and **Richard W. Barger** argued the cause and filed a brief for petitioners:

It is the duty of railway companies to furnish warehouses and elevators at their stations.

Hutchinson, Carr. 2d ed. by Mechem, § 295d; *Mason v. Missouri P. R. Co.* 25 Mo. App. 473; *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461.

One of the duties of a railway company is to furnish facilities in the form of side tracks and premises for grain elevators and warehouses, and it cannot discriminate between its patrons in this particular.

State ex rel. Board of Transportation v. Missouri P. R. Co. 29 Neb. 550, 45 N. W. 785; *Farwell Farmers' Warehouse Assn. v. Minneapolis, St. P. & S. S. M. R. Co.* 55 Minn. 8, 56 N. W. 248; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Chicago & N. W. R. Co. v. People ex rel. Hempstead*, 56 Ill. 365, 8 Am. Rep. 690; *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Railroad Commissioners v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208.

Railway companies will not, by indirection, be permitted to impose additional burdens or hardships upon the public, and all contracts between themselves and third parties having that effect will be void.

Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 657, 32 L. ed. 824, 9 Sup. Ct. Rep. 402; *Fuller v. Dame*, 18 Pick. 472.

A railway company cannot, by contract or otherwise, limit its liability for negligence in any degree.

Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 18 L. R. A. 527, 20 S. W. 803, 7 Am. R. & Corp. Rep. 284, note 4.

A statute attempting to exempt railways from liability for damages caused by fires negligently set out would be unconstitutional and void.

Cooley, Const. Lim. 3d ed. *pp. 351-354; *Thirteenth & F. Street Pass. R. Co. v. Boudrou*, 92 Pa. 481, 37 Am. Rep. 707; *Park v. Detroit Free Press Co.* 72 Mich. 566, 1 L. R. A. 599, 40 N. W. 731.

Federal courts are not concluded by the decisions of state courts made after a contract is entered into, or made after a suit is pending in the Federal courts.

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Burgess v. Seligman, 107 U. S. 20-35, 27 L. ed. 359-365, 2 Sup. Ct. Rep. 10; *Clark v. Bever*, 139 U. S. 116, 35 L. ed. 96, 11 Sup. Ct. Rep. 468; *Carroll County v. Smith*, 111 U. S. 562, 28 L. ed. 519, 4 Sup. Ct. Rep. 539; *Anderson v. Santa Anna*, 116 U. S. 365, 29 L. ed. 636, 6 Sup. Ct. Rep. 413; *Bolles v. Brimfield*, 120 U. S. 762, 30 L. ed. 788, 7 Sup. Ct. Rep. 736.

When contracts and transactions have been entered into and rights have accrued thereon in the absence of any authoritative decision by the state courts, the courts of the United States properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.

East Alabama R. Co. v. Doe ex dem. Vischer, 114 U. S. 352, 29 L. ed. 140, 5 Sup. Ct. Rep. 869; *Buncombe County Comrs. v. Tommey*, 115 U. S. 127, 29 L. ed. 306, 5 Sup. Ct. Rep. 626, 1186; *Ober v. Gallagher*, 93 U. S. 207, 23 L. ed. 831; *Johnson County Comrs. v. Thayer*, 94 U. S. 642, 24 L. ed. 135; *Mohr v. Manierre*, 101 U. S. 421, 25 L. ed. 1054; *Butz v. Muscatine*, 8 Wall. 582, sub nom. *United States ex rel. Butz v. Muscatine*, 19 L. ed. 493; *Venice v. Murdock*, 92 U. S. 501, 23 L. ed. 585; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 623, 30 L. ed. 522, 7 Sup. Ct. Rep. 398; *Anderson v. Santa Anna*, 116 U. S. 365, 29 L. ed. 636, 6 Sup. Ct. Rep. 413; *Bowles v. Brimfield*, 120 U. S. 762, 30 L. ed. 788, 7 Sup. Ct. Rep. 736; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 792, 9 Sup. Ct. Rep. 469; *New York C. R. Co. v. Lockwood*, 17 Wall. 368, 21 L. ed. 636; *Delmas v. Merchants' Ins. Co.* 14 Wall. 667, 20 L. ed. 759.

Messrs. **Charles B. Keeler** and **George R. Peck** argued the cause and filed a brief for respondent:

The decision of a state court of last resort of any state upon the question of the public policy of that state is conclusive upon this court.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 235, 34 L. ed. 345, 10 Sup. Ct. Rep. 1013; *Brown v. Grand Rapids Parlor Furniture Co.* 16 U. S. App. 221, 58 Fed. Rep. 286, 7 C. C. A. 225, 22 L. R. A. 817; *Swann v. Swann*, 21 Fed. Rep. 299.

The exemption contained in the lease is not contrary to public policy, and is therefore valid.

Stephens v. Southern P. Co. 109 Cal. 86, 29 L. R. A. 751, 41 Pac. 783.

A railway company's right of way is its private property, held for the public use, and it cannot be compelled to lease portions thereof to others, even for the purpose of

erecting elevators for storage of grain preparatory to shipment. To compel such occupancy against its will would amount to a taking of private property without due process of law.

Missouri P. R. Co. v. Nebraska, 164 U. S. 414, 41 L. ed. 494, 17 Sup. Ct. Rep. 130.

Not all contracts which seek to relieve one party from legal liability for its own negligence or that of its servants are contrary to public policy and void.

Bates v. Old Colony R. Co. 147 Mass. 265, 18 N. E. 633; *Hosmer v. Old Colony R. Co.* 156 Mass. 507, 31 N. E. 652; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796; *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 31 N. E. 650; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, 18 Atl. 503; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353; *New York C. R. Co. v. Lockwood*, 17 Wall. 377, 21 L. ed. 639; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 440, 32 L. ed. 791, 9 Sup. Ct. Rep. 469; *Hutchinson, Carr.* 2d ed. §§ 40, 44, 73; *Wells v. Steam Navigation Co.* 2 N. Y. 204; *Alexander v. Greene*, 3 Hill, 9.

[92] *Mr. Justice Gray delivered the opinion of the court:

This was an action brought May 10, 1893, in the district court of Jones county, in the state of Iowa, against the Chicago, Milwaukee, & St. Paul Railway Company, a railroad corporation of Wisconsin, by seven fire insurance companies, corporations of other states, to recover for the loss by fire, owing to the defendant's negligence, of a warehouse and goods, belonging to the partnership of Simpson, McIntire, & Company, and insured by the plaintiffs, who had paid the loss.

The petition alleged that on November 11, 1892, and long before, the partnership was doing business at Monticello in that county, and there owned a cold-storage warehouse, situated upon railroad ground by the side of the railway track of the defendant in Monticello, and containing a valuable stock of butter and eggs; that on that day the defendant, while running its engines and cars on its railway track alongside of the warehouse, negligently set fire to and destroyed the warehouse and its contents to the value of \$27,118; that at the time of the fire the partnership held policies of insurance against fire on this property from each of the plaintiffs, and was afterwards paid by them, under those policies, the aggregate sum of \$23,-

[93] 450; and that the plaintiffs thereby *became, to that extent, subrogated to the partnership's right against the defendant, and were entitled to judgment against it for the sum so paid, with interest.

The defendant, on May 23, 1893, removed the case into the circuit court of the United

States for the district of Iowa; and in that court, on September 12, 1893, filed an answer admitting that the parties to the action were corporations, and that the partnership was doing business at Monticello, as alleged, but denying all the other allegations of the petition.

On April 2, 1894, by leave of court, an amended answer was filed, alleging that the land on which the warehouse stood belonged to the defendant as part of its depot grounds at Monticello; and that the sole right and occupancy of the partnership therein were by virtue of an indenture of lease, dated February 1, 1890, executed by the defendant and by the partnership, under which the partnership entered into and thenceforth occupied the land, and which was set forth in the answer, and was as follows:

The defendant leased the land (describing it by metes and bounds, showing it to be a strip 130 feet long and 55 feet wide, part of its depot grounds, and by the side of its track) to the partnership, "to hold for the term of one year from the date hereof for the purpose of erecting and maintaining thereon a cold-storage warehouse, the said lessee yielding and paying therefor the annual rent of \$5 in advance; and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors and administrators and assigns, do hereby expressly release them, from all liability or damage by reason of any injury to or destruction of any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company; *and further, that the said parties of the second part will in no way obstruct or interfere with the track of said railway company in using said premises.

"And the parties of the second part agree to keep said premises in as good repair and condition as the same are in at the commencement of said term; to pay, as the same become due and payable, all taxes and assessments, general and special, that may be levied or assessed thereon during the time they remain in possession thereof; and to quit and surrender said premises at the expiration of said term, on demand of said railway company; and, in case such demand shall not be made at the expiration of said term, to pay said rent, at the rate and in the instalments aforesaid, as long as they remain in possession thereof; and that they will not underlease said premises without the written consent of said railway company.

"And said parties of the second part further agree to quit and surrender said premises at any time before the expiration of said first-mentioned term, or at any time when default shall be made in the payment of said

rent or taxes as aforesaid, within thirty days after demand of said railway company; and that upon the expiration of said thirty days it shall be lawful for said railway company to expel them therefrom.

"The parties of the second part may (and hereby agree that they will, if said railway company shall so require) remove from said premises, within thirty days after any termination of this lease, all structures owned or placed thereon by them."

The amended answer concluded by alleging "that from the first day of February, 1890, down to and including the time of said fire, Simpson, McIntire, & Company remained in possession and occupancy of said premises under the terms and conditions of said original lease, and not otherwise; and were and continued to be tenants holding over under the lease aforesaid, and subject to all its provisions; and that, as to the alleged destruction by fire of the building and property mentioned in the plaintiffs' petition, all such risks and the loss therefrom were assumed by said Simpson, McIntire, & Company, and this defendant company was released therefrom, as one of the *express conditions of said lease and occupancy, and plaintiffs cannot now recover therefor. Wherefore the defendant prays judgment herein."

The plaintiffs demurred to the amended answer, on the ground that the stipulation in the lease, by which it was sought to exonerate the defendant from loss by fire caused by the negligence of itself or its servants, was void as against public policy.

At the argument of the demurrer in the circuit court of the United States at April term, 1894, before Judge Shiras (as is shown by his opinion copied in the record, and printed in 62 Fed. Rep. 904), it appeared that a case between other parties, involving the question at issue in this case, was then pending before the supreme court of the state of Iowa, under the following circumstances: In that case, entitled *Griswold v. Illinois C. R. Co.*, that court, on October 19, 1892 (by an opinion reported only in 53 N. W. 295), had held a similar stipulation to be void as against public policy, but on February 3, 1894, upon a rehearing, had held to the contrary, and had sustained the validity of the stipulation, two judges dissenting. 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843. A second petition for rehearing was then filed, and was still pending in that court. Under those circumstances Judge Shiras suspended action on the demurrer, awaiting the final decision of the supreme court of the state. That court afterwards denied the second petition for rehearing, thereby finally affirming the validity of the stipulation; and thereupon Judge Shiras, at September term, 1894, overruled the demurrer, and, the plaintiffs declining to plead further, rendered judgment for the defendant.

That judgment was unanimously affirmed by the circuit court of appeals upon the ground that the stipulation was valid, and was not against public policy; Judges Sanborn and Thayer, however, expressing the

opinion (Judge Caldwell nonconcurring in this respect) that the decision of the state court was not conclusive upon this question. 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62. The plaintiffs thereupon applied for and obtained this writ of certiorari.

*This action against a railroad corporation for the loss by fire, owing to its negligence in running its engines and trains, of a cold-storage warehouse and the goods therein, owned by a commercial partnership, is brought by insurers of the property, who had paid to the partnership the greater part of the loss, and whose right, thereby acquired by way of subrogation, to recover against the railroad company to the extent of the amount so paid, is but the same right that the partnership had. *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

It is important, therefore, in the first place, to ascertain exactly what were the relations between the railroad company and the partnership.

The warehouse stood upon a strip of land belonging to the railroad company, by the side of its track, and part of its depot grounds at Monticello, in the state of Iowa. The sole right of the partnership in that strip was by virtue of an indenture of lease thereof, dated February 1, 1890, by which the railroad company leased it to the partnership for a year from that date, "for the purpose of erecting and maintaining thereon a cold-storage warehouse," at an annual rent of \$5 payable in advance, "and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released," and the lessees "do hereby expressly release them," from all liability or damage by reason of any destruction or injury of buildings then upon or afterwards placed on the land or of personal property inside or outside of those buildings, "by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company;" and the lessees covenanted in no way to obstruct or interfere with the track of the railroad company. The rest of the indenture consisted of covenants of the lessees to keep the premises in repair; to pay the rent and taxes so long as they remained in possession; to surrender possession to the lessor, at the expiration of the term, if then demanded, or before its expiration, or on default in payment of rent or taxes, *within [97] thirty days after demand; and not to underlease without the lessor's consent; with a further agreement that the lessees might, and, if required by the lessor, would, remove from the premises, within thirty days after any termination of the lease, all structures owned or placed thereon by them.

The indenture, in short, is a lease by the railroad company of a strip of its land by the side of its track to the partnership, for the purpose of erecting and maintaining a cold-storage warehouse thereon, for one year

and for such longer time as the lessee may be permitted by the lessor to remain in possession; and contains no further agreements, other than those usual between lessor and lessee, except a covenant of the lessee not to obstruct or interfere with the railroad track of the lessor, and an express condition of the lease and covenant of the lessee that the lessor shall not be liable to the lessee for any damage to the building or to personal property in or about it, by fire from the lessor's locomotive engines, or by trains or cars running off the railroad track, although owing to the negligence of the lessor or its servants.

The indenture contains no stipulation concerning, or even any mention of, any transportation of goods over the railroad, or any relation of the railroad company as a common carrier to the lessee or to the public; and there is nothing in the record to show that such a relation existed between the railroad company and the lessee, or that the warehouse was built or maintained for the benefit of the public, or of the railroad corporation, or of anyone but the partnership.

The decision of the case turns upon the question whether the provision of this indenture, by which the railroad company is not to be liable for damage to the property by fire from its locomotive engines, owing to the negligence of itself or its servants, is void as against public policy.

The plaintiffs' counsel at the argument much relied on the cases in which similar provisions in the contracts of common carriers or of telegraph companies have been held to be void.

[98] It is settled by the decisions of this court that a provision in a contract between a railroad corporation and the owner *of goods received by it as a common carrier, that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy, and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the state in which the question arises. But the reasons on which those decisions are founded are that such a question is one of general mercantile law; that the liability of a common carrier is created by the common law, and not by contract; that to use due care and diligence in carrying goods intrusted to him is an essential duty of his employment which he cannot throw off; that a common carrier is under an obligation to the public to carry all goods offered to be carried, within the scope and capacity of the business which he has held himself out to the public as doing; and that, in making special contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 439-442, 32 L. ed. 788, 791, 792, 9 Sup. Ct. Rep. 469, and other cases there cited. Although a telegraph company is not a common carrier, yet its relation with senders of messages over its lines is of a commercial nature, and contracts that the company shall not be liable

for the negligence of its servants are affected, in some degree, by similar considerations. *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 269, 22 L. ed. 556, 558; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Western U. Teleg. Co. v. Cook*, 15 U. S. App. 445, 61 Fed. Rep. 624, 9 C. C. A. 680; *Harkness v. Western U. Teleg. Co.* 73 Iowa, 190, 34 N. W. 811.

The plaintiffs further insisted that the same reasons apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authorities cited which support this proposition are a general statement in *Cooley* on Torts, 687, and an obiter dictum in *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 978, 11 S. E. 829; and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or of *his servants, or may, [99] by stipulation with the owner of goods carried, have the benefit of such insurance procured thereon by such owner. *Phœnix Ins. Co. v. Eric & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 414, 33 L. ed. 730, 737, 10 Sup. Ct. Rep. 365; *Wager v. Providence Ins. Co.* 150 U. S. 99, 37 L. ed. 1013, 14 Sup. Ct. Rep. 55.

A railroad corporation holds its station grounds, railroad tracks, and right of way for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others in the manner which it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. But it is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses, or similar structures for their own benefit, upon the land of the railroad company. *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

In the case at bar no one had the right to put a warehouse or other building upon the land of the railroad corporation without its consent; and the corporation was under no obligation to the public, or to the partnership, to permit the latter to do so. In granting and receiving the license from the corporation to the partnership to place and maintain a cold-storage warehouse upon a strip of such land by the side of the railroad track, and in erecting the warehouse there-

on, both parties knew that its proximity to the track must increase the risk of damages, whether by accident or by negligence, to the warehouse and its contents, by fire set by sparks from the locomotive engines, or by trains or cars running off the track. The principal consideration, expressed in their contract, for the license to build and maintain the warehouse on this strip *of land, was the stipulation exempting the railroad company from liability to the licensee for any such damages. And the public had no interest in the question which of the parties to the contract should be ultimately responsible for such damages to property placed on the land of the corporation by its consent only.

The case is wholly different from those cited by the plaintiffs, in which a lease by a railroad corporation, transferring its entire property and franchises to another corporation, and thus undertaking to disable itself from performing all the duties to the public imposed upon it by its charter, has been held to be *ultra vires*, and therefore void,—as in *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950, and in *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, and 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court. *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. ed. 289, 292; *Bank of Augusta v. Earle*, 13 Pet. 519, 594, 10 L. ed. 274, 310; *Vidal v. Philadelphia*, 2 How. 127, 197, 11 L. ed. 205, 233; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 581, 584, 31 L. ed. 795, 798, 799, 8 Sup. Ct. Rep. 974; *Detroit v. Osborne*, 135 U. S. 492, 498, 499, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013; *Etheridge v. Sperry*, 139 U. S. 266, 276, 277, 35 L. ed. 171, 176, 11 Sup. Ct. Rep. 565; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 357, 37 L. ed. 1107, 1109, 14 Sup. Ct. Rep. 140; *Bamberger v. Schoolfield*, 160 U. S. 149, 159, 40 L. ed. 374, 378, 16 Sup. Ct. Rep. 225; *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341.

The validity of the agreement now in controversy does not depend upon the Constitution, laws, or treaties of the United States, or upon any principle of the commercial or mercantile law, or of general jurisprudence.

Generally speaking, the right of a railroad corporation to build its road and to run its locomotive engines and cars thereon, within any state, is derived from the legislature of

*the state; and it is within the undisputed [101] powers of that legislature to prescribe the precautions that the corporation shall take to guard against injuries to the property of others by the running of its trains, as well as the measure of its liability in case such injuries happen. Among the most familiar instances of the exercise of this power are statutes requiring a railroad corporation to erect fences between its road and adjoining lands, and subjecting it to either single or double damages for any injury to cattle or other animals caused by its neglect to do so (*Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870); and statutes making a railroad corporation liable for damages to property of others from fire set by sparks from its locomotive engines, either independently of negligence on its part, or in case of such negligence only. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 699.

As was well said by the circuit court, in the case at bar, in a passage quoted by this court in *St. Louis & S. F. R. Co. v. Mathews*, just cited: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state; and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick, or other like material, when built in cities, or in close proximity to other buildings. The state, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads. 62 Fed. Rep. 907." 165 U. S. 17, 41 L. ed. 617, 17 Sup. Ct. Rep. 243.

The statutes and decisions of the state of Iowa, so far as *they have been brought to our notice, that throw any light upon the present case, are the following: [102]

In *Richmond v. Dubuque & S. C. R. Co.* (1868) 26 Iowa, 191, the railroad company leased a piece of ground at its eastern terminus on the bank of the Mississippi river to an elevator company; and it was agreed between them that the elevator company should maintain an elevator building thereon, and should receive and discharge for the railroad company, at certain rates, all grain brought over the railroad, shipped primarily to points beyond or other than Dubuque, and should have the handling of all such grain;

and that the railroad company, during the lease, would not itself erect, or lease or grant to any other party the right to erect, a similar building in Dubuque. The railroad company, being sued on the agreement, contended that it was in contravention of sound public policy, as giving to the elevator company a monopoly of all the through grain brought over the railroad. But the supreme court of Iowa held the agreement to be valid, and, in the course of its opinion, said: "The elevator is mainly a means or instrumentality for loading and unloading grain into and out of cars, boats, barges, or other vehicles, and, incidentally, for storing the same; it is in no just sense a connecting line of transit or connecting common carrier to the defendants' lines." 26 Iowa, 197. "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." 26 Iowa, 202.

[103] The statute of Iowa of 1862, chap. 169, § 6 (substantially re-enacted in the Code of 1873, § 1289), provided that "any railroad company hereafter running or operating its road in this state, and failing to fence such road on either or both sides thereof, against live stock running at large, at all points where said roads have the right to fence, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by reason of the want of such fence or fences as aforesaid, for the value of the property so injured, killed, or destroyed, unless the injury complained of is occasioned by the wilful act of the *owner or his agent;" that, "in order to recover, it shall only be necessary for the owner of the property to prove the injury or destruction complained of;" and that, if the company should neglect to pay for thirty days after notice and affidavit, the owner might recover double damages. Under that statute it was held to be no defense that the stock was unlawfully running at large, if not by the wilful act of the owner or his agent. *Spence v. Chicago & N. W. R. Co.* (1868) 25 Iowa, 139. But where the owner of land had agreed to maintain a fence between it and the railroad, the court, while holding that persons not in privity of estate with him might still recover, said that it could not be doubted that he and his privies were estopped by his agreement to maintain an action against the company under that statute. *Warren v. Keokuk & D. M. R. Co.* (1875) 41 Iowa, 484, 486.

Upon the question of the liability of a railroad corporation for damage done to the property of others by fire from its locomotive engines, in the absence of any contract between the parties, the course of legislation and decision in Iowa was as follows: Before any statute upon the subject, the corporation was held not to be liable without proof of negligence on its part, or if the plaintiff's own negligence contributed to the loss. *Kesce v. Chicago & N. W. R. Co.* (1870)

30 Iowa, 78, 6 Am. Rep. 643; *Gandy v. Chicago & N. W. R. Co.* (1870) 30 Iowa, 420, 6 Am. Rep. 682; *McCummons v. Chicago & N. W. R. Co.* (1871) 33 Iowa, 187; *Garrett v. Chicago & N. W. R. Co.* (1872) 36 Iowa, 121. Thereupon the legislature amended the section above cited by adding a provision that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway; and such damage may be recovered by the party damaged, in the same manner as set forth in this section in regard to stock, except to double damages." Code 1873, § 1289. This amendment was at first assumed to impose an absolute liability upon the corporation, independently of its negligence, and was held to be constitutional. *Rodemacher v. Milwaukee & St. P. R. Co.* (1875) 41 Iowa, 297, 20 Am. Rep. 592. But it was afterwards settled, upon a consideration of the whole section, that the effect of the amendment was only to change the burden of proof in actions *for damages by fire; [104] that the fact that the fire was set out or caused by operating the railway was only prima facie evidence of negligence on the part of the company; and that such negligence need not be alleged. *Small v. Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 338; *Babcock v. Chicago & N. W. R. Co.* (1883) 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909; *Seska v. Chicago, M. & St. P. R. Co.* (1889) 77 Iowa, 137, 41 N. W. 596; *Engle v. Chicago, M. & St. P. R. Co.* (1889) 77 Iowa, 661, 37 N. W. 6, 42 N. W. 512. It was also held that, by virtue of the statute, contributory negligence on the part of the plaintiff was no defense to such an action. *West v. Chicago & N. W. R. Co.* (1889) 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512, *Engle's Case*, just cited.

The Code of Iowa of 1873, in § 1308, re-enacting the statute of Iowa of 1867, chap. 113, provided that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." That statute was rigidly enforced by the supreme court of Iowa in suits against railroad corporations as carriers. *Brush v. Sabula, A. & D. R. Co.* (1876) 43 Iowa, 554; *McCoy v. Keokuk & D. M. R. Co.* (1876) 44 Iowa, 424. But no intimation that it applied to them in any other relation was ever made by that court before the execution of the agreement in question in the case at bar.

To recapitulate: Before February 1, 1890, the date of this agreement, the supreme court of Iowa had declared that an elevator erected by another party by agreement with a railroad company upon the land of the latter was in no just sense a connecting line of transit, or a connecting common carrier, with the line of the railroad; and that the power of the courts to declare a contract void for being in contravention of public policy should be exercised only in

cases free from doubt. That court, in 1875, when construing § 1289 of the Code of 1873, had declared that an action under the first part of that section, which makes a railroad corporation failing to fence its road wherever it had a right to do so absolutely liable to an action by the owner of any live stock [105] killed or injured by *the want of such fencing, could not be maintained by an owner of adjoining land who had agreed with the railroad company to maintain the fence at the place in question. And that court had never expressed any opinion upon the effect of such an agreement as is now pleaded upon an action against a railroad company, under the latter part of that section, for damages by fire caused by the negligence of its servants in operating its railway.

After this agreement was made, and before this action was begun, a similar agreement was brought before the courts of the state of Iowa, in the case of *Griswold v. Illinois C. R. Co.*, which arose under a contract substantially similar to that now before us, except in containing covenants by the lessee to put in immediate use and to maintain a good and substantial elevator, coal sheds, and lumber yard on the premises; to ship all grain, coal, and lumber that he can control by the lessor's railroad; and to "transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber buildings so erected as aforesaid." A district court of the state having upheld the validity of the contract, and rendered judgment for the defendant, the plaintiff appealed to the supreme court of the state.

That court, at the first hearing, expressed an opinion that the stipulation in the contract, exempting the railroad company from liability to the lessee for damages by fire negligently set by its locomotive engines to such buildings, was void as against public policy; and among the grounds on which that opinion was placed was that the covenants just quoted, and the prospect for business which the existence and use of those buildings held out to the railroad company, "were no doubt the controlling consideration which induced it to execute the lease," and that "the lease itself fully recognizes an interest of the public in its subject-matter." 53 N. W. 295, 297. It does not clearly appear what that opinion *would have been but [106] for those covenants, no equivalent for which is to be found in the lease now before us.

But that court granted a rehearing, and on February 3, 1894, after further arguments, and, by a majority of the judges, reversed its former opinion, affirmed the judgment of the district court, and held the stipulation in question to be valid. 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843. Its course of reasoning may be shown by quoting some passages of the opinion.

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In the first place, it was said: "Public policy is variable; the very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society." So far, the opinion is in precise accord with the opinion of this court in *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 233, 36 L. ed. 414, 418, 12 Sup. Ct. Rep. 632. The Iowa court then quoted with approval the saying of Sir George Jessel, M. R., in *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract."

That court went on to say: "The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to property situated on the premises of its owner, where he has the right to have it, and hence the provision of § 1289 making the corporation operating the railway *absolute- [107] ly liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property, the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not upon his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents, and employees, and that these might be negligent in the performance of their duties." "This is not a question whether, under § 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary; but it is whether the public has any interest that this contract contravenes. It seems to

us now quite clear that, as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said § 1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was." "Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of § 1308 is not applicable." "After a careful review of the case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the district court should be affirmed."

[108] *A second petition for rehearing was then filed, and that case had not been finally decided by the supreme court of Iowa when the present case came before the circuit court of the United States at April term, 1894. The circuit court thereupon suspended judgment in this case; and at September term, 1894,—the state court having meanwhile denied the second petition for a rehearing, and thereby finally affirmed the validity of the stipulation,—followed the final decision of that court, and gave judgment for the defendant. 62 Fed. Rep. 904.

The first opinion of the supreme court of the state of Iowa in the case of *Griswold v. Illinois C. R. Co.* was delivered after the agreement now in question was made. The final decision in that case, reversing the former opinion, was made after repeated arguments and full consideration; was no wise inconsistent, to say the least, with the decision or the opinion of that court in any other case; and was rendered before the case at bar was decided in the circuit court of the United States. Under such circumstances, that decision, being upon a question of statutory and local law, was rightly followed by the circuit court. *Rowan v. Runnels*, 5 How. 134, 139, 12 L. ed. 85, 87; *Morgan v. Curteneus*, 20 How. 1, 15 L. ed. 823; *Fairfield v. Gallatin County*, 100 U. S. 47, 52, 25 L. ed. 544, 546; *Burgess v. Seligman*, 107 U. S. 20, 35, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Bauserman v. Blunt*, 147 U. S. 647, 653-656, 37 L. ed. 316, 318, 319, 13 Sup. Ct. Rep. 466, and cases there cited; *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 765.

The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is therefore affirmed.

*BIENVILLE WATER SUPPLY COM-[109]
PANY, *Appt.*,
v.
CITY OF MOBILE.

(See S. C. Reporter's ed. 109-114.)

Motions to dismiss or affirm—color for motion to dismiss—affirmance.

1. A bill invoking the jurisdiction of the circuit court of the United States on the ground that the case arises under the Constitution of the United States by reason of the violation and impairment of a contract will be dismissed when it does not aver facts to show such violation.
2. On motives to dismiss or affirm a decree by which a bill was dismissed for lack of jurisdiction, which was not error, there being color for the motion to dismiss, the motion to affirm will be sustained.

[No. 368.]

Submitted October 10, 1899. Decided November 6, 1899.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Alabama dismissing a bill for lack of jurisdiction. On motion to dismiss or affirm. *Affirmed.*

See same case below, 95 Fed. Rep. 539.

The facts are stated in the opinion.

Messrs. D. P. Bestor and R. H. Clarke submitted the cause for appellant.

Messrs. B. B. Boone and E. L. Russell submitted the cause for appellee.

*Mr. Chief Justice **Fuller** delivered the [110] opinion of the court:

This was a bill in equity filed in the circuit court of the United States for the southern district of Alabama, by the Bienville Water Supply Company against the city of Mobile and its mayor, to enjoin defendants from making or carrying out any contract for supplying water to the inhabitants of the city or for constructing a system of waterworks for that purpose during the continuance of certain contracts between complainant and the city, made parts of the bill, and from building or acquiring a system of waterworks to bring water into the city during such continuance.

The parties were all citizens of Alabama, but complainant invoked the jurisdiction of the circuit court on the ground that the case was one arising under the Constitution of the United States, in that the contracts between it and the city were violated and impaired in the premises.

Defendants demurred, assigning special causes, among which were the following:

"(1) Because said bill, taken in connection with Exhibits 'A' and 'B,' made a part thereof, shows that no contract was made between the city of Mobile and the Bienville Water Supply Company as to the rates to be charged the inhabitants of said city for water, but that said contract merely fixed a maximum rate that said water company was to charge the inhabitants of said city of Mobile.

"(2) Because said bill of complaint shows that said city of Mobile was specially authorized and empowered by its charter and by the act of the general assembly of Alabama approved November 30, 1898 (and of which said act this court will take judicial notice), to buy or to build, erect and maintain, and to operate waterworks for the supply of its inhabitants with water, and for the extinguishment of fires, and for sanitary, domestic, and other purposes.

"(3) Because there is nothing shown or alleged in said bill of complaint and in said Exhibits 'A' and 'B,' made a part thereof, which precludes or estops the city of Mobile [111] from *buying, building, erecting, maintaining, and operating a system of waterworks.

"(4) Because said Exhibits 'A' and 'B,' made a part of said bill of complaint, show that the only obligation resting upon and binding upon said city of Mobile is that it shall pay to said Bienville Water Supply Company the sum of fifty dollars (\$50) each per annum, payments to be made monthly, for 260 fire hydrants placed on the streets of said city by said water supply company until the expiration of said contract on July 1st, A. D. 1900, and it is not alleged or charged in said bill of complaint that the city of Mobile has or intends to repudiate its obligation to pay for said 260 fire hydrants at the rate of \$50 each per annum, payments to be made monthly."

"(8) Because said bill of complaint fails to allege any facts which show that the city of Mobile has or intends to do or commit any act which will impair the said contract between the city of Mobile and the Bienville Water Supply Company, and which said contract is made a part of the bill of complaint.

"(9) Because it is shown upon the face of said bill of complaint that the city of Mobile did not grant the complainant the franchise to lay its said water mains and pipes in the city of Mobile, but that it was done by the general assembly of Alabama, and from which it appears that said city of Mobile had no lawful authority to grant or to enter into a contract with complainant, conferring thereby the exclusive right or privilege of supplying water to the inhabitants of said city of Mobile."

The court sustained the demurrer on the foregoing grounds, and gave complainant fifteen days in which to amend, and, no amendment having been made, dismissed the bill. From that decree an appeal to this court was allowed and perfected, and motions to dismiss or affirm submitted.

The opinion of the circuit court, Toulmin, J., is reported 95 Fed. Rep. 539, and states the facts appearing from the bill, and pertinent legislation, in substance, correctly, as follows: Complainant was a corporation chartered by the legislature of Alabama for the purpose, among other things, of supply- [112] ing *water to the city of Mobile, a municipal corporation of the state, and its inhabitants, and was authorized to construct the needed canals, ditches, pipes, aqueducts, etc., best

suited for the purpose, and was "charged with the duty of introducing into the port of Mobile (city) such supply of pure water as the domestic, sanitary, and municipal wants thereof may require." Accordingly, complainant laid mains and pipes in the streets of the city, and established hydrants and fire plugs therein, and built a reservoir and erected pumps connecting with such mains and pipes, at large expense to itself, and used the property to supply the city and its inhabitants with water. August 15, 1888, complainant entered into a contract with the city to furnish for its use 260 fire hydrants, and to furnish water for fire service of a certain number of streams and pressure, and further agreed that the city should have the unrestricted use of the hydrants for such fire purposes and the free use of water for all municipal buildings, and that the company would not charge a greater or higher rate for water for domestic use than that specified in the contract. In consideration of complainant's stipulations, the city agreed to pay complainant for the use of the hydrants, monthly, at the rate of \$50 a hydrant per annum, during the continuance of the contract, which was for a term of six years. April 14, 1891, the contract was changed in some particulars and the term extended to twelve years. These two contracts were annexed to the bill and marked Exhibits "A" and "B."

The bill averred that complainant had complied and was complying with all the obligations and requirements of the contract on its part, and that the city had violated and was violating the contract in that it had bought and taken possession of a waterworks plant, and was now operating the same, selling water to customers, and cutting rates below those fixed in the contract, and actually competing in the business of selling and furnishing water to its inhabitants, and that it had taken away some of complainant's customers, thereby decreasing its income; and, further, that the city was building another system of waterworks to supply itself and its inhabitants with water, and that it claimed the right so to do under *the [113] provisions of its charter and an act of the legislature of Alabama of November 30, 1898.

The charter provided that the city might contract for, build, purchase, or otherwise acquire public works subject to the approval of a majority vote of the citizens of Mobile at a special election called therefor; and in July, 1897, such an election was held, and a majority of the votes cast were in favor of the city contracting for or otherwise acquiring waterworks to be owned and operated by the city, and the issuing of bonds to pay for the same. The act of November 30, 1898, authorized the issuing of bonds for that purpose. It was further averred that acting under and by virtue of the power granted by the charter and the act of November 30, the city had entered into a contract to have a system of waterworks

built, and that the building of the same was now going on, and that it had made a contract with certain persons to take said bonds, who had already taken and paid for a part of them. Complainant contended that the city had no legal right to impair the value of its plant and to destroy or diminish its income therefrom, which would be the effect of the city's action in building waterworks and furnishing water to its inhabitants, and it was averred that defendant was insolvent, and that the only way complainant could protect itself was through the interposition of a court of equity. It was not asserted by complainant that it had been granted an exclusive franchise to furnish water to the city and its inhabitants, but that under the contracts the city had no right to furnish water to other persons, or to build or acquire a system of waterworks to supply water to itself and its inhabitants, and that to do this was a violation thereof.

[114] The circuit court observed that the city of Mobile granted complainant no rights or privileges whatever, but that the legislature of the state granted it the right to build waterworks and to use the streets of the city for water purposes, and authorized complainant and the city to contract together for the purpose of supplying the city with water. The contract was made, but there was no express provision in it for furnishing the inhabitants with water, and no stipulation by complainant that it would do so, though it was clear that the *parties contemplated that complainant would contract with the inhabitants to supply them with water for domestic purposes, since it was stipulated that complainant should not charge for water so supplied higher rates than those specified therein. On the other hand, the city was authorized and empowered by its charter and the act of the legislature of November 30, 1898, to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes, and the city in its contracts with complainant did not agree not to do so. It did agree to pay complainant for a certain number of hydrants erected and supplied by it, and to make the payments monthly, but there was no averment that the city had by act or word repudiated its obligation, or failed or refused to make the payments stipulated for, or that it intended to do so.

In short, there were no facts averred showing that the city had violated, was violating, or intended to violate, its contracts with complainant, and there was no legislation to that end. Such being the state of the case, the circuit court did not err in dismissing the bill, and, as there was color for the motion to dismiss, the motion to affirm will be sustained.

Decree affirmed.

Re C. G. BLAKE, and Rogers, Brown, & Company, *Ex parte*.

(See S. C. Reporter's ed. 114-120.)

Mandamus to correct mistake in execution of mandate to state court.

Writ of error, and not mandamus, is the proper remedy to correct the action of a state court in failing to give full effect to a mandate from the Supreme Court of the United States by mistaking or misconstruing its judgment.

[No. —, Original.]

Submitted October 30, 1899. Decided November 13, 1899.

APPPLICATION for leave to file a petition for a writ of mandamus to the Supreme Court of Tennessee to compel it to correctly execute a mandamus which it had received from the United States Supreme Court. *Denied.*

See same case below, 52 S. W. 1001.

Statement by Mr. Chief Justice **Fuller**:

*The Embreeville Freehold, Land, Iron, & [115] Railway Company, Limited, was a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes, carrying on business in the state of Tennessee, as authorized by a law of that state of March 19, 1877. The 5th section of the act gave priority in the distribution of assets to resident creditors of the state. The company having become insolvent McClung and others filed an original creditors' bill in the proper court, asking the appointment of a receiver and the administration of the affairs of the company as an insolvent corporation. The case resulted in a final decree by the supreme court of Tennessee adjudging that the Tennessee creditors were entitled, under said section, to priority in the distribution of the assets over simple-contract creditors of other states and countries. Among the creditors affected were C. G. Blake and Rogers, Brown, & Company, citizens of the state of Ohio, and the Hull Coal & Coke Company, a corporation of Virginia, who, being dissatisfied, sued out a writ of error from this court. And it was held, reversing the decree of the state supreme court, that the 5th section of the act of 1877, in so far as it gave priority to *Ten- [116] nessee creditors over creditors of the same class of other states of the Union, was in violation of the 2d section of the 4th article of the Constitution, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" but it was also ruled that a corporation created under the laws of another state was not a "citizen" within the meaning of this clause. *Blake v. McClung*, 172 U. S. 239, 258, 262, 43 L. ed. 432, 439, 440, 19 Sup. Ct. Rep. 165.

In the opinion, among other things, it was said: "We adjudge that when the general property and assets of a private corporation

lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union."

The judgment was in these terms: "The final judgment of the supreme court of Tennessee must be affirmed as to the Hull Coal & Coke Company, because it did not deny to that corporation any right, privilege, or immunity secured to it by the Constitution of the United States. As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered."

[117] The mandate having gone down, the counsel of Blake and Rogers, Brown, & Company moved for the entry of a decree placing them in the same class and on exact equality with the Tennessee creditors in respect to the distribution of the assets of the insolvent company among its creditors, but this the state supreme court declined to do, and entered a decree that Blake and Rogers, Brown, & Company were entitled to participate in the assets on the basis of a broad distribution of the assets of the corporation among all of its creditors without preference or priority, as though the act of 1877 had not been passed; that there should be a computation of the aggregate indebtedness due from the corporation to its creditors of every *class, wherever residing, whereupon Blake and Rogers, Brown, & Company should be paid the percentage and proportion found to be due to them on that basis; and that the residue of the estate of the insolvent company should be applied first to the payment of the indebtedness due to the creditors of the corporation residing in Tennessee as provided in § 5 of the act of 1877, and then *pro rata* to the payment of the debts of the alien and nonresident creditors of said corporation other than Blake and Rogers, Brown, & Company. Beard, J., dissented. 52 S. W. 100.

To this decree Blake and Rogers, Brown, & Company duly excepted, but, insisting that that court had not complied with the mandate of this court, applied for leave to file a petition for mandamus to compel such compliance.

Mr. Heber J. May submitted the cause for petitioner. Mr. Tully R. Cornick was with him on the brief.

Mr. John W. Green submitted the cause for respondent. Mr. S. C. Williams was with him on the brief.

[117] *Mr. Chief Justice Fuller delivered the opinion of the court:

The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor be used
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to perform the office of an appeal or writ of error. And it only lies, as a general rule, where there is no other adequate remedy. As respects the Federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled either upon a new appeal or writ of error, if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court. *City Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 19 Sup. Ct. Rep. 520.

*Nevertheless, without inquiring whether [118] the conclusions of the supreme court of Tennessee were or were not in harmony with the views expressed by this court, we are of opinion that the remedy of petitioners for the alleged error in the decree of that court, if any, is by writ of error, and not by mandamus. The remedy on error is not only entirely adequate and open to be sought, unrestrained by the amount involved, but, in respect of dealing with state tribunals, is manifestly the proper remedy.

That it is adequate under § 709 of the Revised Statutes is clear. *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754, a case on a second writ of error to the state court, in which the statutes and decisions bearing on the subject are fully considered. And that it should be resorted to when the action of the state courts is complained of is equally plain. Assuming that the question of the form of the proceeding which this court might adopt to enforce the execution of its own mandates in the courts of the United States is one of practice merely, and either mode might be pursued, as ruled by Mr. Chief Justice Taney in *Perkins v. Fourniquet*, 14 How. 328, 330, 14 L. ed. 441, we think the summary character of the proceeding by mandamus renders it inappropriate in respect of the courts of another jurisdiction.

By the 13th section of the judiciary act of 1789 (1 Stat. at L. 81) this court was clothed with the power to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States," and this was carried forward into § 688 of the Revised Statutes. And it was ruled in *Graham v. Norton*, 15 Wall. 427, 21 L. ed. 177, that "this express authority to issue writs of mandamus to national courts and officers has always been held to exclude authority to issue these writs to state courts and officers;" excepting "where they have been issued as process to enforce judgments." In *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900, which was a writ of error to review the action of a state court wrongfully refusing to remove a case into the circuit court, Mr. Justice McLean intimated that mandamus might lie

to compel action by the state court, but the remark was purely *obiter*, and cannot be regarded as authoritative.

[119] *By the 14th section of the judiciary act, circuit courts were vested with power "to issue writs of *scire facias*, . . . and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," which was re-enacted as § 716 of the Revised Statutes. In *Bath County v. Amy*, 13 Wall. 244, 20 L. ed. 539, it was held that the circuit courts had no power to issue writs of mandamus to state courts by way of original proceeding and where the writ was neither necessary nor ancillary to any jurisdiction which the court then had.

But our attention has been called to no case in which this court has exercised jurisdiction by mandamus under circumstances similar to those supposed to exist here; while there are cases in the circuit courts which illustrate the propriety of declining to do so.

In *Ladd v. Tudor*, 3 Woodb. & M. 325, which was an application for a mandamus to compel a state court to remove a cause to the circuit court, Mr. Justice Woodbury said: "Some doubt might exist whether a mandamus to a state court from this tribunal organized under another government was the proper remedy. It has been settled that a state court cannot issue a mandamus to an officer of the United States. *McClung v. Silliman*, 6 Wheat. 598, 5 L. ed. 340. In 16 Pet. 97, 10 L. ed. 900, the remedy was by a writ of error to reverse the first judgment in the state court. And where another remedy lies, a mandamus is held to be improper. *Morris v. Mechanic's Bank*, 10 Johns. 484. But *Spraggins v. Humphries County Ct.* (Cooke (Tenn.)), 160, seems to countenance the present cause. *Brown v. Crippin*, 4 Hen. & M. 173, quoted in some of the Digests for it, seems, on examination, to be a case of a mandamus from the highest state court to common pleas in the same state, to remove such a case, and not one from a court of the United States. . . . In *McIntire v. Wood*, 7 Cranch, 504, 3 L. ed. 420, it was held that a mandamus did not lie from the circuit court to an officer of the United States; and though that speaks generally of the power of this court to issue it in order to sustain its jurisdiction, and the decision in *Cooke* rests on that power of superior courts to enforce their jurisdiction over inferior ones by mandamus, *yet it is very questionable whether a case like the present ought to be considered within that principle. It is a correct principle between inferior and superior courts of the same government, but difficult to be upheld between courts established by separate governments. If necessary to decide on this, it might require more grave consideration before sustaining it in cases like this, because being a mode of redress very likely to lead to jealousies and collisions between the states and general government, of a character anything but de-

sirable." *New York Supreme Ct. Justices v. Murray*, 9 Wall. 214, sub nom. *New York Supreme Ct. Justices v. United States, Murray*, 19 L. ed. 658, was a writ of error to the circuit court for the southern district of New York from a judgment for a peremptory mandamus rendered against the justices of the supreme court of New York for the third district to remove a cause, but Mr. Justice Nelson stated in a note on page 276, L. ed. 660, that "the alternative and peremptory mandamus against the supreme court of New York was allowed by consent of the counsel for the defendants, with a view to present the question raised and decided in the case. The circuit court had refused to issue it against the court, and issued it only against the clerk. This is stated to prevent the case from being cited as an authority for the power, and without intending to express any opinion on this subject." And see *Hough v. Western Transp. Co.* 1 Biss. 425, *Drummond, J.*; *Fisk v. Union P. R. Co.* 6 Blatchf. 362, *Blatchford, J.*; *High, Extr. Rem.* 3d ed. § 227 *et seq.*, and cases cited.

Leave to file petition denied.

CITY OF NEW ORLEANS, *Petitioner*,
v.

JOHN G. WARNER.

(See S. C. Reporter's ed. 120-148.)

Limitation of action on drainage warrant—conclusiveness of judgment dismissing suit on warrant—liability of city for breach of contract to collect assessments to pay warrants—assessment of public property for public improvements—constitutional limitation of municipal indebtedness—interest on municipal warrants.

1. Warrants drawn by the administrator of accounts upon the administrator of finance of a city, payable to the order of a third person out of any funds in the city treasury to the credit of a particular corporation, are not within the provisions of a statute limiting the time for bringing actions on bills of exchange, notes payable to order or bearer, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise.

NOTE.—As to what constitutes "an indebtedness," within the meaning of constitutional and statutory restrictions of indebtedness of municipal corporations, see *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402, and note.

Liability of public property to assessment for public improvements.

Courts are generally unwilling to hold that a state may be taxed by one of its own political subdivisions; and for this reason it is generally maintained that property owned by the state is impliedly exempt from assessment for local improvements even on the theory of benefits, and in order to sustain a local assessment upon such property the intent of the legislature to empower a municipality to make such an assessment must be clearly made to appear. *State v.*

[120]ferior ones by mandamus, *yet it is very questionable whether a case like the present ought to be considered within that principle. It is a correct principle between inferior and superior courts of the same government, but difficult to be upheld between courts established by separate governments. If necessary to decide on this, it might require more grave consideration before sustaining it in cases like this, because being a mode of redress very likely to lead to jealousies and collisions between the states and general government, of a character anything but de-

2. The statute of limitations will not run against the liability of a city under its agreement, upon voluntarily purchasing with drainage warrants a plant for perfecting its drainage system, to facilitate the collection of assessments, and not to divert such collections from payment of the warrants, until it repudiates the trust, although judgments are substituted for the warrants against its own property.
3. Repudiation of its trust by a city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to facilitate the collection of the drainage assessments and apply the fund to payment of the warrants, is not shown by abandonment of the drainage work soon after purchasing the plant.
4. A city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to collect the drainage assessments and apply the fund to payment of the warrants, does not cease to be a trustee with respect to the assessments against its own property, because they are reduced to judgments.
5. A decree dismissing, with a bill against a city upon drainage warrants, an intervening petition filed by the owner of some of a series of warrants issued in payment of property purchased, is not binding upon the owners of other warrants of that series, who were neither parties nor privies to the suit.
6. A judgment dismissing a suit against a city upon drainage warrants issued for work done under compulsion of a statute is not a decisive authority against the right to recover upon other warrants issued under a voluntary agreement by the city for purchase of property, although the owner of certain of the latter warrants intervened in the former suit, where the court did not notice the distinction between the two kinds of warrants, but treated them all as belonging to the former class.
7. A city which purchases with drainage warrants a plant to perfect its drainage system cannot defeat liability for breach of its agreement to facilitate the collection of drainage assessments and apply the fund to payment of the warrants, by setting up a judgment holding the assessments noncollectible because of its abandonment of the drainage system.
8. In Louisiana, public property is liable to assessment for public improvements.
9. That private property is to be assessed for the entire cost of a public improvement, including the benefit to streets and public squares, is not shown by the fact that the statute makes no provision as to how the proportion of the expense applicable to public property is to be assessed and paid for, while elaborate provision is made for the assessment of private property for its proportion of the expense.
10. After a lapse of more than twenty years a city cannot question the validity of judgments against itself, to which it assented, for assessments upon its property for public improvements, upon the ground that such property was not subject to assessment,—especially assessments approved by the legislature.
11. A constitutional amendment adopted, pending the execution of a contract for the construction of a drainage system for a city, prohibiting "increase" of the city's debt, which expressly provides that it shall not be

Hartford, 50 Conn. 89, 47 Am. Rep. 622; Polk County Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416; *Re* Mt. Vernon, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533.

The rule seems otherwise in New York. See *Roosevelt Hospital v. New York*, 84 N. Y. 108, in which it is said that "all colleges, churches, schools, seminaries of learning, courthouses, jails, schoolhouses, and even the lands of the state, unless by appropriate words specially exempted, are liable to be assessed for local improvements."

But a statute conferring power as to state property may not do so as to United States property, *e. g.*, postoffice grounds. *Fagan v. Chicago*, 84 Ill. 227.

In some jurisdictions county property devoted to public purposes cannot be assessed for local improvements, in the absence of express legislative or constitutional authority. *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Big Rapids v. Mecosta County Supers.* 99 Mich. 351, 58 N. W. 358.

In Illinois, county property is liable for local improvements in the absence of any statutory restriction as to the property to be assessed. *McLean County v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624; *Higgins v. Chicago*, 18 Ill. 276.

The property of a municipal corporation, if benefited by an improvement, is as much the subject of assessment as the property of individuals. *Ross v. New York*, 3 Wend. 333; *Scammon v. Chicago*, 42 Ill. 192; *Marquez v. New Orleans*, 13 La. Ann. 319; *Correjoles v. Foucher*, 26 La. Ann. 362.

But the public streets of a city can in no sense be regarded as the property of the city, 175 U. S. U. S., Book 44.

like schoolhouses, the city hall, and other public buildings, and cannot be assessed for public improvements. *Smith v. Buffalo*, 90 Hun, 118, 35 N. Y. Supp. 635.

It has been maintained that because a city had not, under its charter, power to sell city lots, those lots could not be held liable to special taxation to improve city streets. *Leavenworth v. Laing*, 6 Kan. 274; *Palne v. Spratley*, 5 Kan. 525.

But, on the contrary, it is elsewhere said that the power to assess may be exercised without power to sell, and that the fact that the property cannot be sold is not material because the tax may be paid out of the public treasury, and mandamus is a competent writ to compel the assessment of the tax for that purpose, when no ordinary remedy of law is competent to enforce the assessment. *Palne v. Spratley*, 5 Kan. 525; *McLean County v. Bloomington*, 106 Ill. 209; *People ex rel. Lawrence v. Clark County Supers.* 50 Ill. 213; *Taylor v. People ex rel. Reed*, 66 Ill. 322; *Philadelphia v. North Pennsylvania R. Co.* 4 Pa. Dist. R. 451; *Re Berks Street*, 12 W. N. C. 10; *Vacation of Howard Street*, 142 Pa. 601, 21 Atl. 974.

Furthermore, it is said that "It may be assumed that the state will provide means for the liquidation of assessments imposed by virtue of laws enacted by its legislature, and that, as has been done frequently heretofore, appropriations will be made for that purpose. *Hassan v. Rochester*, 67 N. Y. 528.

Conversely, the power to sell for taxes is not the power to sell for assessments for benefits. *Sharp v. Speir*, 4 Hill, 76.

The exemption laws regarding public property will, in the main, be construed like exemptions respecting other prop-

construed so as to prevent the issue of drainage warrants to the transferee of the drainage contract, payable only from drainage taxes, should receive a construction commensurate with the object intended to be accomplished, and will authorize the issue of warrants in payment for the contractor's plant in case the city decides to do the work itself, where the debt created by the drainage assessments had already been incurred and put in judgment.

12. A court will not set aside a contract by a municipal corporation for the purchase of property which has been delivered to it, upon the ground that it made a bad bargain and paid more than the property was worth, and that the action of the common council was dictated by improper motives.
13. Presentation of drainage warrants for payment or indorsement, as provided by statute, is necessary to start the running of interest under a statute providing that they shall be paid out of a particular fund when presented, and in case the fund is not sufficient that fact shall be indorsed upon them by the proper officer, and that they shall bear interest from such indorsement, where the city has merely abandoned the work for which the assessments to pay the warrants were to be collected, and has not repudiated or disabled itself from performing its obligation.
14. Commencement of suit upon a drainage warrant which, by the terms of the statute under which it was issued, is to bear interest above the legal rate from the time it is presented for payment and the fact of lack of funds is indorsed thereon, is a sufficient demand to make the warrant carry interest from that time at the specified rate.

[No. 172.]

Argued March 13, 1899. Decided November 13, 1899.

CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to

erty. City lots may be expressly exempted by statute. *Meridian v. Phillips*, 65 Miss. 362, 4 So. 119.

It may be liable according to the construction (*Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174), or it may be exempt because of the construction, as, for example, a public common was held to be exempt from local assessment because it was a lot not owned by a "person or persons" within the express provisions of the legislature for assessing lots that fronted upon the improvement. *McGonigle v. Allegheny*, 44 Pa. 118, 121.

Assessments on property devoted to the use of public schools are governed by the same rules that control in regard to other public property; where no remedy is given for the nonpayment of such assessment school property is held to be not assessable for local improvements. *Board of Improvement v. Little Rock School Dist.* 56 Ark. 354, 16 L. R. A. 418, 19 S. W. 969; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Poock v. Ely*, 4 Ohio C. C. 41; *Toledo v. Toledo Bd. of Edu.* 48 Ohio St. 83, 26 N. E. 403; *Toledo Bd. of Edu. v. Toledo*, 48 Ohio St. 87, 26 N. E. 404.

As in other cases of exemption, it is often required that school property should be in use for that purpose; when it is liable it is upon

review a judgment reversing a judgment of the United States Circuit Court for the Eastern District of Louisiana in favor of defendant in an action brought to enforce a liability of the city for breach of its contract to facilitate the collection of drainage assessments and apply the proceeds to payment of plaintiff's warrants. *Modified and affirmed.*

See same case below, 52 U. S. App. 348, 81 Fed. Rep. 645, 26 C. C. A. 508.

Statement by Mr. Justice **Brown**:

*This was a bill in equity filed November [122] 26, 1894, in the circuit court for the eastern district of Louisiana by John G. Warner, a citizen of the state of New York, on behalf of himself and all other parties holding obligations of the same nature and kind as himself, to charge the city of New Orleans as the debtor of specific taxes averred to have been levied by lawful authority for the payment of certain warrants, issued for the purchase of a drainage plant and franchise, the collection of which was made the duty of petitioner by statutes hereinafter set forth. A liability on the part of the city was averred as the result of a contract alleged to have been broken by it, and a disregard and violation of duties imposed upon it by statute as to the prosecution of the work of drainage and the collection of assessments therefor.

The facts of the case are so fully set forth in the cases of *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541, and *Warner v. New Orleans*, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892, that a succinct statement of such facts, taken largely from the opinion of the circuit court of appeals, is all that is deemed necessary here.

By an act approved March 18, 1858, the legislature of Louisiana provided for a system of draining certain lands within the city

the theory of benefits received, and when exempt it is so because a strict interpretation of the statute will not permit the assessment. *People ex rel. Little v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262; *Toledo v. Toledo Bd. of Edu.* 48 Ohio St. 83, 26 N. E. 403; *School Dist. v. Board of Improvement*, 65 Ark. 343, 46 S. W. 418.

Where public school property is held liable to local assessment the argument that it is taxing all the property within the district, and is therefore illegal, has no force. *St. Louis Public Schools v. St. Louis*, 26 Mo. 468.

The principle underlying the cases in which the exemption of public property from liability for local improvements is implied, is that such implication will only arise when the property is actually appropriated to public use. When it is not in public use, and especially when it is the source of an income to private persons, there is no exemption. The presumption of exemption arising, it follows that the liability must be shown by the party asserting it. *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431; *Proprietors of South Cong. Meeting-house v. Lowell*, 1 Met. 538; *Worcester v. Western R. Corp.* 4 Met. 564; *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624; *San Diego v. Linda Vista Irrig. Dist.* 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291.

of New Orleans and elsewhere, which was to be carried out by boards of commissioners appointed for the three districts into which the territory was divided. The act further provided for plans of the work to be prepared by the commissioners, for assessments to be levied upon the lands benefited, and for the entry of judgments decreeing the lands to be subject to a lien for such amount as might be assessed.

By a supplemental act, approved March 17, 1859, the boards of commissioners were authorized to borrow money to carry on the work, and to issue bonds therefor. It was contemplated that the money should be raised at once for the payment of the work, in anticipation of the collection of the assessments.

[123] By an act approved March 1, 1861, the prior acts were amended by providing for a summary mode of collecting the assessments, authorizing the commissioners to apply to certain courts for the approval and homologation of the assessment rolls, which approval and homologation the act declared "shall be a judgment against the property assessed and the owners thereof, upon which execution may issue in the ordinary mode of proceeding."

The commissioners made plans of the work proposed to be done, including therein the streets, squares, and public places within the several districts, as the property of the city of New Orleans, and from time to time judgments were rendered charging these public places, as well as private property, with the amounts that had been assessed for drainage purposes. The city was named as the owner of these public places in the tableau, and judgments were rendered against it as such owner for sums amounting in the several districts to \$719,926.63.

On February 24, 1871, the legislature passed an act entitled "An Act to Provide for the Drainage of New Orleans." This act abolished the several boards of drainage commissioners, transferred their assets to the board of administrators of the city of New Orleans, subrogated this board to all the rights, powers, and facilities then possessed by the commissioners, directed it to collect the balance due on the assessments as shown by the books of the drainage districts, "which said assessments are hereby confirmed and made exigible at such time and in such manner as the board of administrators may designate." It further authorized the Mississippi & Mexican Gulf Ship Canal Company to undertake the work of draining the city, required the board of administrators to place all collections of drainage assessments to the credit of such company, and hold the same as a fund to be applied to the drainage of New Orleans and Carrollton. Under these and the prior acts assessments were made and reduced to judgment against the city on the area of the streets and other public places within the drainage districts to the amount of \$696,349.30, and against private persons to the amount of \$1,003,342.98, of which about \$330,000 have been col-

lected from private property in cash and drainage warrants, leaving outstanding at the date of the filing of the bill in this case uncollected assessments to the amount of \$1,469,714.47, of which the city owes \$696,349.30.

By an act passed February 24, 1876, after more than two-thirds of the drainage system [124] had been completed, the city of New Orleans was authorized to purchase, if the common council deemed it advisable, the property and franchises of the ship canal company or its transferee, including all tools, implements, machines, boats, and apparatus belonging to said company or its transferee, on a valuation to be fixed by appraisers to be appointed by the common council, the amount to be paid in warrants drawn against the drainage assessments. It further provided that the city should have exclusive control of all the powers and franchises granted to the ship canal company, and should alone have the power to do all the drainage work required to be paid for by assessment upon property or from the city treasury. Meantime, however, the ship canal company, having become embarrassed, on May 22, 1872, assigned all its rights to Warren Van Norden.

Acting under the authority of this act of February 24, 1876, the city accepted the option, appointed an appraiser of the property of the ship canal company, and authorized the mayor to purchase of said company, or its transferee, all its property, and to stipulate for a full settlement of all its claims for damages. Thereupon the mayor entered into a contract with the canal company and with Van Norden, its transferee, for the purchase of their property and the relinquishment of all their claims for damages, for the sum of \$300,000, payable in drainage warrants. In this contract of sale the city covenanted and agreed "that the existing rights and powers of the holders of drainage warrants, under the civil acts of the legislature of this state relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected, and paid" in the manner and under certain terms specified, and that "the collection of drainage assessments shall be assigned to an officer who shall be selected by the said W. Van Norden and be confirmed by the city council." The city further agreed "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law, until said warrants have been fully paid, *it being well understood by and between the [125] said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until the full and final payment of the same."

The bill, after reciting these facts, averred in substance that upon acquiring the drainage plant and franchises of the canal company the city abandoned all drainage work

and suffered the dredge boats and machinery purchased as above stated to decay and become valueless, and that by reason of the city's failure to complete the drainage and benefit the lands the courts have refused to enforce the collection of the assessments; that, having thus abandoned all drainage work, the city, by its ordinances and by a proclamation of the mayor, then advised property holders not to pay the assessments, and that in consequence of these ordinances and said proclamation and the decisions of the courts the drainage assessments became practically valueless and uncollectible. The bill further averred that the city had issued bonds in exchange for drainage warrants given for work done prior to the sale, under the authority of the act of the legislature of 1872, to an amount in excess of all the drainage assessments, which it will claim operated as a discharge of its liability, as assessee of the streets, etc., and of all liability it may have incurred by any dereliction of duty in regard to the assessments against private property, but that this claim was not made known to Van Norden at the time of the purchase, and that he would not have parted with his property for a consideration payable out of drainage assessments, if he had known that such claim would be set up to defeat the payment of the price. The bill closed with a prayer for an accounting of the drainage fund, including the amounts due by the city and the application thereof to the payment of the complainant's warrants and those held by others similarly situated who might come in and avail themselves of the benefits of the bill.

To this bill the defendant demurred for want of jurisdiction and of equity, and because the matters sought to be litigated had been decided adversely to complainant's pretensions by *the circuit court in the case of *Peake v. New Orleans*, and by the Supreme Court on appeal in the same case, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541. This demurrer was sustained, the bill dismissed by the circuit court, and the case carried to the circuit court of appeals for the fifth circuit. That court, being in doubt as to the application of the *Peake Case*, certified to this court the questions: First, whether the city, under the warranties, expressed and implied, contained in the contract of sale of June 7, 1876, by which it acquired the property and franchise from Warner Van Norden, was estopped from pleading against the complainant the issuance of bonds to retire \$1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of its obligation to account for drainage funds collected on private property, and as a discharge of its own liability to that fund as assessee of the streets and squares; and, second, whether the decision in *Peake v. New Orleans* should be held to apply to the facts of this case and operate to defeat complainant's action.

The first of these questions this court answered in the affirmative; the second it declined to answer. *Warner v. New Orleans*,

167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892.

Thereupon the court of appeals held that the city was estopped from pleading the issue of the bonds, and that the *Peake Case* did not necessarily apply to the facts of this case nor operate to defeat the plaintiff's action. The decree of the circuit court sustaining the demurrer was reversed, and the case remanded with instructions to proceed to a decision upon the merits. 52 U. S. App. 348, 81 Fed. Rep. 645, 26 C. C. A. 508.

The case subsequently went to a hearing upon the pleadings and proofs in the circuit court, and resulted in a decree dismissing the bill. Thereupon an appeal was taken to the circuit court of appeals, which reversed the decree of the circuit court and remanded the case to that court, with directions to enter a decree that the city was indebted to Warner in \$6,000 with 8 per cent interest from June 6, 1876, to be paid out of the drainage assessments set forth in the bill; that such assessments, including those against the city, as the owner of its streets and squares, constituted a trust fund in *the hands of the city [127] for the purpose of paying complainant and other holders of the same class of warrants; and that the case be referred to a master to state an account. Whereupon the city applied for and obtained a writ of certiorari from this court.

Mr. Branch K. Miller argued the cause and, with Mr. Samuel L. Gilmore, filed a brief for petitioner:

The constitutional amendment of 1874 is a complete defense to this action.

Prince v. Quincy, 105 Ill. 138, 44 Am. Rep. 785; *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *National State Bank v. Independent Dist.* 39 Iowa, 490; *Davis v. Des Moines*, 71 Iowa, 501, 32 N. W. 470; *Scott v. Davenport*, 34 Iowa, 208; *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Erie's Appeal*, 91 Pa. 398; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *New Orleans Taxpayers' Asso. v. New Orleans*, 33 La. Ann. 568; *State ex rel. Marchand v. New Orleans*, 37 La. Ann. 19; *State ex rel. New Orleans Gaslight Co. v. New Orleans*, 37 La. Ann. 438; *State ex rel. Wood v. Board of Liquidation of City Debt*, 40 La. Ann. 413, 4 So. 122.

The drainage warrant holders have the right, under La. Civ. Code, art. 3547, to remove the judgments against the city; having failed to do so prescription has run and the judgments are extinguished.

Brown v. Union Ins. Co. 3 La. Ann. 177; *Wagoner v. Phillips*, 22 La. Ann. 152.

Mr. Wheeler H. Peckham argued the cause and filed a brief for respondent:

It must be regarded as settled that the is-

sue by the city of its bonds in taking up prior warrants is no defense to this suit.

Warner v. New Orleans, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892.

The city must be charged as if she had collected these assessments.

Reilly v. Albany, 112 N. Y. 30, 19 N. E. 508, and cases cited; *Cumming v. Brooklyn*, 11 Paige, 596; *Beard v. Brooklyn*, 31 Barb. 142; *Hunt v. Utica*, 23 Barb. 398; *Atchison v. Byrnes*, 22 Kan. 65.

The claim of *res judicata* does not merit serious attention. One suing for himself and others similarly situated does not represent the others, and a judgment does not bar them until and unless they come in and become parties to the suit.

Messrs. John D. Rouse and William Grant filed a further brief for respondent:

The levy of local assessments for the improvement of property benefited thereby is not considered taxation in the sense in which that term is generally used.

Charnock v. Fordoche & G. T. Special Levee Dist. Co. 38 La. Ann. 326; *Levee Commissioners v. Lorio Bros.* 33 La. Ann. 276; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 36 La. Ann. 666; *Burroughs, Taxn. chap. 22*; *Cooley, Taxn. chap. 20*; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 263, 5 So. 848.

The city is liable for drainage assessments in streets and other public places, although neither the city nor the public places were expressly included in the statute.

Marquez v. New Orleans, 13 La. Ann. 319; *Correjolles v. Foucher*, 26 La. Ann. 362; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 259, 5 So. 848; *McLean County v. Bloomington*, 106 Ill. 209.

A final judgment is no less conclusive because based on the assessment of a special tax.

Driggers v. Cassady, 71 Ala. 533; *Burroughs, Taxn. p. 285*; *Wellshear v. Kelley*, 69 Mo. 343; *Eitel v. Foote*, 39 Cal. 439; *Cadmus v. Jackson*, 52 Pa. 295; *Mayo v. Foley*, 40 Cal. 281; *Davidson v. New Orleans*, 34 La. Ann. 170.

The prescription of five years claimed under La. Civ. Code, art. 3540, applies exclusively to unconditional promises to pay a fixed sum of money whether the obligation be negotiable or not. Any condition inserted in an obligation takes it out of this rule.

Thompson v. Simmons, 22 La. Ann. 450; *Baird v. Livingston*, 1 Rob. (La.) 183; *Jouett v. Erwin*, 9 La. 231; *Davidson v. New Orleans*, 34 La. Ann. 177; *Fisher v. New Orleans School Directors*, 44 La. Ann. 185, 10 So. 494; *Gasquet v. City School Directors*, 45 La. Ann. 342, 12 So. 506; *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 459, 31 L. ed. 514, 8 Sup. Ct. Rep. 582.

No prescription runs in favor of a trustee against a debt which he owes to the trust.

McKnight v. Calhoun, 36 La. Ann. 408; *Farmers' Succession*, 32 La. Ann. 1037.

The prescription of judgments may be interrupted or suspended in the same manner and for the same causes which operate with regard to ordinary debts.

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Levy v. Calhoun, 34 La. Ann. 413; *Saunders' Succession*, 37 La. Ann. 769.

A trustee must clearly repudiate the trust before the statute can begin to run.

Perry, Tr. § 863; *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483.

The drainage taxes, being debts of the city at the date of the adoption of the constitutional amendment, cannot by any reasoning be included in the clause prohibiting any increase of the indebtedness of the corporation. The amendment, even if it had provided in express terms that no debt of the city of New Orleans would be valid, would be construed to apply to future transactions only.

McEwen v. Den, 24 How. 242, 16 L. ed. 672.

The purpose of inserting a clause in the amendment authorizing the city to draw warrants payable out of drainage taxes was to permit the city to complete the improvement and to use the drainage fund to its full extent for that purpose.

Mr. Richard De Gray filed a further brief for respondent:

The assessments against the city of New Orleans are not affected by the fact that the public property of the area on which they are levied cannot be sold, in default of voluntary payment, by the city to pay such assessments.

United States v. New Orleans, 98 U. S. 381, 25 L. ed. 225; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395.

After the contract of sale the city became voluntarily the trustee of the drainage tax assessment, and the statute of limitations has no application.

Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113; *Perry, Tr. § 863*.

Nor are taxes assessed for drainage purposes subject to any prescription.

School Directors v. Shreveport, 47 La. Ann. 1310, 17 So. 823; *Reed v. His Creditors*, 39 La. Ann. 115, 1 So. 784.

Unless the law under which a tax is assessed provides a limitation none exists.

Davidson v. Lindop, 36 La. Ann. 766.

And so strictly is the statute of prescription construed that it applies to future and not prior assessments.

New Orleans v. Vergnole, 33 La. Ann. 39; *Dupuy's Succession*, 33 La. Ann. 258; *State ex rel. Jackson v. Recorder of Mortgages*, 34 La. Ann. 178.

In no event can such a statute be pleaded by a city owing taxes while she is trustee, and a trustee who owes a debt to the trust is treated in law as if he had collected the same and was charged with the amount as an asset on hand.

Perry, Tr. § 440; *Stevens v. Gaylord*, 11 Mass. 269; *Sigourney v. Wetherell*, 6 Met. 557; *Leland v. Felton*, 1 Allen, 533; *Com. v. Gould*, 118 Mass. 307.

*Mr. Justice **Brown** delivered the opinion of the court: [127]

Nineteen assignments of error were filed in this case, but we shall only notice such as were pressed upon our attention in the oral arguments or in the briefs of counsel.

1. That this suit was, at the institution thereof, prescribed by the statutes of Louisiana. In this connection reference is made to articles 3540, 3544, and 3547 of the Civil Code.

Article 3540 provides that "actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years," etc. Even though it could be assumed in this case that this bill was an "action on" these drainage warrants, we think they do not fall within the description of either of the instruments specified in article 3540. These warrants are in the form of an order drawn by the administrator of accounts upon the administrator of finance, directing him to pay to the order of W. Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, a certain amount "out of any funds in the city treasury to the credit of said company." They also contain the following memorandum: "This warrant is issued in accordance with the provisions of act 30 of the session of the general assembly of the state of Louisiana, held in the year 1871, *and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi & Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the administrator of finance is required to indorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of 8 per cent per annum from and after the date of such presentation and indorsement until paid."

This instrument is neither a bill of exchange, a promissory note, a note payable to order or bearer, nor an effect negotiable by indorsement or delivery. The construction given to article 3540 by the supreme court of Louisiana confines it to unconditional promises to pay a fixed sum of money on a day certain whether the obligation be negotiable under the law merchant or not. Conditional obligations which lack these essential characteristics do not come within its provisions. *Baird v. Livingston*, 1 Rob. (La.) 182; *Bank of Louisiana v. Williams*, 21 La. Ann. 121; *Thompson v. Simmons*, 22 La. Ann. 450; *Jouett v. Erwin*, 9 La. 231; *Gasquet v. City Schools Bd. of Directors*, 45 La. Ann. 342, 12 So. 506; *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 459, 31 L. ed. 514, 8 Sup. Ct. Rep. 582.

As these warrants were not only payable out of a particular fund to the credit of the canal company, but were only payable when there were funds to the credit of such company, we think it entirely clear that they are not included within the terms of article 3540.

We are also referred to article 3544, prescribing, "in general, all personal actions, except those before enumerated," by ten years, and to article 3547, which enacts that "all

judgments for money, whether rendered within or without the state, shall be prescribed by the lapse of ten years from the rendition of such judgments. Provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed," etc., in which case it "shall continue in full force for ten years from the date of the order of court reviving the same." This latter article is *supposed to be applicable to the homologation of the several assessment rolls against the city as well as against private parties, which, under the act of March 1, 1861, were declared to be judgments against the property assessed and the owners thereof, upon which execution might issue in the ordinary mode of proceeding. These homologations or judgments were rendered at the suit of the commissioners of the drainage district, or the city itself, at various times from 1861 to 1875.

But we think a decisive answer to the argument upon both these articles is found in the contract of June 7, 1876, wherein the city purchased of Van Norden the drainage plant, and contracted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by said parties thereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same." In respect to this we adhere to the opinion pronounced by us when this case was first before this court, that the city in respect to this purchase acted voluntarily; that it was not, as had been held in the former case of *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541, with respect to other warrants, a compulsory trustee, but a voluntary contractor; that as the fund was to be partly created by the performance by the city of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the city had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund, and not to itself. The duty of the city to collect these assessments was affirmed in *State, Van Norden, v. New Orleans*, 27 La. Ann. 497. See *also *Cumming v. Brooklyn*, 11 Paige, 596; *Atchison v. Byrnes*, 22 Kan. 65.

Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation, which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in

actions by *cestuis que trust* against an express trustee, the statute of limitations has no application, and no length of time is a bar. While that relation continues, and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them. Perry, Trusts, § 863. In *Oliver v. Piatt*, 3 How. 333, 411, 11 L. ed. 622, 657, it is said that "the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestuis que trust*." To set the statute in motion the relation of the parties must be hostile, and so long as their interests are common, or their relations fiduciary, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustee and *cestuis que trust*, the statute does not begin to run. *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979; *Seymour v. Freer*, 8 Wall. 202, 19 L. ed. 306; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113. This doctrine has been applied in Louisiana in favor of an administratrix having claims against the estate, in which it is held that, as she cannot sue the estate, the statute will not run against her on her claims against the estate, so long as she is administratrix. *Farmer's Succession*, 32 La. Ann. 1037; *McKnight v. Calhoun*, 36 La. Ann. 408. A like ruling was made with respect to taxes levied for a particular purpose, as to which the city was held to be a trustee, in *Parish Bd of School Directors v. Shreveport*, 47 La. Ann. 1310, 17 So. 823.

[131] This trust has never been repudiated by the city. In fact, one of the defenses set up in the answer was that the city had applied itself with great diligence, and to the full extent of its ability, to improve and to make serviceable the drainage work *and to proceed with the collection of drainage taxes, and did all in its power to prosecute the collection of the same, extending the drainage work on its regular tax bills, which were asserted and claimed in every account filed in the courts by administrators, executors, syndics, and other persons exercising like authority. By these modes and others, collections were made and accounted for. Indeed, the whole gist of the answer is that the city has executed its trust faithfully, so far as it was possible to do so, by collecting assessments against private persons, but has not accounted for taxes assessed against itself, because it is not legally responsible therefor. There is no claim throughout the answer that the city disavowed the trust.

At the time the assessment rolls were homologated and the judgments against the city were rendered, there was no claim made that the city was not responsible, or that the public grounds, streets, and squares were not assessable for these improvements; and in so far as the collection of these judgments is concerned, the city stood in the same relation

of trustee to the warrant holders which it did with respect to the assessments upon private property.

The argument that the city repudiated its trust by the abandonment of the work of drainage in 1876 is untenable. Indeed, by the very act of February 24, 1876, under which the city was authorized to purchase the canal company's plant, the city was given exclusive control of all the rights, powers, and franchises formerly invested in the canal company, and authorized to do all the drainage work required to be paid for by assessments upon property, or from the city treasury. What was this purchase made for if not to continue the drainage work? It can scarcely be supposed that the city purchased this plant with a view of discontinuing such work. If it were abandoned at that time it might readily be supposed that such abandonment was temporary, and that the purchase was made in good faith, and for the purpose for which it should have been purchased, namely, the prosecution of the work.

We deem it entirely immaterial whether the assessments *against the city for the drainage of public property were reduced to judgments or not. When put in this form they were none the less obligations of the city—debts which it owed to the drainage fund, was bound to treat as assets collected, and such as were held by it as trustee for the benefit of the warrant holders. Perry, Trusts, § 440; *Stevens v. Gaylord*, 11 Mass. 269; *Sigourney v. Wetherell*, 6 Met. 557; *Leland v. Felton*, 1 Allen, 533. The debts of private owners it agreed to use due diligence to collect, and as to these it was a trustee. Its own debts it was bound to pay, and as to these it was equally a trustee. By reducing its own claim to judgment it neither ceased to be debtor nor trustee.

2. A defense of *res judicata*, not noticed by the court below, is set up as arising from the decree of the circuit court, affirmed by this court in the case of *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541. This plea is based upon the fact that in that case one James Jackson appeared by intervening petition as the holder of eight purchase warrants, identical in character with those sued upon by the complainant,—part of those given in payment of the purchase price of the drainage plant from the canal company and Van Norden; that the decree in the *Peake Case* was a dismissal of complainant's bill and of all intervening petitions; and that the decree upon the warrants sued upon by Jackson was decisive of the whole series of purchase warrants. It is a sufficient reply to this plea to say that the complainant Warner was neither a party nor a privy to this litigation, and that the decree was binding only upon Peake and such others as actually intervened. *Hook v. Payne*, 14 Wall. 252, 20 L. ed. 887. Indeed, the attempt to identify these warrants with those which were made the basis of Jackson's intervention was evidently an after-thought, as the city in its answer, while setting up

the decree in the *Peake Case*, makes no mention whatever of the intervening petition of Jackson, and relies upon the final decree of this court (139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541), which turns only upon defenses applicable to the *Peake* claim.

[133] But the case, so far from being *res judicata* of this, is not even a decisive authority. The complainant *Peake* was a holder of warrants issued to the Mississippi & Mexican Gulf *Ship Canal Company under the act of February 24, 1871, which authorized the canal company to undertake the drainage work, required the boards of drainage commissioners to transfer to the board of administrators all their assets, and required the latter to collect the drainage assessments and place them to the credit of the canal company. This court held that, under this act, the city, though a trustee, was a compulsory trustee and its obligations strictly statutory, such as placed upon the city only a limited responsibility for that which the board of administrators might do or omit to do; that it had been denuded by the legislature of all freedom of action; that it had no choice of contractor or price; that neither the property to be taxed nor the means or method of collecting its assessments were intrusted to its discretion, and that by providing an officer for the collection of the assessments it had discharged its duty in that particular. In the intervening petition of Jackson he avers that he is the holder of eight warrants, similar to those described in the bill of *Peake*, upon which he had obtained judgment; and it is only by looking at the original petition on the law side of the court that it appears that these warrants were issued in favor of Van Norden, transferee of the ship canal company, and that they were indorsed by him. They were evidently treated by this court as standing upon the same footing as the *Peake* warrants. But, however this may be, the whole opinion of this court is based upon the *Peake* warrants, which, as before said, were not purchase warrants at all, and no allusion is made in that opinion to the Jackson intervention.

[134] In the case under consideration the complainant bases his suit upon \$6,000 of warrants given for the purchase of the drainage plant. The obligations of the city with respect to these are measured, not by the act of 1871, but by the act of February 24, 1876, authorizing such purchase, and by the contract of sale, wherein the city agrees to facilitate by all lawful means the collection of the drainage assessments, and to apply the same to the liquidation of these warrants. In respect to these warrants we held, when this case was first before this court (167 U. S. 467, 477, 42 L. ed. 239, 242, 17 Sup. Ct. Rep. 892), that the city acted voluntarily; *that it was not, in reference to these warrants, as it was to those in the *Peake Case*, a compulsory trustee, but a voluntary contractor; and that it could not, when purchasing property and contracting to pay for it out of a particular fund, and issuing warrants therefor payable out of

such fund, deliberately abandon that duty, take steps to prevent the further creation of the fund, and plead in defense to a liability on the warrants that it had, prior to the purchase, paid off obligations theretofore created against the fund.

For these reasons we hold that there is not only no room for a plea of *res judicata*, but that the *Peake Case* is not to be considered as a controlling authority.

3. The gravamen of the bill is that, after the purchase of the drainage plant, the city became possessed of the sole power of completing the system of drainage, that it became its duty to do so or to establish some other system; but that from the very date of the purchase the city ceased all work, sold some of the boats and machinery purchased, diverted the proceeds of taxes to other purposes than that of the payment of drainage warrants, allowed other boats to rot and sink, and also permitted the canal dug by the company to fill up with sediment. Further, that the city did nothing to enforce payment and collection of the drainage taxes, but adopted an ordinance advising drainage taxpayers not to pay, whereby, by reason of her conduct in abandoning her system of drainage, the supreme court of Louisiana in *Davidson v. New Orleans*, 34 La. Ann. 170, decided that such taxes could not be enforced and collected. That by this and other means it destroyed the drainage fund, until now the same has become unenforceable and worthless to the holders of the warrants.

In this connection the city averred in its answer that it had performed its full duty in relation to the collection of assessments against private property, but admits that the proclamation referred to in the bill advising property owners not to pay drainage assessments was issued by the mayor under authority of an ordinance of the city. It further alleged that the drainage plans made by the canal company were so defective that their completion would have been of no benefit to the property *attempted to be drained: [135] that the work done under them was also defective and of no value, and that for these reasons the city was justified in suspending the further prosecution of the work, which resulted in the decision of the supreme court in the case of *Davidson v. New Orleans*, 34 La. Ann. 170, declaring judgments for drainage assessments void for failure of consideration, and that this decision had become the settled rule of law in the state, rendering further collections impossible; but that, notwithstanding this decision, the city had constantly and at all times endeavored in every way possible to realize the assessments; and the city filed an account showing the collections made in 1871 to June 20, 1891, inclusive, and the disposition thereof, as a sufficient compliance with its duty as trustee. The answer further set up and pleaded that the city had discharged itself from all liability for drainage taxes which it had collected, or ought to have collected, for the benefit of the warrant holders, by the issue and delivery of bonds to the amount of \$1,672,-

105.21 to take up drainage warrants issued under the act of 1871, all of which were used and applied at various times between May 10, 1872, and December 31, 1874, to the redemption of drainage warrants.

That the city is estopped to plead the issue of bonds as a discharge of its obligation to the holders of these purchase warrants was settled upon the prior hearing of this case. *Warner v. New Orleans*, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892. In this connection we said "that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had, prior to the purchase, paid off obligations theretofore created against the fund."

[136] Prior to the purchase of the ship canal company's plant from Van Norden, the legality of these drainage assessments had been affirmed by the supreme court of Louisiana. *Re First Draining Dist. Comrs.* 27 La. Ann. 20. *This was a proceeding by the city board of commissioners praying for the homologation of certain assessment rolls for drainage taxes to which opposition was made upon different grounds. The court, however, sustained the assessments, and, in the opinion, remarked that "the state in ordering the draining is exercising sovereign power, and can, of course, direct or authorize the work to be done in such way and compensation made on such terms as in its discretion may seem best, restrained only by the fundamental principles upon which the government is to be conducted; and we find nothing in them inhibiting the state from having the means provided for such a work, in the way it is done in the present system of drainage in the city of New Orleans. On this question we see no room for judicial interference with the discretion of the state, and we think the existing laws authorize the collection sought herein to be enforced." So far, then, as the law is concerned, there would seem to have been no doubt of the validity of these assessments, had the city continued the work and lived up to the obligations of its contract with Van Norden.

With reference to its alleged neglect in this particular the court of appeals found that all the facts averred in the bill had either been admitted by the answer, or abundantly established by evidence. When the city purchased the drainage plant it seems to have been in good condition, and, although the work had been about two thirds completed, the city not only abandoned the work, but proceeded to disqualify itself from undertaking it. In April, 1878, an ordinance was adopted instructing the administrator to advertise the dredge boats for sale. Although this does not seem to have been carried out,

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another ordinance was adopted in July requiring three boats which were then in bad condition to be broken up and the material stored. Subsequently, and in April, 1881, the mayor was authorized to issue and did issue a proclamation advising the people not to pay their drainage taxes until the question was decided by the supreme court, although the validity of these taxes had been determined in the case above cited. This expected decision was delivered in March, 1882, *in the case of *Davidson v. New Orleans*, 34 [137] La. Ann. 170, in which the court found that, owing to the fact that plaintiff derived no benefit from the contemplated drainage, *the abandonment of all drainage work*, the disposal of all drainage apparatus, the impotency of the city to resume the enterprise, and the fact that the property assessed was worth but one tenth of the amount claimed, the taxes could not be collected. The prior case was cited, and the decision put upon the ground that "causes occurring subsequently to the rendition of judgments may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby. . . . Here would be failure of the only possible consideration of such judgments, and it could not be doubted that such failure would furnish just ground to enjoin their execution." But the court did not hold that the city itself could set up this defense,—its own dereliction of duty.

We do not appreciate the equity of now permitting the city to set up this decision as an excuse for its failure to collect these assessments, since the decision itself is based upon the fact that the city had been derelict in abandoning the work, and failing to carry out in good faith its contract with Van Norden. The court of appeals further found that, so far as the answer attempted to fasten the responsibility for the alleged defects in the drainage plant upon Van Norden, its transference, as a defense to this action, it was entirely unsupported by the evidence, as counsel for the city very frankly admitted in their argument at the hearing. Under the act of February 24, 1871, authorizing the ship canal company to undertake the work, power was reserved to the city board of administrators to designate the location of the canals and levees to be built by the company subject to certain specifications provided by the act to build and run all the pumps and drainage machinery necessary to lift the water from the canals into Lake Pontchartrain, and to keep the water in the canals at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands. It *was further made the [138] duty of the city surveyor to examine the work each month, certify to the administrators of accounts the number of cubic yards excavated and the number of yards of levees built, for which warrants were to be drawn upon the administrators of finance, and to be paid from the funds to the credit of the canal company. In fact, the city by ordinance lo-

cated these canals, put the matter in charge of the administrator of improvements, and, through its officers, exercised supervision over the work. The testimony is that it was done strictly in accordance with the specifications furnished. If, as testified, it was not sufficiently extensive to meet the requirements of the city, or the plant was in any respect defective, such faults were due to the city itself, rather than to the contractors. In this connection the conclusion of the court of appeals was that the plan under which the work was done by the canal company and its transferee would, if carried out as contemplated, have sufficiently accomplished the drainage of the lands within the several districts to render the assessments available, if the city had kept the work in a serviceable condition, as the law required. Indeed, the fact that the city had abandoned the work, and, so far from facilitating by all lawful means the collection of the drainage assessments as provided by law, not only did nothing in this direction, but advised the taxpayers not to pay such assessments, is really too clear for argument.

4. If the city be not estopped, by consenting to the homologation of the assessment rolls,—in other words, consenting to the judgments against itself,—to question its liability for the assessments upon its streets, squares, and other public places, or by drawing these warrants against the drainage fund, we think the validity of those assessments sufficiently appears from the opinions of the supreme court of Louisiana, sustaining similar assessments upon public property. The argument is that public property, being exempt from taxation, is also exempt from these assessments; but the authorities have long recognized a distinction between general taxes, which are for the benefit of the public generally and which in the nature of things the public must directly or indirectly pay, and special assessments for the benefit of particular property, which are a charge upon the property benefited. If this be private property, then each owner of such property pays his share; if it be public property, the city pays it as the agent of the entire body of its citizens, who are assumed to have been benefited to that extent. *Charnock v. Fardoche & G. T. Special Levee Dist. Co.* 38 La. Ann. 323.

This was apparently the view taken by the supreme court of Louisiana in the case of *New Orleans Draining Co.* 11 La. Ann. 338, 377, in which it is said of similar assessments that "the large portion of the expenses which, by this view, is thrown upon the city for the streets, meets in some measure that equity which has been urged upon our consideration, that as this work has been undertaken for the public good, the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil."

In *Marquez v. New Orleans*, 13 La. Ann. 319, property owners upon a certain street refused to pay more than one half of their assessments for paving, upon the ground that the city owned a promenade located in

the center of the street opposite the paved road. It was held that the city should pay one half of the entire cost of paving, upon the ground of its ownership of this public ground. This case was subsequently approved in the similar case of *Correjoles v. Poucher*, 26 La. Ann. 362, and in *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 259, 5 So. 848.

In *McLean County v. Bloomington*, 106 Ill. 209, it was also claimed that public property, being expressly exempt from taxes, was also exempt from special assessments. But, said the court, "we have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments, to now admit that it is even debatable. . . . The distinction between taxation and special assessment is also clearly made in our present Constitution (§§ 1-5, 9, art. 9), and while providing that the general assembly may exempt the property of the state, counties, and other municipal corporations from the former, § 3 (*supra*) makes no provision in regard to the latter, but, on the contrary, . . . authorizes the general assembly to 'vest the corporate authorities of cities, *towns, and villages with power to make lo-
cal improvements by special assessments' without any restriction as to the property to be assessed." This ruling was followed in *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624; *Beach, Pub. Corp.* § 1172. The rule is different in Massachusetts (*Worcester County v. Worcester*, 116 Mass. 193), and perhaps also in Connecticut (*State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622), but, as this is a question of local law, we are bound by the Louisiana cases.

There is nothing in the several statutes of Louisiana upon the subject which indicates that private property only was intended to be affected. It is true that by the act of 1858, § 7, the district court is empowered to decree that each portion of the property situated within the draining limits is subject to a first mortgage, lien, and privilege in favor of the board of commissioners for such amount as should be assessed upon such property for its proportion of the cost of the draining; and that this was obviously intended not to apply to public property. But while it is doubtless true that public property was not intended to be chargeable with a lien under which it might be sold and title pass to private parties, it by no means follows that the city is not liable, and that in such cases the amount should not be paid out of the treasury. *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624. Indeed, something of this kind seems to have been contemplated in the act of February 24, 1876, § 4, where the city was given the power of doing all the drainage work "required to be paid for by assessments upon property, or from the city treasury." This would seem to contemplate that the drainage work applicable to public property was to be paid for by the public out of the municipal treasury. Indeed, it is improb-

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able that, if the cost of draining the streets and public squares was to be included in the proportion which each parcel of private property was to contribute as its share of the expense, no mention was made of this or of the manner in which the liability of each private owner for his proportion of the expense of draining the public property was to be ascertained. That the city was itself liable was evidently the view taken by the city officers when the assessment rolls were homologated.

[141] *One thing in this connection is certain. No general system of drainage could be established that did not include streets and public squares as a part of the territory to be drained. Assuming that no provision was made as to how the proportion applicable to public property was to be assessed and paid for, but that elaborate provision was made for the assessment of private property for its proportion of such expense, and for the creation of a lien therefor, enforceable by the courts, what follows? That private property was to be assessed for its contributory portion of a public expense? Not at all. Private owners may be assumed to be interested in draining their own property, but in the absence of a special provision to that effect there is no presumption that they are also to be called upon to pay that which prima facie belongs to the public. Indeed, in view of a recent decision in Massachusetts, it may well be doubted whether the legislature could impose the cost of draining public property upon private lotowners. *Sears v. Boston Street Comrs.* 53 N. E. 876. The expense of keeping streets in order is a public charge, and the same may be said of all other expenses which are for the benefit of the public. It is true that the expense of paving may be assessed upon the adjoining property upon the theory that such property is specially benefited by the improvement, but a special provision is necessary to create such charge.

As the boards of drainage commissioners assessed the city for the expense of draining its public property, and the legislature approved all these assessments in the act of February 24, 1871, and the city subsequently assented to the homologation of these assessment rolls, except in the first district, and to judgments against itself for the amount of the assessments, it is difficult to see upon what principle it can now, after a lapse of more than twenty years, raise the question of its liability. We know of no reason why these judgments should not be treated as conclusive. A judgment for taxes does not differ from any other in respect to its conclusiveness. *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Driggers v. Cassidy*, 71 Ala. 533; *Cadmus v. Jackson*, 52 Pa. 295; *Freem. Judgm.* § 135; *Mayo v. Foley*, [142] 40 Cal. 281; **Anderson v. Rider*, 46 Cal. 134; *Starns v. Hadnot*, 42 La. Ann. 366, 7 So. 672.

5. The only other assignment of error we are required to notice is that the court erred in holding that the constitutional amend-
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ment of 1874, limiting the power of the city of New Orleans to contract debts, was not a complete defense to this suit. This amendment is as follows:

"The city of New Orleans shall not hereafter increase her (its) debt in any manner or form or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to prevent . . . the issue of drainage warrants to the transferee of contract under act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The argument is that the act of February 24, 1876, authorizing the purchase by the state of the drainage plant and franchise, is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

At the time this amendment was adopted, the act of February 24, 1871, which provides for the drainage of New Orleans, was in force. This act authorized the ship canal company to undertake the drainage of the city under the general direction of the board of administrators, and to provide funds for the payment of the work, directed the boards of drainage commissioners to turn over to the board of administrators "all moneys, assessments, and claims of drainage in their hands," including all judgments in favor of the commissioners, authorized the board of administrators to collect from the holders of property within the draining districts the balance due on the assessments, as shown by the books, "which said assessments are hereby confirmed and made exigible, at such time and in such manner as the board of administrators may designate; provided, that the said board shall collect the said assessments herein authorized in time to *provide for the [143] payment of the warrants to be issued to the said company at the date of their issue," and place all collections to the credit of the canal company for the drainage of the city. The ship canal company, having become embarrassed by the want of funds in the city treasury to pay the drainage warrants, on May 22, 1872, made a contract with Van Norden, by which he agreed to advance to the canal company \$150,000 to meet the expenses of doing the work, upon condition of being reimbursed out of the warrants and money which might be obtained from the city of New Orleans, and to secure the same the company assigned to him all moneys, profits, and benefits that were to be realized by the execution of the work, as well as all certificates and warrants to be received, with authority to collect them. Subsequently, and on November 22, 1872, the company assigned all its property to Van Norden, acknowledging an indebtedness of \$161,962.86 for moneys advanced. At the time the constitutional amendment went into effect the work was being carried on by Van Norden under the above contracts with the ship canal company.

The assessments, both against the city and individuals, which constitute the debt from which the warrants are to be paid, were all in existence long prior to this amendment, and were reduced to judgments at sundry times from 1861 to 1873. It seems, however, that the city concluded to do this work itself, and applied to the legislature for authority to purchase of Van Norden his drainage plant and to undertake itself to do the drainage work. This authority was granted by the act of February 24, 1876, under which the contract was made with Van Norden to purchase the plant, and to pay therefor the sum of \$300,000 in drainage warrants as a consideration for the property, and also in full settlement of all claims for damages which the canal company or Van Norden had against the city. To provide for the payment of these warrants the city agreed that the rights of the holders of such warrants should remain unimpaired, and that the drainage taxes should be administered and paid under certain conditions, and their collection assigned to an officer to be selected *by [144] Van Norden,—the city agreeing, as heretofore stated, to put no obstacle in the way of such collections.

We think it was the intention of the constitutional amendment to validate the issue of the drainage warrants to the transferee of the contract, not only for the work done, but for the property purchased by the city, in case it should elect to do the work itself. The act of 1876 did not so much authorize an increase of the city's debt as a diversion of the warrants to the purchase of the drainage plant instead of a payment to the transferee for work done. We think the amendment should receive a construction commensurate with the object intended to be accomplished, namely, the drainage of the city, whether such drainage were carried out by Van Norden or by the city itself, and that it should not be limited to such warrants as were to be issued for the work. The debt for the assessments had already been incurred and put in judgment, and the amendment was intended to recognize the existence of such debt, and to provide that the warrants issued in payment of the same should not be treated as within the scope of the amendment. Beyond this, however, these warrants were to be issued, not only in payment of the drainage plant, but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out its contract with the canal company and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for \$50,000, may be assumed to have been the greater part of the consideration.

Indeed, it is open to serious consideration whether the reservation of drainage warrants in the constitutional amendment of 1874 was necessary, in view of the fact that the assessments had already been reduced to judgments against the city and the property owners, and that the further issue of drainage warrants was rather in the nature of the payment of a debt already incurred than the cre-

ation of a new obligation. There can be no question that the amendment was not designed to impair the validity of a debt already legally incurred, and that if it had attempted that, it would have been hostile to the provision of the Federal Constitution against impairing the obligation of a contract.

*6. It is scarcely necessary to say the fact [145] that the city chose to pay \$300,000 in 1876 for property which Van Norden bought in 1872 from the ship canal company for \$50,000, is not one which can be considered here. The act of 1876, authorizing the purchase and the settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredge boats and machinery at \$153,750, being 25 per cent less than the original cost. He announced himself as unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of \$300,000 was fixed upon, not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871, and the claims for damages against the city.

It may be that the city made a bad bargain. It may be that it paid far more than the fair value of the property and claims purchased. It may be that the action of the common council was dictated by improper considerations, though this is rather hinted at than asserted; but from the case of *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, to the present time we have uniformly refused to inquire into the motives of legislative bodies. In this case Mr. Chief Justice Marshall, speaking for the court, observed: "That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable *in [146] a court of justice. . . . If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct; and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned." See also *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. ed. 264, 265; *Doyle v.* 175 U. S.

Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *United States v. Old Settlers*, 148 U. S. 427, 466, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 543, 35 L. ed. 1099, 1108, 12 Sup. Ct. Rep. 308. This is also the law in Louisiana. *Villavaso v. Barthet*, 39 La. Ann. 247, 258, 1 So. 599.

7. The objection that the decree finds the city a debtor to the complainant in the amount of the warrants is more apparent than real, since it also declares that he is entitled to be paid out of the drainage assessments, refers it to a master to state an account of such assessments, and provides for an absolute decree against the city only if the fund established by the accounting shall be sufficient, and for a *pro rata* decree if such fund be not sufficient, to pay all the warrant holders in full.

There was no error in allowing interest except as to amount. The act of 1876, authorizing the city to purchase the drainage plant, declared that the consideration should be paid in drainage warrants, issued in the same form and manner as those theretofore issued under the act of 1871 for work done. This act of 1871 provided that if there should not be sufficient funds to cash the warrants when issued, the administrator of finance was required to indorse upon them the date of presentation, after which such warrants should bear interest at the rate of 8 per cent until paid. The warrants also made this provision upon their face. But there was no presentation for payment as the statute and warrants required, and there was no waiver of such presentation. In 1876, it is true, the city abandoned the work, but the whole of complainant's case rests upon the theory that there was no repudiation of the trust, or of the obligation to do whatever was possible in the collection of the assessments. If, then, the trust continued so as to charge the city as trustee, the [147] obligation of the complainant to take *such measures as were necessary to charge the city with interest also continued. But the liability of the city to pay interest was conditioned upon the presentation of the warrants and the indorsement upon them of the date of such presentation. While refusal to indorse the date, upon a proper presentation of the warrants, would not prevent the collection of interest, there must have been a presentation, or something equivalent thereto, before interest would begin to run. If the city had wholly denied the right of complainant, or distinctly refused to perform its obligation, or had wholly disabled itself from complying with its contract, a different question might have arisen, but the mere abandonment of the work was not sufficient to obviate the necessity of a demand. *Berard v. Boagni*, 30 La. Ann. 1125.

But the commencement of suit was a sufficient demand to charge the defendant the interest from that day (*Fuller v. Hubbard*, 6 Cow. 13, 22, 16 Am. Dec. 423), at the rate 175 U. S.

specified in the contract. It is true, the cases of *Brewster v. Wakefield*, 22 How. 118, 16 L. ed. 301; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. ed. 766; and *Holden v. Savings Trust Co.* 100 U. S. 72, 25 L. ed. 567,—hold that, where there is a promise to pay upon a certain day with interest at an exorbitant rate, the creditor is only entitled to interest after that time by operation of law, and not by any provision in the contract; although if the local law be different, this court will follow it. *Cromwell v. Sac County*, 96 U. S. 51, 61, 24 L. ed. 681, 687; *Ohio v. Frank*, 103 U. S. 697, 26 L. ed. 531. These very cases, however, recognize the principle that, if the parties themselves have fixed a rate to be paid up to the time of payment, that rate will be respected. In this case both the statute and the warrants provided that such warrants shall bear interest at the rate of 8 per cent "until paid," and we are therefore of opinion that complainant is entitled to that rate from November 26, 1894, the date of filing the bill and issuing the subpoena.

While this opinion does not cover all the assignments of error, it disposes of all questions raised by counsel in their briefs, and our conclusion is that *the decree of the Court of Appeals be modified in respect of the date from which interest is to *be calculated,* [148] *and as so modified affirmed*, with costs of this court equally divided, and that the case be remanded to the Circuit Court for the Eastern District of Louisiana, with a direction to comply with the decree of the Court of Appeals as modified.

So ordered.

Mr. Justice **White** and Mr. Justice **Peckham** did not sit in this case, and took no part in its decision.

WILLIAM A. BRADY, *Plff. in Err.*,
v.

JOSEPH F. DALY and Richard Dorney, Executors, and Mary Daly, Executrix, of Augustin Daly, Deceased.

(See S. C. Reporter's ed. 148-161.)

Damages for violation of copyright act— not penalty or forfeiture—conclusiveness of decree in equity.

1. An action at law to recover damages for infringement of copyright under U. S. Rev. Stat. § 4966, is not one to recover either a penalty or a forfeiture, so as to make the jurisdiction of a district court of the United States exclusive, but is within the provision of U. S. Rev. Stat. § 629, subd. 9, giving to the circuit courts jurisdiction of suits at law or in equity arising under the patent or copyright laws.

2. A decree establishing the validity of a copyright, and determining that a railroad

NOTE.—That a right question of fact put in issue and determined in a suit cannot be disputed in a subsequent suit between the same parties or their privies, although the second suit is for a different cause of action,—see note to *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

scene in a play, apart from the dialogue, is a dramatic composition and entitled to protection under the copyright laws, is conclusive on the parties in a subsequent action at law for damages for the infringement.

8. A suit for an injunction against infringement of a copyright, in which an accounting of profits is asked, but in which no evidence of profits is offered, or any decree or finding made concerning them, but in which a decree is made for an injunction only, does not constitute such an election of remedy as will preclude a subsequent action for the recovery of damages for the infringement.

[No. 52.]

Argued October 18, 1899. Decided November 20, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit affirming a decision of the Circuit Court in an action at law for damages for violation of a dramatic copyright. *Affirmed.*

See same case below, 51 U. S. App. 621, 83 Fed. Rep. 1007, 28 C. C. A. 253.

Statement by Mr. Justice **Peckham**:

This was an action at law brought by Augustin Daly, and prosecuted since his [149] death by the executors of his will, for *the violation of a dramatic copyright. In 1867 Daly was the owner of a dramatic composition entitled "Under the Gaslight," and in that year he took out a copyright therefor in the United States.

The play was produced by Daly and his licensees, and became quite popular, and he derived considerable profit from its production by himself and from the royalties he received. The chief value of the play and its popularity depended upon an incident in the third scene of the fourth act, commonly described as the railroad scene, where one of the characters is laid helpless upon a railroad track upon which a railroad train is momentarily expected that will run him down and kill him, and just at the last moment another of the characters contrives to reach the intended victim and drag him from the track as the train rushes in and passes over the spot.

After the play was produced, Dion Boucicault prepared a play called "After Dark," in which he introduced a railroad scene differing but slightly and only colorably from that which appeared in "Under the Gaslight." The plaintiff in error, defendant below, without the consent of Daly, produced and procured to be publicly performed on the stage in divers cities the play "After Dark," including the railway scene.

On the 20th of May, 1889, Daly brought a suit in equity against the plaintiff in error herein, in the circuit court of the United States for the southern district of New York, in which he prayed that the defendant might be perpetually enjoined from the further performance of the play "After Dark," upon the ground that the performance was an infringement of the copyright of his play "Under the Gaslight," and he asked for an

accounting for all money and profits received by the defendant in that suit by reason of the performance of the play "After Dark" and of the railroad scene therein.

The complainant moved for a preliminary injunction, which was denied upon the ground that there was a material variance between the registered title and the published title of "Under the Gaslight," and that therefore the complainant had not a valid copyright. *Daly v. Brady*, 39 Fed. Rep. 265. After the taking of proofs on the issues joined by the defendant's *answer, the [150] circuit court, following the decision of the court upon the motion for an injunction, dismissed the bill with costs. *Daly v. Webster*, 47 Fed. Rep. 903. An appeal was taken by Daly from this decree to the circuit court of appeals, where it was reversed, and the cause remanded, with instructions to enter the usual decree for an accounting and a perpetual injunction, the circuit court of appeals holding that the plaintiff's copyright was valid, and the railroad scene in his play was itself a dramatic composition and protected by the plaintiff's copyright, which had been infringed by the defendant in the production of the play "After Dark" with the railroad scene therein. *Daly v. Webster*, 1 U. S. App. 573, 56 Fed. Rep. 483, 4 C. C. A. 10. The only charge of infringement consisted in the production of that scene.

Pursuant to the mandate of the circuit court of appeals, a decree for a perpetual injunction was entered by the circuit court November 5, 1892, and it was referred to a master to take proof of the number of unauthorized performances of the play "After Dark," with the railroad scene, which had been given by the defendant. The court did not direct the master, either in the decree or in the order of reference, to ascertain anything in regard to profits; no evidence was offered before him upon that subject, and no finding was made thereon. A final decree in the case, accepting the master's report and making his findings the findings of the court, was entered on April 1, 1893, but no decree for profits was asked or rendered.

Another appeal was taken to the circuit court of appeals, and the decree affirmed, with costs, June 7, 1893. 11 U. S. App. 791, 8 C. C. A. 681.

The mandate of the circuit court of appeals on this second appeal was filed in the circuit court June 14, 1893, and a decree in conformity therewith duly entered. The defendant attempted to obtain a review of the judgment against him by appealing to this court, but his appeal was dismissed for the reasons stated in *Webster v. Daly*, 163 U. S. 155, 41 L. ed. 111, 16 Sup. Ct. Rep. 961.

The present action was commenced July 14, 1893, by Daly against Brady, the plaintiff in error herein, in the United *States [151] circuit court for the southern district of New York, to recover damages for the violation of his copyright, placing their amount at \$13,700. The complaint contained two counts, the first making no reference to §

4966 of the Revised Statutes, while the second alleged that the defendant had infringed his copyright in violation of the provisions of that section, and that "by virtue of the provisions of said act of Congress (the copyright act) and of said § 4966 of the Revised Statutes of the United States the defendant then and there became liable to pay to said plaintiff the sum of \$13,700, lawful money of the United States, as damages."

The answer of the defendant denied the infringement and set up various defenses which are noticed in the following opinion. A jury trial was waived, and the court found the facts as above stated, and held that the copyright obtained by Daly was good and valid and covered and protected the railway scene already described; that the acts of the defendant were in disregard of the copyright and of plaintiff's exclusive rights therein.

It was also found by the court that the evidence did not authorize an increase of the damages above the minimum amount provided for by § 4966 of the Revised Statutes, and that it had no power to establish a rule of damages below the minimum amount provided for therein, and that such section should be construed as penal rather than remedial in its character. The only testimony in this action on the hearing before the master as to the number of representations which the defendant Brady had given that were infringements of the plaintiff's copyright, and upon which a judgment for damages could be based, was the evidence of the defendant in the equity suit above mentioned, and introduced before the master in this action, and such evidence the court decided was inadmissible for that purpose, upon the ground that evidence obtained from a party by means of judicial proceedings could not be used against him for the enforcement of a penalty; and because of the absence of all legal evidence as to the number of representations the defendant was entitled to judgment, refusing any recovery for damages.

[152] *Subsequently, upon application to the court, the cause was opened, and testimony, entirely independent of that of the defendant in the plaintiff's examination of him in the accounting before the master in the equity suit, was presented as to the number of times the play of "After Dark" had been produced by the defendant, with the railroad scene in it, and upon that evidence a finding was made that the plaintiff was entitled to judgment against the defendant of \$50 for each performance falling within the period of two years prior to the commencement of the action; that is to say, for 126 performances, or the sum of \$6,300 with costs. The court restricted the plaintiff's right to damages to two years, because it held that the action was brought to recover a penalty, and that the two years' statute of limitations applied. The defendant brought the case by writ of error before the circuit court of appeals for the second circuit, where the judgment was affirmed (*Brady v. Daly*, 51 U. S. App. 621, 83 Fed. Rep. 1007, 28 C. C. A. 253), and he then

sued out a writ of error from this court, and the case is now here for review.

Mr. David Gerber argued the cause and, with **Mr. A. J. Dittenhoefer**, filed a brief for plaintiff in error.

Mr. Stephen H. Olin argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court: [152]

The first objection made by the plaintiff in error to the judgment in this case is that the circuit court had no jurisdiction of the action because it was brought to recover a penalty or forfeiture under § 4966 of the Revised Statutes, and it was contended that the district courts of the United States have by law exclusive jurisdiction over that class of actions.

Whether the district courts still have exclusive jurisdiction over an action to recover for a forfeiture or a penalty arising from a violation of the copyright act, it is not necessary to *here determine, because we think that [153] § 4966 of the Revised Statutes, upon which this suit is founded, is not a penal statute, and therefore the action in this case is not one to recover either a penalty or a forfeiture, and the circuit court had jurisdiction of the action by virtue of § 629 of the Revised Statutes, subdivision 9, which grants jurisdiction to the circuit courts "of all suits at law or in equity arising under the patent or copyright laws of the United States." Section 4966 of the Revised Statutes reads as follows:

"Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just."

The act of 1856 (11 Stat. at L. 138, chap. 169) was the first Federal statute which conferred upon the author or proprietor of any dramatic composition designed or suited for public representation, "along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained." The same act further provided that any "manager, actor, or other person acting, performing, or representing the said composition, without or against the consent of the said author or proprietor, his heirs or assigns, shall be liable for damages to be sued for and recovered by action on the case or other equivalent remedy, with costs of suit in any court of the United States, such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and

fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just."

[154] Section 101 of chapter 230 of the Statutes of 1870 (16 Stat. at L. 198, 214) re-enacted the provision of the act of 1856, *giving damages to the proprietor of any dramatic composition against any person wrongfully representing the same. Then came the revision of the statutes, and § 4966 embodies the provisions contained in the above-mentioned acts of 1856 and 1870, in regard to the recovery of damages.

These statutes, it will be perceived, all use the word "damages" when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, "liable for damages therefor." This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to

[155] sue. It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture.

If, upon the trial of such an action, the court should find from the evidence that the plaintiff had, in fact, sustained a greater amount than the minimum sum of damages provided in the statute, and should direct judgment in his favor for the sum so proved, would that judgment be for a penalty? On the contrary, it would be for the actual amount of damages which the evidence showed had been sustained by the plaintiff,

and his recovery of that sum would be the recovery provided by the law for the wrong which he had suffered. When the evidence does not warrant a greater than the minimum recovery, the amount named in the statute still constitutes the remedy provided by the law, which plaintiff can pursue.

In *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, there is a very full discussion of the meaning of the word "penal" when used in reference to the maxim of international law that "the courts of no country execute the penal laws of another." In the course of the opinion in that case it was stated by Mr. Justice Gray, speaking generally as to what constituted a penal statute, as follows:

"The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer,' *Hyde v. Cogan*, 2 Dougl. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones v. Booth*, 2 W. Bl. 1226; *Brandon v. Pate*, 2 H. Bl. 308; *Grace v. M'Elroy*, 1 Allen, 563; *Read v. Stewart*, 129 Mass. 407, 410; *Cole v. Groves*, 134 Mass. 471. As said by Mr. Justice Ashhurst in the King's bench, and repeated by Mr. Justice Wilde in the supreme judicial court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' *Woodgate v. *Knatchbull*, 2 T. R. [156] 148, 154; *Read v. Chelmsford*, 16 Pick. 128, 132. Thus, a statute giving to a tenant ousted without notice double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act, indeed, does give a penalty, but it is to the party grieved.' *Lake v. Smith*, 1 Bos. & P. N. R. 174, 179, 180, 181; *Wilkinson v. Colley*, 5 Burr. 2694, 2698. So in an action given by statute to a traveler injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offense, or to conclude against the form of the statute, because, as Chief Justice Shaw said: 'The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the

suit calls for indemnity.' *Reed v. Northfield*, 13 Pick. 94, 100, 23 Am. Dec. 662."

Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff and gives the right of action solely to him, the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute.

[157] So, a statute which makes a person liable for his wrongful neglect or default by which the death of another person is caused, and which gives a right of action to the administrator for the benefit of the widow and next of kin, to recover damages for the pecuniary injuries resulting from his death, thus altering the common law and imposing a new liability, has been held by this court not to be penal, and to be enforceable in a state other than the state in which the statute was passed, and in which the wrongful act and death occurred. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 45, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.

The English statute of 3 & 4 Wm. IV. chap. 15, entitled, "An Act to Amend the Laws Relating to Dramatic Literary Property," by its 2d section provides that a person who wrongfully produces and represents a dramatic composition "shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented."

In *Chatterton v. Cave*, L. R. 3 App. Cas. 483, 492, the court in speaking of this provision for damages said that the same "was no doubt fixed, because of the difficulty of proving with definiteness what amount of actual damage had been sustained by perhaps a single performance at a provincial theater of a work belonging to a plaintiff, while at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it." This does not look as if that statute were regarded by the English courts as one of a penal nature, but, on the contrary, as one of a remedial kind providing for the recovery of the damages sustained by the plaintiff, and providing for the recovery of a minimum sum for the reason, as stated
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by the court, of the difficulty of proving with definiteness in all cases the amount of damages which plaintiff really had suffered.

*The court below was, as is stated in the [158] opinion, somewhat influenced in its decision of this question by the belief that if this were not a penal statute there was no Federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the intent of Congress to permit such a statutory rate of damages to run without Federal statutory limitation. If there were no such Federal statute, then the state statute would apply. Although not an action to recover a statutory penalty or forfeiture, still, in the absence of any Federal statute of limitations, it would be limited by the limitation existing for the class of actions to which it belongs, in the state where the action was brought. *Campbell v. Haverhill*, 155 U. S. 610, 614, 39 L. ed. 280, 281, 15 Sup. Ct. Rep. 217.

We think the plaintiff in error fails to sustain his first objection to the judgment herein.

Another objection made is that § 4966 renders defendant liable only when substantially the whole of a copyrighted play is produced, and not when merely a single incident in one of the acts is represented.

In the equity suit between these parties, already referred to, the complainant therein alleged that he had a copyright of the play "Under the Gaslight," in which was the railroad scene which made up the substantial value of the play and the one upon which the profits of the production of the play depended, and that the defendant had infringed upon the complainant's copyright by producing that same railroad scene in the defendant's play of "After Dark."

The answer of the defendant put in issue the existence and validity of complainant's copyright, denied any infringement whatever, and also raised the question whether there could be any infringement where the only part of plaintiff's play that was produced was the railroad scene as described.

Upon the trial of the issues the complainant succeeded, and obtained a decree which established the validity of his copyright, and determined that the railroad scene in the complainant's play, apart from the dialogue which accompanied the scene, was a dramatic composition, and entitled to protection under the copyright laws. *Daly v. Webster*, 1 U. S. App. 573, 56 Fed. Rep. 483, 4 C. C. A. 10. *It determined also that there could be [159] an infringement of the copyright when the only part of plaintiff's play that was produced was the railroad scene, and that the defendant had in that manner infringed the copyright of the plaintiff. An injunction was decreed and a reference made to the master to ascertain the number of times, etc., that the infringement had occurred.

In the opinion of the court, the case of *Daly v. Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3,552, where the same question arose in regard to the same scene, was referred to and followed. The judgment record in the equity suit was introduced in evidence in
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this case, and it was conclusive upon the matters which had been in issue in the suit as between these parties, and neither of them can ever again raise such questions between themselves. *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18. We have, therefore, the fact conclusively established by that record that this railroad scene was a dramatic composition, protected by the plaintiff's copyright. The section (4966) of the Revised Statutes covers such a case. Any person publicly performing or representing any dramatic composition protected by copyright, under the circumstances named in that section, is liable for the damages sustained by the proprietor, and as the fact is conclusively established between these parties that the railroad scene is a dramatic composition, and that it is protected by copyright, the statute covers such a case, and makes the plaintiff in error liable for the production of that scene.

The question, as an original one, of how far a copyright of a play protects any particular scene therein from being publicly produced or represented by another, aside from the dialogue contained in the play, is not before us, because the judgment in the equity suit between these same parties establishes the fact of the copyright, and also that the railroad scene is a dramatic composition protected by that copyright.

The plaintiff in error also contends that the trial court erred in admitting in evidence the record in the equity suit as proof of the material allegations of the complaint.

[160] It does not appear herein that the record in the equity suit was admitted for the purpose stated. The record was admissible for the purpose of showing the validity of the copyright, and that the railroad scene was a dramatic composition protected by it. The bill of exceptions herein shows that the record was not used for the purpose of proving the number of times the play of "After Dark" had been represented containing the railroad scene, nor in any way to show the amount of damages which the plaintiff had sustained by reason of the defendant's infringement of his copyright.

The further objection, that the answer of the defendant in the equity suit was inadmissible for the purpose of proving any admission of the defendant therein which might tend to render him liable for a penalty or forfeiture, becomes immaterial by our holding that the statute under which this action is brought is remedial and not penal. It appears, however, in this record that, although the answer was received as a part of the whole record in the case between these parties in the equity suit, it was not, nor was any evidence given by defendant, used upon the final hearing, in any way whatever, for the purpose of showing any admission on his part, but, on the contrary, evidence outside and independent of any admission or evidence of the defendant was produced, and it was with reference wholly to such inde-

pendent evidence that the recovery was granted. There was no error in this procedure.

The plaintiff in error further claimed that the plaintiff below, by first proceeding in equity for an injunction, and incidentally for an accounting of profits, made an election to recover profits, which effectually barred him from a recovery of damages under the statute.

The equity action was brought to enjoin the defendant from performing the play of "After Dark" with the railroad scene in it, taken from the plaintiff's play "Under the Gaslight," and the injunction was asked for on the ground that plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not be made by damages, and as a portion of the relief complainant asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered.

In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the Revised Statutes before referred to.

Conceding that he might in the equity suit have recovered profits if there had been an accounting concerning the same, and that a decree for their recovery would be a bar to a proceeding under the statute, yet the plaintiff was not bound to take such remedy; and when in fact he did not take it, and there was no accounting for profits in the equity suit, no decree made in regard to them and no recovery had, we see nothing to prevent the plaintiff in this action from recovering under the statute the damages which he has sustained by reason of the infringement of his copyright by the defendant.

Other objections were taken by the plaintiff in error upon questions of evidence which do not call for special consideration. They were properly disposed of by the court below.

Our ruling in this case, if it had obtained upon the trial, might have permitted a larger recovery than the plaintiff secured, because, the statute upon which the action is founded not being of a penal character, the two years' statute of limitations to which the plaintiff was limited in his recovery does not apply. But as the plaintiff did not seek to review the correctness of the decision of the trial court, and contented himself with the recovery actually obtained, his executors have now no cause of complaint on that account and they assert none.

Upon a full review of the case, we are of opinion that there was no error committed prejudicial to the plaintiff in error, and the judgment is therefore affirmed.

[162] CHARLES F. SIMMS and George T. Brosius, Executors of the Will of James T. Simms, Deceased, *Appts.*,

v.

HANNAH T. SIMMS, *Appellee*.

(See S. C. Reporter's ed. 162-172.)

Appeal from decree for divorce and alimony—amount in controversy—remittitur erroneously ignored.

1. A controversy as to the continuance or dissolution of the status or relation of marriage cannot be reviewed by the Supreme Court of the United States on appeal from a territorial court, as the matter is not one the value of which can be estimated in money.
2. Questions of fact depending on the evidence cannot be re-examined by the Supreme Court of the United States on appeal from a territorial court.
3. A decree for alimony and counsel fees, although in one sense an incident to a suit for divorce, if it is a distinct and severable final judgment for a sum of money of a sufficient jurisdictional amount, may be appealed from the supreme court of a territory to the Supreme Court of the United States.
4. The absence of the clerk's signature and the seal of his office from a blank attestation of a release of part of a judgment, which is otherwise duly executed according to the requirements of the Arizona Revised Statutes, authorizing it to be filed in the supreme court, will not prevent the release from being valid and effective.
5. An appeal from a decree of a territorial court, which is for more than the jurisdictional amount, will not be dismissed because the decree would have been for less than the jurisdictional amount if the territorial court had not erroneously disregarded a remittitur or release of part of the recovery; but the decree will be reviewed only to the extent of affirming the validity of the release or remittitur, and, thus modified, will be affirmed.

[No. 16.]

Submitted October 10, 1899. Decided November 20, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming a judgment for alimony in a suit for divorce, and erroneously disregarding a remittitur. *Modified and affirmed.*

Statement by Mr. Justice Gray:

The suit was commenced by a complaint filed October 6, 1894, in a district court of the territory of Arizona, by a husband [163]* against his wife for a divorce from the bond of matrimony for the cause of desertion on and ever since December 18, 1893. The wife's answer denied the desertion alleged, and set up desertion by the husband on and ever since December 14, 1893, as well as cruelty on his part.

The Revised Statutes of 1887 of the territory of Arizona, title 34, chap. 4, vest the jurisdiction of suits for divorce in the dis-

trict courts of the territory, and the only provisions thereof touching alimony, counsel fees, or costs are copied in the margin.†

Pending this suit, the wife, by her counsel, moved the court to order the husband to pay her the sum of \$5,000 as provisional alimony to enable her to employ counsel and defend the suit. The court made no order on the motion until its final decision of the cause upon its merits; and then, on a review of the whole evidence (which had been taken by a referee and made part of the record), held that the suit could not be maintained, overruled a motion for a new trial, allowed a bill of exceptions, and by a decree entered June 13, 1896, adjudged that the complaint be dismissed and the issues therein decided in favor of the defendant, and that she recover \$750 counsel fees, and \$150 a month for her maintenance from December 14, 1893, amounting in all to the sum of \$5,250, exclusive of costs. On June 30, 1896, the husband appealed to the supreme court of the territory, and gave bond to prosecute his appeal.

*The record of the supreme court of Arizona [164] (a copy of which, duly certified by its clerk, was transmitted to this court) stated that on the 11th and 13th days of January, 1897, respectively, each described as "being one of the judicial days of the January term, 1897, of the supreme court of Arizona," orders were made fixing the times of filing briefs. The record then stated that "on the 26th day of January, 1897, a release of part of the judgment of the lower court for alimony was filed in said court in said cause by said appellee," and set forth a copy thereof, by which it appeared to have been signed by her attorneys of record, with no other attestation than this blank form: "Attest, _____, Clerk of the Supreme Court of Arizona." And the release was indorsed by the clerk as filed on that day. By the release so filed and recorded, the wife "remits, from the judgment for alimony and counsel fees recovered by the said defendant and appellee against the plaintiff and appellant herein in this cause in the district court, all of the said judgment for alimony and counsel fees in excess of the sum of \$5,000, to wit, the sum of \$250."

The provisions of the Revised Statutes of

†"2114. The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property."

"2120. If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case."

"2122. The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable."

NOTE.—As to review by the United States Supreme Court of territorial decisions, see note to *Miners' Bank v. State ex rel.* District Prosecuting Attorney, 13 L. ed. U. S. 867.

Arizona of 1887, on the subject of the right of a party to remit part of the sum awarded by verdict or judgment, are copied in the margin.†

[165] *On January 30, 1897, the case was submitted on briefs to the supreme court of the territory, and on February 23, 1897, that court affirmed the judgment of the district court for \$5,250. The husband took an appeal to this court, which has been prosecuted by his executors since his death; and the whole case was submitted to this court on briefs.

The appellee moved to dismiss the appeal for want of jurisdiction, "because the judgment or decree, from which said appeal purports to have been taken, is the judgment or decree of the supreme court of one of the territories of the United States, to wit, the supreme court of the territory of Arizona, affirming a judgment or decree of a district court of said territory, dismissing a bill for divorce brought by said appellant against said appellee in said district court, and awarding appellee alimony and counsel fees *pendente lite*; and for the further reason that the matter in dispute does not exceed the sum of \$5,000 exclusive of costs."

Mr. L. E. Payson submitted the cause for appellants.

Messrs. A. H. Garland and R. C. Garland filed a brief for appellants in opposition to motion to dismiss:

This release, or attempted release, was made after the case was closed and after it had been appealed in due form of law and it is submitted that the jurisdiction of the court had ended for all purposes; that the jurisdiction had attached in the appellate court and the supposed order granting the release was absolutely void.

Keyser v. Farr, 105 U. S. 265, 26 L. ed. 1025; *Coates Bros. v. Wilkes*, 94 N. C. 174; *Stone v. Spillman*, 16 Tex. 432; *Levi v. Karriek*, 15 Iowa. 444; *Penrice v. Wallis*, 37 Miss. 172; *Skinner v. Bland*, 87 N. C. 168.

Mr. William H. Barnes submitted the cause for appellee:

Where a judgment is reduced by a remittitur to \$5,000 or less, this court is without jurisdiction.

Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540; *Opelika City v. Daniel*, 109 U. S. 108, 27 L. ed. 873, 3 Sup. Ct. Rep. 70; *Alabama*

Gold L. Ins. Co. v. Nichols, 109 U. S. 232, 27 L. ed. 915, 3 Sup. Ct. Rep. 120; *First Nat. Bank v. Redick*, 110 U. S. 224, 28 L. ed. 124, 3 Sup. Ct. Rep. 640; *Texas & P. R. Co. v. Horn*, 151 U. S. 110, 38 L. ed. 91, 14 Sup. Ct. Rep. 259.

*Mr. Justice Gray, after stating the case [165] as above, delivered the opinion of the court:

The motion to dismiss this appeal for want of jurisdiction is made upon two grounds: 1st. That the decree appealed from is a decree dismissing a suit for divorce, and awarding to the appellee alimony and counsel fees pending that suit. 2d. That the matter in dispute does not exceed the sum of \$5,000 exclusive of costs.

The Revised Statutes of the United States conferred on this court jurisdiction, upon writ of error or appeal, to review and *re- [166] verse or affirm the final judgments and decrees of the supreme court of any territory except Washington, "in cases where the value of the matter in dispute [or as elsewhere described, "where the value of the property or the amount in controversy"], to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars," and, in the territory of Washington, two thousand dollars; and also in all cases in any territory, arising under the Constitution and laws of the United States, or in which the Constitution or a statute or treaty of the United States is brought in question; and in all cases upon writs of habeas corpus involving the question of personal freedom. Rev. Stat. §§ 702, 1909-1911. By the act of March 3, 1885, chap. 355, except in cases in which is involved the validity of a patent or a copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, "no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." 23 Stat. at L. 443. This act has not repealed the provision of the Revised Statutes giving an appeal from the supreme court of a territory in cases of habeas corpus. *Gonzales v. Cunningham*, 164 U. S. 612, 41 L. ed.

†"817. Any party in whose favor a verdict or judgment has been rendered [in the district court] may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted.

"818. Any party may make such remitter in vacation by executing and filing with the clerk a release in writing signed by him or his attorney of record and attested by the clerk with the seal of his office; such release shall constitute a part of the record of the cause, and any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted."

"822. A remitter made as provided in any of

the preceding sections shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess."

"945. If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court in the same manner as such release is required to be made in the district court; and upon such release being filed in said supreme court, the said court, after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

572, 17 Sup. Ct. Rep. 182. The act of March 3, 1891, chap. 517, transferring to the circuit courts of appeals the appellate jurisdiction from the supreme courts of the territories in cases founded on diversity of citizenship, or arising under the patent, revenue, or criminal laws, or in admiralty, has not otherwise affected the appellate jurisdiction of this court from the territorial courts. 26 Stat. at L. 828, 830; *Shute v. Keyser*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960; *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

Under the existing acts of Congress, therefore (except in the cases so transferred to the circuit courts of appeals, and in cases of habeas corpus, cases involving the validity of a copyright, and cases depending upon the Constitution or a statute or treaty of the United States—none of which classes *includes the case at bar), the appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the supreme court of a territory includes those cases, and those cases only, at law or in equity, in which “the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.”

In order to sustain the appellate jurisdiction of this court, under such an enactment, the matter in dispute must have been money, or something the value of which can be estimated in money. *Kurtz v. Moffitt*, 115 U. S. 487, 495, 496, 29 L. ed. 458, 459, 6 Sup. Ct. Rep. 148, and cases there cited; *Durham v. Seymour*, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; *Perrine v. Slack*, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79.

In support of the motion to dismiss this appeal because the decree below concerned divorce and alimony only, the appellee relied on *Barber v. Barber*, 21 How. 582, 16 L. ed. 226. In that case, a majority of this court held that a wife who had obtained against her husband, in the courts of the state of their domicil, a decree divorcing them from bed and board and awarding alimony to her, might sue the husband for such alimony in a circuit court of the United States held in a state in which he had since become domiciled. Mr. Justice Wayne, in delivering judgment, said: “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.” 21 How. 584, 16 L. ed. 226. And from that proposition there was no dissent. It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States. *Re Burrus*, 136 U. S. 586, 593, 594, 34 L. ed. 500, 503, 10 Sup. Ct. Rep. 850.

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But those considerations have no application to the jurisdiction of the courts of a territory, or to the appellate jurisdiction *of this court over those courts. In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory. *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548, and cases cited; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. ed. 498, 500, 19 Sup. Ct. Rep. 183. In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) “the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.” Rev. Stat. § 1851; act of July 30, 1886, chap. 818, 24 Stat. at L. 170. The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a state, are regulated by the laws of the state only. *Cope v. Cope*, 137 U. S. 682, 684, 34 L. ed. 832, 11 Sup. Ct. Rep. 222.

By the territorial statutes of Arizona, the original jurisdiction of suits for divorce is vested in the district courts of the territory; and their final judgments in such suits, as in other civil cases, may be reviewed by the supreme court of the territory on writ of error or appeal. Ariz. Rev. Stat. 1887, title 34, chap. 4; title 15, chap. 20.

As already observed, the motion to dismiss, in the case at bar, is made upon the twofold ground that the decree appealed from is one concerning divorce and alimony only, and that it is for no more than \$5,000.

The decree of the supreme court of the territory in favor of the wife includes the dismissal of the husband's suit for a divorce from the bond of matrimony, and the award to the wife, upon her motion, of the sum of \$5,250 for alimony and counsel fees.

So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal, both because that was a matter the value of which could not be estimated in *money, and because the refusal of the divorce involved no matter of law, but mere questions of fact, depending on the evidence, and which this court is not authorized to re-examine. *Young v. Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802.

The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal, for the same reason that a judgment for or against the defendant upon a counterclaim of like amount would support the appellate jurisdiction. *Dushane v. Benedict*,

120 U. S. 630, 636, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568, 10 Sup. Ct. Rep. 242; *Block v. Darling*, 140 U. S. 234, 35 L. ed. 478, 11 Sup. Ct. Rep. 832.

It was argued for the appellee that the decree of the supreme court of the territory in her favor for alimony and counsel fees was not really for more than the sum of \$5,000, because before that decree was rendered, or the case submitted to that court, she had filed a remittitur of the excess above that sum, but its final judgment, as actually entered, having been for the sum of \$5,250. the question whether the remittitur was erroneously disregarded touched the question what that court should have done, and not what it actually did; in other words, a question of error, and not of jurisdiction.

Had there been no local statute on the subject of remittitur, it would have been within the discretion of the court, before rendering judgment, to allow a remittitur reducing the sum recovered below the amount required to sustain an appeal; and, if the court had done so, and had rendered judgment for the reduced sum, the appeal must have been dismissed. *Alabama Gold L. Ins. Co. v. Nichols*, 109 U. S. 232, 27 L. ed. 915, 3 Sup. Ct. Rep. 120; *Pacific Postal Teleg. Cable Co. v. O'Connor*, 128 U. S. 394, 32 L. ed. 488, 9 Sup. Ct. Rep. 112; *Texas & P. R. Co. v. Horn*, 151 U. S. 110, 38 L. ed. 91, 14 Sup. Ct. Rep. 259.

The making of a remittitur in this case did not depend upon the discretion of the court, but was authorized and regulated by the statutes of the territory. While the right of appeal to this court from the courts of the territory is governed by the acts of Congress, the proceedings in the territorial courts are regulated by the territorial statutes.

[170] *The Revised Statutes of the territory of Arizona contain full and explicit provisions upon this subject, which have been set forth in the statement prefixed to this opinion. They begin by providing that "any party in whose favor a verdict or judgment has been rendered" in the district court "may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and entered in the minutes." [§ 817.] This provision clearly includes any party, whether plaintiff or defendant, in whose favor a judgment for a sum of money has been rendered; and is applicable to the case of a wife who has recovered a judgment for alimony and counsel fees. The provision of the next section is equally comprehensive, by which "any party may make such remitter in vacation by executing and filing with the clerk a release in writing signed by him or his attorney of record and attested by the clerk with the seal of his office," and "such release shall constitute a part of the record of the cause." In whichever of those two ways the remittitur is made, it is provided that "any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted" [§ 818], and

that "a remitter . . . shall from the making thereof, cure any error in the verdict or judgment by reason of such excess." [§ 822.]

Those statutes, in a subsequent section, provide that "if in any judgment rendered in the district court there shall be an excess of damages rendered, and, before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court in the same manner as such release is required to be made in the district court."

This section again, construed together with the earlier sections, clearly authorizes either party, whether plaintiff or defendant, in whose favor a judgment for a sum of money has been rendered in the district court, and who has made no remittitur or release of part thereof in that court, to make the same in the supreme court of the territory.

The section concludes by enacting that, "upon such release *being filed in said su-[171]preme court, the said court, after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

The only departure from the provisions of these statutes in the case at bar, as appearing by the record transmitted to this court, is that the clerk's attestation upon the defendant's release or remittitur was a blank form without the clerk's signature or the seal of his office. But the appellant in his brief, while contending in general terms that the course prescribed by the statute had not been pursued, made no specific objection to the proceedings except that the right to remit was given to the plaintiff only. And in the material parts of the record, as set forth in the brief of the appellee, the attestation to the release appears to have been signed by the clerk and under seal. It is possible that the signature and seal may have been inadvertently omitted in the record transmitted to this court. But, however that may have been, the attestation of a release filed in vacation, like the noting on the docket and entry in the minutes of a remittitur made in open court, was an act to be done by the clerk, and not by the party; its sole object in either case was to verify the act of the party; and when, as in this case, the release was executed by the party's attorneys of record, and was both filed and recorded in the supreme court of the territory, while the case was pending in that court, we are of opinion that the statute was so substantially and sufficiently complied with as to render the release of part of the judgment below valid, and to make it the duty of that court to give effect to the release, and, according to the express terms of the statute, "after revising said judgment," to "proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

If that court had duly given effect to the release, and had rendered in other respects the same decree that it has rendered, the case would not have been appealable. This case is appealable because, and solely because, the decree rendered by that court is for a sum of more than \$5,000. If this court [172]*were to dismiss the appeal, it could not modify the decree appealed from, and the appellee would retain a decree, not only for \$5,000, but also for \$250 more, which she had legally remitted and released before that decree was rendered. If this court were to re-examine the merits of the case, the appellant would have the full benefit of an appeal which he could not have taken at all, had that court acted rightly in a matter wholly independent of those merits.

The just and appropriate way of disposing of the case appears to this court to be, to affirm the validity of the release or remittitur which the supreme court of the territory erroneously ignored, to leave the case as if that court had performed its duty in this regard, and, without considering whether there was any other error in the decree for alimony and counsel fees, to order that the decree of the Supreme Court of the Territory of Arizona for \$5,250 be modified so as to stand as a decree for \$5,000, and, as so modified, affirmed, with costs.

Mr. Justice White and Mr. Justice Peckham dissented.

JAMES K. BROWN, *Plff. in Err.*,
v.

STATE OF NEW JERSEY.

(See S. C. Reporter's ed. 172-177.)

Constitutionality of struck-jury law—due process of law—equal protection of laws.

1. The decision of the highest court of a state, that a statute is not in conflict with the Constitution of the state, is conclusive on the Federal courts.
2. The first ten Amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal government.
3. Trial by a struck jury in a murder case, in conformity to a state statute which is valid under the state Constitution, providing that the court may select from the persons qualified to serve as jurors ninety-six names, from which the prosecutor and defendant may each strike twenty-four and the remainder of which shall be put in the jury box, out of which the trial jury shall be drawn in the usual way,—does not violate the provision of the Federal Constitution as to due process of law.
4. A statute allowing an accused person only

NOTE.—As to what constitutes due process of law, see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.
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five peremptory challenges in a case where a struck jury has been ordered, while twenty peremptory challenges are allowed in a trial before an ordinary jury, does not constitute a denial of the equal protection of the laws, where the same number of challenges is permitted in all cases in which a struck jury is ordered.

[No. 290.]

Argued October 30, 1899. Decided November 20, 1899.

ERROR to the court of Oyer and Terminer of Hudson County, New Jersey, to review a judgment of conviction in a murder case in which was involved the constitutionality of a struck-jury law. *Affirmed.*

Statement by Mr. Justice Brewer:

*The plaintiff in error was, on October 5, [173] 1898, in the court of oyer and terminer of Hudson county, New Jersey, found guilty of the crime of murder. On March 6, 1899, the judgment of the court of oyer and terminer was affirmed by the New Jersey court of errors and appeals, and the case being remanded to the trial court plaintiff in error was, on April 19, 1899, sentenced to be hanged. The jury which tried the case was what is known to the New Jersey statutes as a "struck jury," authority for which is found in chap. 237, p. 894, Laws of New Jersey (1898). Sections 75 and 76 read as follows:

"Sec. 75. The supreme court, court of oyer and terminer, and court of quarter sessions, respectively, or any judge thereof, may, on motion in behalf of the state, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served, and returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided.

"Sec. 76. When a rule for a struck jury shall be entered in any criminal case, the court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for *the county in [174] which any indictment was found, whether the names of such persons appear on the sheriff's book of persons qualified to serve as jurors in and for such county or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way, and the remaining forty-eight names shall be placed by the sheriff in the box, in the presence of the court, and from the names so placed in the box the jury shall be drawn in the usual way."

By §§ 80 and 81 of that statute, where there is no "struck jury" and the party is on trial for murder, he is entitled to twenty peremptory challenges and the state to twelve, but in the case of a "struck jury" each party is allowed only five peremptory challenges.

Mr. William D. Daly argued the cause and, with Mr. Joseph M. Noonan, filed a brief for plaintiff in error:

By the common law as recognized and de-

clared by statute, 3 Geo. II. 25, struck juries were to be resorted to in trials of misdemeanors only, or on informations in the nature of quo warranto.

King v. Edmonds, 4 Barn. & Ald. 471.

The procedure provided by the New Jersey statute for trial by a struck jury in a murder case is not due process of law.

Jones v. Robbins, 8 Gray, 329; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

The equal protection of the law guaranteed by the 14th Amendment of the United States Constitution requires that all persons subjected to legislation which is limited either in the object to which it is directed or by the territory within which it is to operate shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Mr. James S. Erwin argued the cause and filed a brief for defendant in error:

No privilege or immunity of plaintiff in error as a citizen of the United States is infringed or abridged by a trial by an impartial jury of twelve men in the state and county where the crime was committed.

Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

He was tried by due process of law under the laws of the state of New Jersey, and by what is generally understood as due process of law.

Pennoy v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Hurtado v. California*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224.

He was tried under the law applicable to all her citizens or those violating her laws as the words "equal protection of the law" are understood in the 14th Amendment.

Missouri v. Lewis, 101 U. S. 22, 31, 25 L. ed. 989, 992; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Caldwell v. Texas*, 136 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *Re Converse*, 137 U. S. 631, 34 L. ed. 799, 11 Sup. Ct. Rep. 191.

The decision of the New Jersey court of errors and appeals construing the statutes in question, and that the same do not violate the Constitution of New Jersey, will be conclusive on this court, even though this court may differ from the state court.

Murdock v. Memphis, 20 Wall. 611, 22 L. ed. 429; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Hallinger v. Davis*, 146 U. S. 319, 36 L. ed. 989, 13 Sup. Ct. Rep. 105; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; 14th Amendment, Guthrie, p. 44.

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Such amendments of the Constitution of the United States as may be claimed are applicable (exclusive of the 14th Amendment) relate only to the Federal government, and not to the states.

Barron v. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; *McElvaine v. Brush*, 142 U. S. 158, 35 L. ed. 973, 12 Sup. Ct. Rep. 156; 14th Amendment, Guthrie, 3, 22, 58.

*Mr. Justice Brewer delivered the opinion of the court: [174]

That the statutory provisions for a struck jury are not in conflict with the Constitution of New Jersey is for this court foreclosed by the decision of the highest court of the state. *Louisiana v. Pilsbury*, 105 U. S. 278, 294, 26 L. ed. 1090, 1095; *Hallinger v. Davis*, 146 U. S. 314, 319, 36 L. ed. 986, 989, 13 Sup. Ct. Rep. 105; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

The first ten Amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal government. *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. ed. 588, 591; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Re Sawyer*, 124 U. S. 200, 219, 31 L. ed. 402, 408, 8 Sup. Ct. Rep. 482; *Eilenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874.

*The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its modes of judicial proceeding." *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. ed. 989, 992.

The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the cen-

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tury to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a state to abolish the grand jury entirely and proceed by information. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

In providing for a trial by a struck jury, impeached in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. "The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350.

[176] *Due process and equal protection of the laws are guaranteed by the Fourteenth Amendment, and this amendment operates to restrict the powers of the state, and if trial by a struck jury conflicts with either of these specific provisions it cannot be sustained. A perfectly satisfactory definition of due process may perhaps not be easily stated. In *Hurtado v. California*, *supra*, page 537, L. ed. 239, Sup. Ct. Rep. 121, Mr. Justice Matthews, after reviewing previous declarations, said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." In *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 577, Chief Justice Fuller declared "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." Within any and all definitions, trial by a struck jury in the manner prescribed must, when authorized by a statute valid under the Constitution of the state, be adjudged due process. A struck jury was not unknown to the common law, though, as urged by counsel for plaintiff in error, it may never have been resorted to in trials for murder. But if appropriate for and used in criminal trials for certain offenses, it could hardly be deemed essentially bad when applied to other offenses. It gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or no than any
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other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the state, and that is all that due process in this respect requires.

It is said that the equal protection of the laws was denied because the defendant was not given the same number of peremptory challenges that he would have had in a trial before an ordinary jury. In the latter case he would have been entitled under the statute to twenty peremptory challenges, but when a struck jury is ordered he is given only five. *But that a state may make different arrangements for trials under different circumstances of even the same class of offenses, has been already settled by this court. Thus, in *Missouri v. Lewis*, *supra*, in certain parts of the state an appeal was given from a final judgment of a trial court to the supreme court of the state, while in other parts this was denied; and it was held that a state might establish one system of law in one portion of its territory and a different system in another, and that in so doing there was no violation of the Fourteenth Amendment. So, in *Hayes v. Missouri*, *supra*, it appeared that a certain number of peremptory challenges was allowed in cities of over 100,000 inhabitants, while a less number was permitted in other portions of the state. It was held that that was no denial of the equal protection of the laws, the court saying, page 71, L. ed. 580, Sup. Ct. Rep. 352: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It is true that here there is no territorial distribution, but in all cases in which a struck jury is ordered the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, state or defendant, may apply for a struck jury, and the matter is one which is determined by the court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws. That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.

Perceiving no error in the record, the judgment is affirmed.

Mr. Justice Harlan concurs in the result.

[178]†CHARLES COUDERT, as Ancillary Executor of the Last Will and Testament of Raphael Madrazo, Deceased, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 178-183.)

Claim against United States—loss of deposit in bank designated as depositary of public moneys.

The proceeds of the sale of a vessel seized as a prize, deposited by a marshal in a national bank which is a special or designated depositary of public moneys, do not constitute public moneys of the United States, within the meaning of the statutes applicable to public money and authorizing its deposit in a public depositary; and such deposit does not, therefore, constitute a payment of such moneys to the United States, which will make the government liable therefor in case of the failure of the bank pending appeal.

[No. 15.]

Argued October 10, 1899. Decided November 20, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment reversing a decision of a Circuit Court in favor of the plaintiff for the amount of a deposit made *pendente lite* in a bank designated as a depositary of public moneys. *Affirmed.*

See same case below, 38 U. S. App. 515, 73 Fed. Rep. 505, 19 C. C. A. 543.

The facts are stated in the opinion.

Mr. Frederic R. Coudert, Jr., argued the cause and *Messrs. Coudert Bros.* and *Charles Frederic Adams* filed a brief for plaintiff in error.

Assistant Attorney General Pradt argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[178] ***Mr. Justice McKenna** delivered the opinion of the court:

The plaintiff bases his right of action on the act of March 3, 1887, known as the Tucker act (24 Stat. at L. 505), and the following facts:

In November, 1863, the United States vessel *Granite City* seized the Spanish bark *Teresita*, the property of Raphael Madrazo, in the Gulf of Mexico as a blockade runner. Proceedings were instituted for her condemnation and forfeiture in the district court for the eastern district of Louisiana. By order of the court, dated August 23, 1864, she and her cargo were sold by the United States marshal, and the proceeds of the sale, amounting to the sum of \$10,359.20, after deducting costs and other charges, were deposited by the marshal in the First National

Bank of New Orleans, a special or designated depositary of public moneys of the United States, *to await the further order of the court. Judgment was subsequently rendered in favor of the claimant against the United States, from which the latter appealed to the supreme court, obtaining a supersedeas pending the appeal. The judgment was affirmed and restitution of the vessel and cargo directed. *The Teresita*, 5 Wall. 180, *sub nom. United States v. The Teresita*, 18 L. ed. 627.

Pending the appeal to the supreme court the bank failed, and a receiver was duly appointed of its assets. In liquidating its affairs the receiver paid Madrazo during his lifetime, and to his representatives after his death, dividends amounting in all to \$8,183.87, the first payment May 1, 1871, the last on September 28, 1882. Madrazo died in Cuba on the 14th of April, 1877, and on the 20th of September, 1888, ancillary letters of administration were issued in the county of New York to the defendant in error.

After the payment of September 28, 1882, the receiver had no further funds applicable to the claim. This action was brought September 24, 1888, for the sum of \$2,175.43, the balance of the proceeds of the sale after deducting the payments made by the receiver.

The circuit court rendered judgment for the plaintiff for the amount claimed, with interest from September 28, 1882. The circuit court of appeals reversed the judgment (38 U. S. App. 515, 73 Fed. Rep. 505, 19 C. C. A. 543), and the case was brought here.

The contention of plaintiff in error is that the deposit of the proceeds of the sale of the *Teresita* in the First National Bank of New Orleans, then a depositary of the public moneys of the United States, was a payment into the Treasury of the United States, and hence a receipt thereof by the United States, and "consequently, a sum of money equal to the whole of such net proceeds must be held to have become payable to the claimant by the United States under the decree of restitution, wholly irrespective of any loss of particular assets of the Treasury through the failure of the bank."

A similar contention was made upon facts very much the same in *Branch v. United States*, 100 U. S. 673, 25 L. ed. 759. In that case certain cotton was seized under the confiscation act, and sold during the progress of a suit for its condemnation, by order of *the court, and the proceeds deposited by the clerk to await the further order of the court in the First National Bank of Selma, Alabama, upon a notification of the Secretary of the Interior that such bank had been designated by the Secretary of the Treasury as a depositary of public money. The suit was dismissed and judgment entered in favor of the defendants for costs. Pending the suit the bank failed, and in the proceedings for winding up its affairs a dividend upon the deposit was paid to the court, and then by order paid over to the claimants. A suit was brought against the United States for the

†This case originally stood on the docket as *Coudert, Plaintiff in Error, v. United States*. Death of the plaintiff being suggested at the argument, the appearance of Fuller, administrator, etc., as plaintiff in error, was filed herein and entered.

balance of the original deposit upon the ground that the Selma bank was at the time of the deposit a designated depository of public money and was part of the Treasury of the United States, and that consequently a deposit in it was a payment into the Treasury of the United States, binding the latter to its return if the decision of the court should be against condemnation. To the contention the court answered by Chief Justice Waite: "The position assumed by the appellants is to our minds wholly untenable. The designated depositories are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depository. In this case the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong."

But that case is claimed to be distinguished from the pending one because the "confiscation act," under which the *Branch Case* was decided, contained no provision for the deposit in the Treasury, *pendente lite*, of the proceeds of property seized, but *not yet finally condemned*.

[181] *In other words, the argument is that there was no provision in the "confiscation act," which required a deposit of the proceeds of the sale of property seized, and hence the deposit was the personal act of the officer, neither directed nor authorized by law, and did not charge the United States with responsibility, but that in the pending case, in pursuance of law, the deposit was virtually in the Treasury of the United States and became the property of the United States—"assets of the Treasury"—and subject, as public moneys are subject, to the use of the United States, and that the relation of debtor and creditor was created between the owner of the property sold and the United States.

The argument concedes, and necessarily, that there must have been authority or requirement of law for the deposit in this case. Was there such authority or requirement? It is claimed to have been contained in certain statutes of the United States which enabled the Secretary of the Treasury to designate national banks as public depositories, and by the acts of March 3, 1863 (12 Stat. at L. 759, chap. 86), and June 30, 1864 (13 Stat. at L. 308, chap. 174).

The latter acts respectively provided, with some difference of expression and detail, that "prize property" may be ordered sold by the court *pendente lite*, and upon any sale it

shall be the duty of the marshal "forthwith to deposit the gross proceeds of the sale with the Assistant Treasurer of the United States nearest the place of sale, subject to the order of the court in the particular case." This direction of the statutes was not complied with. Its practical and legal alternative, it is contended, was complied with by a deposit of the proceeds of the sale of the *Teresita* in the New Orleans bank, then a public depository, which by such designation became the Treasury of the United States.

It is impracticable to quote all the provisions of law in regard to the deposit, keeping, and disbursement of the moneys of the United States. They will be found with a reference to the statutes of which they are the reproduction in the Revised Statutes of the United States, title XL., *Public Moneys*. It is sufficient to say that places of deposit of the public moneys *are provided, and the [182] duty of the officers who receive and disburse them. From these provisions it will be seen that the public moneys of the United States are the revenues of the United States from all sources, and the gross amount received must first be paid into the Treasury. §§ 3617 and 3618. They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law. §§ 3593 and 3642. See also § 3210.

From this summary we may more clearly understand the particular provisions of law which were applicable to public depositories at the time of the deposit in this case. They were contained in the act of March 3, 1857 (11 Stat. at L. 249, chap. 114, § 3621, Rev. Stat.), and in § 45 of the general banking act (13 Stat. at L. 113, chap. 106, § 3620, Rev. Stat.).

The first act provided that "every disbursing officer or agent of the United States, having any money of the United States intrusted to him for disbursement, shall be and he is hereby required to deposit the same with the Treasurer of the United States or with some one of the assistant treasurers or public depositories, and draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instructions; except when payments are to be made in sums under twenty dollars, in which cases such disbursing agent may check in his own name, stating that it is to pay small claims."

The second act provided that "all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositories of public moneys and financial agents of the government, as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the pub-

[183] lic money deposited with them, and for the faithful performance of their duties as financial agents of the government; provided, that every association which shall be selected and designated as receiver or depository of the public money shall take and receive at par all of the national currency bills by whatever association issued, which have been paid into the government for internal revenue or for loans or stocks."

It was also provided by the act of August 6, 1846 (§ 3616, Rev. Stat.): "All marshals, district attorneys, and other persons than those mentioned in the preceding section, having public money to pay to the United States, may pay the same to any depository constituted by or in pursuance of law, which may be designated by the Secretary of the Treasury."

It is obvious from these provisions that it was only *public money* of the United States of which national banks could be made depositories, and it was therefore only *public money* which an officer could deposit in them, whether he received it originally or received it to disburse. This is the ruling in the *Branch Case*, and it is clearly applicable to the case at bar. By the seizure of the Teresita the title to her did not change nor the title to the proceeds of her sale, *pendente lite*. That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an assistant treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depository.

It is not without significance that when Congress authorized "moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court," to be deposited with a designated depository, it required it to be done "in the name and to the credit of such court," and not to the credit of the United States. Act of March 24, 1871 (17 Stat. at L. 1, chap. 2).

Judgment affirmed.

[184] NORMAN MARKUSON, *Appt.*,
v.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck.

(See S. C. Reporter's ed. 184-187.)

Habeas corpus to review conviction in state court.

Habeas corpus to review a judgment of a state court in a criminal case, on the ground that some right under the Constitution of the United States has been denied to the person convicted, will not ordinarily be granted, as the proper remedy is by writ of error.

[No. 77.]

NOTE.—As to *habeas corpus* to test constitutionality of statute, see note to *Hovey v. Elliott* (N. Y.) 39 L. R. A. 449.

As to jurisdiction of Federal courts on *habeas corpus*, see notes to *Re Huse*, 25 C. C. A. 4, and *Tinsley v. Anderson*, 43 L. ed. U. S. 92.

Argued and Submitted October 27, 1899. Decided November 20, 1899.

APPEAL from a judgment of the District Court of the United States for the District of North Dakota discharging a writ of habeas corpus issued on behalf of a person imprisoned under commitment by state court. *Affirmed.*

The facts are stated in the opinion.

Mr. C. D. O'Brien argued the cause and filed a brief for appellant:

Habeas corpus is the appellant's proper and appropriate remedy inasmuch as at the time of his application for the writ he was without means to prosecute an appeal or writ of error from the North Dakota supreme court to this court.

Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

Mr. Edward Winterer argued the cause and filed a brief for appellee:

The writ of habeas corpus is not a proceeding for the correction of errors, and cannot be used as a substitute for a writ of error.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232, 1 Sup. Ct. Rep. 381; *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Stevens v. Fuller*, 136 U. S. 468, 34 L. ed. 461, 10 Sup. Ct. Rep. 911.

In the absence of exceptional and urgent circumstances this question should be reviewed in the Supreme Court of the United States on a writ of error.

New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Re Wood*, 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

*Mr. Justice McKenna delivered the [184] opinion of the court:

On the 3d of January, 1898, the appellant presented a petition to the United States district court for the district of North Dakota for a writ of habeas corpus. It alleged that the petitioner was confined, and had been since the 7th of December, 1897, in the state penitentiary of North Dakota, under and in pursuance of a "certain pretended commitment" issued by the district court of the fifth judicial district of the state, in and for the county of Barnes, upon a "pretended judgment and sentence" of said court in certain

proceedings therein instituted on the relation of the assistant attorney general of the state, and by the terms of said judgment and sentence the petitioner was sentenced to be imprisoned in said state penitentiary for one year.

[185] *That petitioner appealed to the supreme court of the state, which court affirmed "in all things the said judgment, conviction, and sentence," whereupon he was confined as aforesaid. That the proceedings "were had and carried on" under and pursuant to the provisions of § 7605 of the Revised Statutes of the state, and of other statutes of the state.

The petition further alleged that the said statutes violated the fifth and sixth articles of the Amendments of the Constitution of the United States, and article 1 of the Fourteenth Amendment, in that they (the statutes) provide for the charging of a citizen with an infamous crime and compel him to answer and be punished therefor without a presentment and indictment of a grand jury, and deprive in a criminal prosecution the right of a trial by an impartial jury of the state and district wherein the crime was committed, and permit a conviction of one accused of crime without being confronted with the witnesses against him, and operate to abridge the privileges and immunities of citizens of the United States, and deprive them of liberty and property without due process of law and the equal protection of the laws, in that they provide that in prosecutions thereunder a conviction for the contempt of court may be had without a trial by jury, whereas in all other criminal prosecutions persons accused are entitled to a jury trial; and, further, in that under such proceedings a contempt of court is punishable as an infamous crime, whereas in all other proceedings a contempt of court is punishable as a misdemeanor.

Petitioner further alleged that he was in "straitened circumstances, and without means or power to prosecute a writ of error from the supreme court of the state to the Supreme Court of the United States, or to employ counsel to present or argue it there, and is informed and believes if he had such means it could not be brought on for hearing before the expiration of his sentence."

A writ of habeas corpus was prayed for and issued. On return and hearing it was discharged, and the petitioner remanded to custody. From the order remanding, this appeal was prosecuted, and the petitioner was admitted to bail to await the decision of the appeal.

In the brief of appellant's counsel, and also in that of the attorney general of the state, as well as in oral argument, the constitutional points raised were argued at length. We are not disposed to consider them. We have frequently pronounced against the re-

[186]view by habeas corpus of the judgments *of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeat-

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edly decided the proper remedy was by writ of error.

It is not necessary to review the cases or to repeat or justify their reasoning. We lately stated the rule and the reasons for it in the cases of *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323, and in *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805. In the latter, passing on an appeal from judgment dismissing a writ of habeas corpus, the chief justice said: "The dismissal by the circuit court of the United States of its own writ of habeas corpus was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, a law, or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323."

In *Baker v. Grice* Mr. Justice Peckham said: "Instead of discharging they [the Federal courts] will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state *courts of an indictment found under the [187] laws of a state be finally prevented."

The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a state in which the constitutional rights of a prisoner could have been claimed and may be were rightly decided, or, if not rightly decided, could be reviewed and redressed by a writ of error from this court.

The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons. Nor does the question arise what right appellant

would have had to petition relief from the district court if his remedies against the judgment of the state court had ceased to exist.

Judgment affirmed.

†THE NEW YORK.

(See S. C. Reporter's ed. 187-210.)

Libel in admiralty for collision—cross-libel—judicial notice of Canadian statute—duty of vessel when signals are disregarded—defective lookout—failure to put officers and crew on the stand—duty to answer signals—recovery for loss of cargo where both vessels are in fault.

1. Judicial notice may be taken of the Canadian act of 1886 for the regulation of navigation, which is in all material respects like the act of Congress of 1885.

2. A Canadian statute used in the trial court by consent of counsel, and shown by affidavit to have been treated as part of the record, though not formally certified as such, but certified by the clerk to be a true copy of the act as published, in response to a writ of certiorari reciting that the statute had been introduced in evidence, and requiring the clerk to transmit a certified copy thereof to the circuit court of appeals, may be considered on a review of the decision by the Supreme Court of the United States on writ of certiorari.

The rule that a steamer approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, is bound to stop until her course be ascertained with certainty, is peculiarly applicable when a vessel going up a narrow river channel is about to meet a descending vessel upon cross courses, and signals of the latter are given three times without reply.

4. The failure of a vessel to see the lights of another vessel or hear signals blown by her on a clear night, when they are not more than a mile apart, is conclusive evidence of a defective lookout.

5. Failure to put the officers and crew of a vessel on the stand to explain why the lights of another vessel were not seen or her signals heard in a clear night, when the vessels were not more than a mile apart, greatly strengthens the presumption of a defective lookout.

6. The fact that a steamer is entitled to hold her course does not excuse her from attending to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fall in her duty.

7. The rule that every vessel, when approaching another so as to involve risk of collision,

shall slacken her speed, or, if necessary, shall stop and reverse, clearly applies to a vessel going with the stream, which has signified an intention to pass to the left, which involves danger of collision.

8. An obligated steamer proposing by whistle to deviate from the customary course should receive an immediate reply.

9. The fault of a vessel will not preclude the underwriters of her cargo from recovering the full amount of their damages caused by collision, from another vessel which is also in fault.

[No. 56.]

Argued October 19, 1899. Decided November 20, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision reversing a decree of the District Court on a libel in admiralty and cross-libel for damages caused by collision of vessels. *Reversed.*

See same case below, 54 U. S. App. 248, 82 Fed. Rep. 819, 27 C. C. A. 154; 56 U. S. App. 146, 86 Fed. Rep. 814, 30 C. C. A. 628.

Statement by Mr. Justice **Brown**:

This was a libel in admiralty filed by the Erie & Western Transportation Company, owner of the propeller Conemaugh, *and a [189] cross-libel by the Union Steamboat Company, owner of the propeller New York, against the propeller Conemaugh, to recover damages for a collision between these vessels which occurred between 7 and 8 o'clock in the evening of October 21, 1891, on the Canadian side of the Detroit river, a short distance below the village of Sandwich in the province of Ontario, and between what is known as Petite Côte, on the Canadian side, and Smith's Coal Shutes, on the American side, of the river. The river at this point is nearly straight, and flows in a direction about south-southwest. The underwriters of the cargo of the Conemaugh were permitted to intervene to protect their interests.

The libel of the Conemaugh averred that she was bound from Milwaukee to Erie, Pa., with a cargo of about 1,800 tons of package freight; that she was proceeding down the river on the American side of mid-channel, "having hauled some to starboard to avoid some piles driven in the channel," and known as the Kasota piles, and when half or three-quarters of a mile above Smith's Coal Dock, she received a signal of two blasts from the steamer Burlington, which, with four barges in tow, had gone down the Canadian side of the river, and was then rounding to at the coal dock on the American side, exhibiting her masthead and green lights to the Cone-

†The docket title of this case is *Erie & Western Transportation Company et al., Petitioners, v. Union Steamboat Company, Claimant of the Propeller New York.*

NOTE.—As to rules for avoiding collisions, see notes to *St. John v. Paine*, 13 L. ed. U. S. 537; *Williamson v. Barrett*, 14 L. ed. U. S. 68; *The Ahbotsford v. Johnson*, 25 L. ed. U. S. 168; *The E. A. Packer v. New Jersey Lighterage Co.*

35 L. ed. U. S. 453; *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

As to the signification of the signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.

As to damages for collision where both vessels are at fault, see note to *The City of Hartford v. Rideout*, 24 L. ed. U. S. 930.

As to presumption against a party from failure to produce evidence, see *Cartier v. Troy Lumber Co.* (Ill.) 14 L. R. A. 470 and note.

maugh. Her engine was at once checked, and remained checked until the time of the collision, her helm starboarded, the whistle answered by two blasts, and the propeller hauled out sharply, keeping some distance above the tow, and so directing her course as to pass astern and to the Canadian side of the tow, which was then stretched out in the river toward that side; that the Conemaugh then made the lights of the New York down the river below the tow, and coming up toward the Conemaugh upon such a course that the Conemaugh would cross the course of the New York before the latter could reach the point of intersection; that the Conemaugh at once blew her a signal of two blasts, notifying the New York that she was so directing her course as to keep well in on the Canadian shore, and to leave the New York to starboard as she should come abreast [190] of the tow. Receiving *no reply thereto, the Conemaugh repeated the signal of two blasts. The New York did not reply to this second signal, whereupon the Conemaugh blew a third signal of two blasts, when the New York, which had all the time been coming rapidly up the river, without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over to the Canadian side; seeing which, the Conemaugh blew alarm whistles and hardstarboarded her helm. But the New York, first swinging rapidly and violently to starboard, and apparently turning some to port before she struck, came on at full speed, struck the Conemaugh on the starboard side abreast the texas, cut deeply into her, and crushed her side. The Conemaugh almost immediately struck the Canadian bank of the river and filled and sank.

The answer and cross-libel of the New York averred that she was bound on a voyage from Buffalo to Milwaukee, laden with a cargo of general merchandise; that at the time of the collision she was bound up the Detroit river, and when near the point in said river below where the river Rouge empties into it, a steamer—the Burlington—with a tow of four barges began to round to from the Canadian side to Smith's Coal Dock on the American side, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow. To this the New York blew her a passing signal of one blast, "at the same time checking her engine and reducing her speed to about 4 miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, this signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of [191] her quarter starboarded so as to go close under her stern. *While passing under the stern of this barge, and not more than 10 or 20 feet from her, several short blasts of a propeller, which proved to be the Conemaugh, were heard close at hand, and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and to swing clear under a hard-a-starboard helm. This was done. Notwithstanding this the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside." The New York immediately backed, and offered her assistance to the Conemaugh, but as she was then on the bank she refused the assistance. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the Burlington, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, where no steamer could pass with safety, starboard to starboard.

A large amount of testimony was introduced on behalf of the libellant, but none whatever by the claimant. A hearing upon pleading and proofs before the district court resulted in a decree holding both vessels in fault and dividing the damages, although the district judge expressed some doubt with regard to the fault of the Conemaugh. 53 Fed. Rep. 553. Libellant soon thereafter moved for a rehearing upon the ground that the rules of the supervising inspectors had no application; that the International Rules adopted in 1885 governed the case, and asked leave to submit further testimony, and for other reasons. This was granted, and a new decree entered vacating the former decree, and adjudging the New York to have been solely in fault upon the ground that, under *the case of *The City of New York*, 147 U. S. [192] 85, *sub nom. Alexander v. Machan*, 37 L. ed. 90, 13 Sup. Ct. Rep. 211, then recently decided, the fault of the Conemaugh had not been proved with sufficient clearness to justify a division of damages. Thereupon the claimant moved to vacate the decree and for leave to introduce evidence in its own behalf, which was denied. This motion was repeated upon affidavits, and the deposition of the master, second mate, and engineer of the New York taken *de bene esse* under the statute. The motion was, however, denied, the depositions stricken from the files, and a final decree entered against the New York for the damages and loss to the Conemaugh and her cargo.

Thereupon the claimant appealed the cause to the circuit court of appeals, and upon the

record being filed in that court a motion was made by the libellant for an order that the testimony of a witness be taken to prove the Canadian statute in force for regulating the navigation of the waters of the province of Ontario at the time of the collision, and that a copy of such statute be introduced in the cause. This motion was supported by an affidavit that the Canadian statute was introduced in the district court, and used and referred to in the arguments upon the rehearing before the district judge; that such statute was then treated and used as part of the record; but there was no stenographer present at the time and no minute of such introduction and use of the Canadian statute was preserved in the record. The motion for an order permitting testimony to prove the Canadian statute appears to have been withdrawn, a suggestion of diminution of record substituted, and a writ of certiorari asked for and granted to supply such evidence as did not appear in the record. The district court made return to this writ by an order that the clerk transmit to the court of appeals a certified copy of the Canadian statutes governing the navigation of vessels in the waters of Canada during the year 1891. The navigation act of Canada of 1886 was thereupon sent up with a certificate of the clerk of the district court that "the papers hereto attached, marked Exhibit A, are a true copy of the Revised Statutes of Canada 1886, volume 1, chapter 79, entitled 'An Act Respecting the Navigation of Canadian Waters, A. D. 1886; *that I have carefully compared the same with the original act as published, and find the same to be a true copy of such original and of the whole thereof."

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That court, however, refused to consider this statute upon the ground that the return of the district court to the writ contained no certificate that the statute was made a part of the record by being offered and received in evidence, but only a statement by the clerk that "that which is returned is a correct copy of the Canadian statute as published."

The hearing of the appeal resulted in a reversal of the decree of the district court, and a remand to that court with directions to dismiss the libel of the Conemaugh upon the ground that she only was in fault. 54 U. S. App. 248, 82 Fed. Rep. 819, 27 C. C. A. 154. A rehearing was subsequently asked for and denied. 56 U. S. App. 146, 86 Fed. Rep. 814, 30 C. C. A. 628.

Whereupon libellant applied for and was granted a writ of certiorari from this court.

Mr. Harvey D. Goulder argued the cause and, with **Mr. John C. Shaw**, filed a brief for petitioners:

Where a party has withheld the best evidence of a material fact claimed by him, or has not produced witnesses whom he might have called, the presumption is that such evidence, if produced, would have been detrimental to, or would have disproved, his contentions.

Wolff v. The Vaderland, 18 Fed. Rep. 736; *Clifton v. United States*, 4 How. 246, 11 L. ed. 959; *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 640, 54 Fed. Rep. 481, 4 C. C. A. 454.

The Great Lakes are not "lakes and inland waters of the United States" within the meaning of the act of 1885 (23 Stat. at L. 438, chap. 354).

Moore v. American Transp. Co. 24 How. 1, 16 L. ed. 674; *American Transp. Co. v. Moore*, 5 Mich. 368; *The Garden City*, 26 Fed. Rep. 766; *The Robert Holland & Parana*, 59 Fed. Rep. 200; *The Genesec Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058; *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *United States v. Rodgers*, 150 U. S. 261, 37 L. ed. 1075, 14 Sup. Ct. Rep. 109.

The Conemaugh had an active duty to perform in keeping out of the way of the New York, and the New York had an equally imperative duty to keep her course; each had a right to rely upon the other's performance of its duty.

The Delaware, 161 U. S. 467, 40 L. ed. 774, 16 Sup. Ct. Rep. 516; *Meyers Excursion & Nav. Co. v. The Emma Kate Ross*, 41 Fed. Rep. 828.

The New York's duty, as to course, was to continue as she was then going, unless it became necessary to depart from that course to avoid impending peril or any immediate danger, and in that event her departure must only be to the extent that the immediate danger reasonably demands.

The John L. Hasbrouck, 93 U. S. 408, *sub nom. Lyman v. The John L. Hasbrouck*, 23 L. ed. 963.

When an obstruction is presented, it is the duty of the steamer ascending, breasting the tide or current, to stop until the vessel proceeding with the tide or current shall get out of the way, because of the greater facility with which the ascending steamer can control her movements.

The Galatea, 92 U. S. 439, *sub nom. Robert v. The Galatea*, 23 L. ed. 727.

Statutory rule 19 leaves it optional with the steamer required to keep out of the way to do it in such a manner as she may choose, fixing upon her the imperative obligation to get out of the legal course of the privileged vessel. Any rule taking away this option and requiring this to be done in a certain manner would be in derogation of the statutory rule and, so far as inconsistent with it, invalid.

The B. B. Saunders, 23 Blatchf. 378, 25 Fed. Rep. 727; *The Atlas*, 4 Ben. 27, Fed. Cas. No. 633; *The Transfer No. 4*, 44 Fed. Rep. 303; *The Ottoman*, 33 U. S. App. 443, 74 Fed. Rep. 316, 20 C. C. A. 214.

A court of admiralty will take judicial notice of foreign regulations for the prevention of collisions, without such technical proof as might be required by a common-law court in an ordinary action.

Talbot v. Seeman, 1 Cranch, 1, 2 L. ed. 15; *The Scotia*, 14 Wall. 170, *sub nom. Sears v.*

The Scotia, 20 L. ed. 822; Marsden, Collisions, 310-340; Wharton, Conf. L. § 771; Wharton, Ev. §§ 285, 331.

Mr. F. H. Canfield argued the cause and, with **Mr. G. L. Canfield**, filed a brief for the underwriters on the cargo of the propeller *Conemaugh*:

In cases of collision, the solution of which is doubtful because of conflicting testimony, if it appear that an important witness is not called, the doubt will be resolved against the vessel on which he was engaged.

The Fred M. Laurence, 15 Fed. Rep. 635.

The rule with respect to lookout having been violated by the *New York*, she must be held to have been in fault unless it be established by clear proof, not only that the violation of the rule probably did not contribute, but that it could not have contributed, to the collision.

Richelieu & O. Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934; *The Pennsylvania*, 19 Wall. 125, *sub nom. The Pennsylvania v. Troop*, 22 L. ed. 148.

The rule that a ship is to keep her course does not mean that she is to do so obstinately when she sees that, under the peculiar circumstances of the case, she can, by departing from it, avoid a collision.

Marsden, Collisions, 475; *The Sunnyside*, 91 U. S. 208, *sub nom. Mincer v. Sunnyside*, 23 L. ed. 302.

The right of a vessel to keep her course does not relieve her from the obligation to maintain a careful lookout.

The Chicago, 61 Fed. Rep. 521.

The *Conemaugh's* three repeated signals and the exhibition of her green light were clear and certain indications of her intent not to keep out of the way of the *New York*, which the latter should have regarded by checking her speed, or, if necessary, by stopping and reversing.

The C. H. Seuff, 32 Fed. Rep. 237; *The America*, 32 Fed. Rep. 845; *The Baltimore*, 34 Fed. Rep. 600; *The Aurania & The Republic*, 29 Fed. Rep. 98; *The Friesland*, 76 Fed. Rep. 591; *The City of Chester*, 42 U. S. App. 366, 78 Fed. Rep. 186, 24 C. C. A. 51; *The Louise*, 8 U. S. App. 138, 52 Fed. Rep. 885, 3 C. C. A. 330; *The Grand Republic*, 16 Fed. Rep. 424; *The Memnon*, 6 Asp. Mar. L. Cas. 317.

A vessel whose duty it is to hold her course is not justified in departing therefrom simply because it is convenient for her to do so. She must hold her course, unless prevented from doing so by some necessity or *vis major*.

The Illinois, 103 U. S. 298, *sub nom. Golding v. The Illinois*, 26 L. ed. 562; Marsden, Collisions, 493; *The Clara Davidson*, 24 Fed. Rep. 763; Spencer, Collisions, p. 202.

The owner or underwriter on the cargo, in cases of collision brought about by the mutual faults of the colliding vessels, has the right to pursue either, or both, of the wrongdoers.

The Alabama & The Game-Cock, 92 U. S. 695, *sub nom. The Alabama v. Nicholas de las Casas*, 23 L. ed. 763; *The Virginia Ehrman*, 97 U. S. 309, *sub nom. The Virginia* 175 U. S. U. S., Book 44.

Ehrman v. Curtis, 24 L. ed. 890; *The Atlas*, 93 U. S. 312, *sub nom. Phoenix Ins. Co. v. The Atlas*, 23 L. ed. 865; *The Beaconsfield*, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. Rep. 860; *The Juniata*, 93 U. S. 337, *sub nom. United States v. The Juniata*, 23 L. ed. 930.

Messrs. **H. C. Wisner** and **C. E. Kremer** argued the cause and, with **Mr. W. O. Johnson**, filed a brief for respondent:

The laws of the United States and rules of navigation prescribed by the supervising inspectors, having attached to the steamers by reason of the commencement of their maneuvering to pass, when both were in American waters, continued to be obligatory up to the time the *Conemaugh* blew the alarm signal and starboarded across the bow of the *New York*, when both were thereby put in *extremis*.

New York, L. & U. S. Mail S. S. Co. v. Rumbali, 21 How. 372, 16 L. ed. 144; *The Johnson*, 9 Wall. 146, *sub nom. The Johnson v. McCord*, 19 L. ed. 610; *The Wenona*, 19 Wall. 41, *sub nom. Fraser v. The Wenona*, 22 L. ed. 52; *The Breakwater*, 155 U. S. 252, 39 L. ed. 139, 15 Sup. Ct. Rep. 99.

Navigation on the Great Lakes is excluded from the operation of the act of March 3, 1885, by the clause excepting its application to vessels navigating within the harbors, lakes, and inland waters of the United States.

The North Star, 22 U. S. App. 242, 62 Fed. Rep. 72, 10 C. C. A. 262.

Under inspector's rule No. 2, it was the duty of the *Conemaugh* to port and go under the stern of the *New York*.

The Johnson, 9 Wall. 146, *sub nom. The Johnson v. McCord*, 19 L. ed. 610; *The Grand Republic*, 16 Fed. Rep. 427; *The B. B. Saunders*, 23 Blatchf. 378, 25 Fed. Rep. 727; *United States v. Miller*, 26 Fed. Rep. 97; *The John King*, 1 U. S. App. 64, 49 Fed. Rep. 469, 1 C. C. A. 319; *The E. A. Packer*, 14 U. S. App. 684, 58 Fed. Rep. 251, 7 C. C. A. 216; *The George S. Shultz*, 55 U. S. App. 274, 84 Fed. Rep. 508, 28 C. C. A. 476.

This is the rule of navigation whether declared by inspector's rules or not.

The Rhondra, L. R. 8 App. Cas. 549; *The Columbia*, 10 Wall. 246, *sub nom. The Columbia v. Bunting*, 19 L. ed. 890; *The Britannia*, 153 U. S. 138, *sub nom. The Britannia v. Cleugh*, 38 L. ed. 663, 14 Sup. Ct. Rep. 795; *The Delaware*, 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516.

The *New York* was not bound to check or stop her speed.

The George S. Shultz, 55 U. S. App. 274, 84 Fed. Rep. 508, 28 C. C. A. 476.

The *New York* was under no obligation to answer the *Conemaugh's* signal, and her act in refusing to accept the proposition was in law equivalent to a refusal, and the only legal way of declaring that refusal.

The Delaware, 161 U. S. 467, 40 L. ed. 774, 16 Sup. Ct. Rep. 516; *The George S. Shultz*, 55 U. S. App. 274, 84 Fed. Rep. 508, 28 C. C. A. 476; *The John King*, 1 U. S. App. 64, 49 Fed. Rep. 469, 1 C. C. A. 319; *The Florence*, 68 Fed. Rep. 940; *The B. B. Saunders*, 23 Blatchf. 378, 25 Fed. Rep. 731.

The refusal of the New York to accept the Conemaugh's signal required the strictest observance of the rules of navigation on the part of the Conemaugh, and the latter, by cutting across the line of the protecting tow and across the course of the New York, and by ringing up the engine and starboarding the helm, brought about the collision and subsequent loss.

The Mury Powell, 63 U. S. App. 781, 92 Fed. Rep. 408, 34 C. C. A. 421; *The E. A. Packer*, 14 U. S. App. 684, 58 Fed. Rep. 251, 7 C. C. A. 216.

[193] *Mr. Justice **Brown** delivered the opinion of the court:

This collision took place in October, 1891. The navigation of the two steamers was therefore governed by the Congressional Rules and Regulations of April 29, 1864 (13 Stat. at L. 58, chap. 69), reproduced in Revised Statutes, § 4233, and, so far at least as the manœuvres of the respective vessels took place in American waters, by the supervising inspectors' rules in force in 1891.

The Revised International Regulations of 1885 (23 Stat. at L. 438, chap. 354) apply only to navigation "upon the high seas and in all coast waters of the United States;" and in § 2, repealing prior inconsistent laws, [194]*there is an exception of vessels navigating "the harbors, lakes, and inland waters of the United States." It is true that in *Moore v. American Transp. Co.* 24 How. 1, 16 L. ed. 674, the limited liability act of 1851, which contained an exception of vessels used "in rivers or inland navigation," was held, notwithstanding this exception, to apply to vessels navigating the Great Lakes; but the cases are readily distinguishable. In that the exception was "any canal boat, barge, or lighter, or to any vessel of any description used in rivers or inland navigation." It was held that the character of the craft enumerated might "well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the law-makers, which are designated by the place where employed." But the case was really decided upon the ground of the magnitude of the Lakes, their commerce, their vessels, and the well-known perils incident to lake navigation. It was thought that such commerce deserved to be placed on the footing of commerce on the ocean, and that "Congress could not have classed it with the business upon rivers, or inland navigation," in the sense in which we understand these terms. In the present case the exception is specifically of "vessels navigating the harbors, lakes, and inland waters of the United States." If the word "lakes" was not intended to include the Great Lakes it is difficult to see the object of Congress in making use of that word, since nearly all the other navigable lakes, except Lake Champlain, are located within the limits of a single state, and no act was necessary to exempt them, as the power of Congress does not extend to the purely internal or infraterritorial commerce of the country. *The Montello*, 11 Wall. 411, *sub nom. United*

States v. The Montello, 20 L. ed. 191; *Veazie v. Moor*, 14 How. 568, 14 L. ed. 545.

The question, however, is one of little practical importance in this case, inasmuch as rule 19 of Rev. Stat. § 4233, is word for word the same as article 16 of the Revised International Rules and Regulations of 1885. Both are as follows: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

*The power of the supervising inspectors [195] to adopt rules for the government of steam vessels in passing each other (Rev. Stat. 4412) is limited by § 4400 to steam vessels "navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation." These rules are pertinent to this case only so far as they make it the duty of vessels to indicate by signals of one or two whistles the course they are about to take, and of the other vessel to answer them, and also, in case of vessels crossing each other, within the meaning of article 16, in requiring the obligated vessel to avoid the other by porting and going under her stern. These rules are as follows:

Rule 2. "When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head' or nearly so, and the signals by whistle shall be given and answered promptly, as in that case specified."

Rule 3. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course of the other, whether from signals being given or answered erroneously or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and after the vessels have approached within half a mile of each other both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

Rule 6. "The signals by the blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting at a distance of within half a mile, and whether passing to the starboard or port."

1. We are of opinion that the Canadian statute of 1886 may properly be considered by us.

The question how far this court may take judicial notice of the laws of a foreign country has been the subject of some discussion, and was first considered by this court in the case of *Talbot v. Seeman*, 1 Cranch, 1, 38, 2 [196] L. ed. 15, 27. That was a case of salvage upon recapture from the French. It became necessary to inquire whether the laws of France were such as to have rendered the condemnation so probable as to create a case of such real danger that her recapture could

be considered a meritorious service. To prove this, counsel offered several decrees of the French government, to the reading of which objection was made upon the ground that they were the laws of a foreign nation, and therefore to be proved as facts. In holding that the decree, having been promulgated in the United States as a law of France, was entitled to be read, Mr. Chief Justice Marshall observed "that the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law without being proved as facts. It has been said that this is done by consent; that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet this decree, having been promulgated in the United States as the law of France, by the joint act of that department which is intrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume the character of notoriety which renders it admissible in our courts."

[197] The same question as applied to the original rules and *regulations was presented to us in the case of *The Scotia*, 14 Wall. 170, *sub nom. Sears v. The Scotia*, 20 L. ed. 822, in which we held that, in view of the fact that these rules and regulations were originally adopted by the British orders in council of January 9, 1863, and by Congress in 1864, and had been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic ocean, we would take judicial notice of them and treat them as laws of the sea and of general obligation. The duty to take judicial notice of these rules was also recognized by this court in *The Belgenland*, 114 U. S. 355, 370, *sub nom. The Belgenland v. Jensen*, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860, in *Riche-lieu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 422, 34 L. ed. 398, 403, 10 Sup. Ct. Rep. 934, and in numerous cases in the lower courts. There is nothing in the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, in conflict with this. That did not involve a question of general maritime law, but of a statutory exemption from the 175 U. S.

consequences of negligence in navigation given by a British act of Parliament. We know of no reason why the rule adopted in *The Scotia* should not be applied to the Revised International Rules and Regulations. They have also been adopted by most, if not all, the nations which gave their assent to the original rules and regulations of 1863, and the reasons which induced this court to take judicial notice of these rules are equally persuasive here. The reference to the Canadian statute of 1886, used in the district court and printed as a part of the record here, shows it to be, except as to the waters covered by it and as to certain immaterial local regulations, a literal copy of the congressional act of 1885.

But we think that for another reason the act is properly before us. After the case had been appealed to the circuit court of appeals, the libellant moved that court for an order requiring the testimony of a witness to be taken to prove the Canadian statute, and filed in support of this motion affidavits that in the printed record there was no copy of this statute, but that it was introduced in the district court and used and referred to in the arguments upon the rehearing before the district judge; that at that time the libellant offered to prove the statute by oral testimony, but that it was then agreed in *open court between the proctors that the tes- [198] timony of such witness might be dispensed with, and that the statute then in court might be used without technical proof thereof. No order was made upon this motion, but there was a further suggestion to the court of a diminution of the record in that the Canadian statute, which was introduced and used as evidence in the district court, did not appear in the record, and a writ of certiorari was granted "because the transcript of the record in this case does not contain a copy of the Canada statutes governing the navigation of vessels in the waters of Canada during the year 1891, which was introduced in evidence, as alleged." In obedience to this writ, the clerk of the district court was ordered to transmit to the circuit court of appeals a certified copy of the Canadian statute. This was done, but the clerk, instead of certifying that it was a part of the record, certified only that he had "carefully compared the same with the original act as published" (by which we understand as published in the statutes of Canada), "and find the same to be a true copy of such original and of the whole thereof." It thus appears that the Canadian statute had been used in the district court by consent of counsel, had been treated as part of the record, and that the copy sent up was a true copy of the statute as published. It is true that the clerk did not formally certify it to be a part of the record, but the fact that it had been so treated was established by the affidavit; and the writ of certiorari upon its face recited the fact that a copy of the statute had been introduced in evidence, as alleged, and required the court below to "send the record and proceedings, with all things concerning the same, as fully and en-

tirely as they remain of record in said district court." In view of these proceedings, we think the circuit court of appeals should have accepted the certified copy of the statute as properly in evidence before it.

The only novel feature of this statute, pertinent to this case, is as follows:

[199] "Art. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following *signals on her steam whistle, that is to say: One short blast to mean 'I am directing my course to starboard;' two short blasts to mean 'I am directing my course to port;' three short blasts to mean 'I am going at full speed astern.' The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made."

In this view, the question whether two American vessels running from one American port to another are bound, whenever they cross the boundary line between the United States and Canada, which at this point is the *filum aquæ* of Detroit river, to conform to the navigation laws of Canada, does not arise in this case. Were all the commerce of the lakes carried on in American vessels the question would be less difficult of solution. But as much of this commerce is Canadian, and it is impossible to tell whether an approaching vessel be American or Canadian, an attempt to apply the laws of the United States in all cases might result in confusion and in great injustice to Canadian vessels, in case the rules and regulations of the two countries differed in any material respect. We are saved, however, consideration of these questions by the fact that the signals and the steering rules of the United States and Canada are practically identical. This fact being once established, the duty of vessels of both nations in meeting each other, either upon American or Canadian waters, is easily understood.

2. In judging of the responsibility for this collision it should be borne in mind that the Burlington and her tow were temporarily occupying from two thirds to three quarters of the navigable channel of the river. The distance between the rear barge and the Canadian bank of the navigable channel is variously estimated, but according to the court of appeals was about 500 feet. It may have been as much as 800 feet, but probably was not more than that. The night was clear and starlit, the weather fine, and the collision could scarcely have occurred except by the fault of one or both vessels.

[200] The Conemaugh, a steamer of 1,609 tons burden, was coming *down the American side of the river at her usual speed of about 10 miles an hour, and, when her attention was first called to the obstruction of the Burlington's tow, was about passing what are known as the Kasota piles, which were in fact the remains of a coffer dam once used in raising the steamer Kasota. They were near mid-channel, though somewhat upon the American side, and about three quarters of a mile above Smith's Coal Dock. As she was pass-

ing these piles, leaving them on her port hand, she received and answered a signal of two blasts from the Burlington, which had come down the river on the Canadian side, and was at that time rounding to at the coal dock on the American side, her tow of four barges making a crescent or semicircle, the outer arm of which was, as above stated, from 500 to 800 feet from the Canadian bank. The length of the tow was about 2,600 feet, the width of the channel about 3,000 feet. The Burlington at this time was exhibiting to the Conemaugh her white masthead and her starboard green light. The first barge in tow was also exhibiting her green light, but the others had not rounded to sufficiently to exhibit their colored lights. After exchanging this signal with the Burlington, the wheel of the Conemaugh was put hard-a-starboard, her speed checked, and her course taken across the stream at almost a right angle with her former course. Upon this course she was exhibiting her green light to vessels ascending the river. After she had "picked up" or discovered the rear barge her wheel was steadied, and then ported to follow the tow, which by the force of the current was gradually swinging down stream, and would ultimately round to on the American side, astern of the Burlington. As the Conemaugh steadied her wheel to starboard her watch made out below the tow and about a mile distant the white and red lights of the New York, apparently somewhat on the American side of mid-channel, and promptly signaled her with two blasts of her whistle, indicating that she would pass her to the left. No answer was received from the New York. Under such circumstances it would have been more prudent for the Conemaugh to stop and wait a few minutes, until the *tow had drifted down and left the [201] channel clear below her; but inasmuch as there was a clear space of 500 feet of navigable water between the last barge and the Canadian bank of the channel, we should hesitate to condemn her for this fault, were there no others contributing more immediately to the collision.

Receiving no answer to her first blast, the Conemaugh, when the two steamers were about three quarters of a mile apart, repeated her signal of two blasts,—the New York then showing her masthead and both colored lights. Again no reply was made by the New York. The Conemaugh, which had then ported and was heading toward the Canadian shore, and about four points from the direct course down the river, gave a third signal of two blasts, the New York continuing to show all three of her lights, and being apparently close to and between the second and third barges of the tow. The New York made no answer to this third signal. The duty of the Conemaugh at this juncture was plain. She should have stopped her engines after the second signal, and, if necessary to bring her to a complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disre-

garded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. *The Louisiana v. Fisher*, 21 How. 1, 16 L. ed. 29; *Chamberlain v. Ward*, 21 How. 548, 16 L. ed. 211; *Nelson v. Leland*, 22 How. 48, 16 L. ed. 269; *The Martello*, 153 U. S. 64, 71, *sub nom. The Martello v. Willey*, 38 L. ed. 637, 640, 14 Sup. Ct. Rep. 723; *The Teutonia*, 23 Wall. 77, *sub nom. Seward v. The Teutonia*, 23 L. ed. 44; *The James Watt*, 2 W. Rob. 271; *The Birkenhead*, 3 W. Rob. 75; *The Hermann*, 4 Blatchf. 441, Fed. Cas. No. 6,408; *The Huntsville*, 8 Blatchf. 228, Fed. Cas. No. 6,915; *The Hammonia*, 4 Ben. 515, Fed. Cas. No. 6,005; *The Mary Sandford*, 3 Ben. 100, Fed. Cas. No. 9,225; *The Arabian*, 2 Stuart. Vice Adm. 72. There was peculiar necessity for such action in this case. These vessels were about to meet upon crossing courses, and to pass each other in the narrowest part of the channel. The Conemaugh had three times signaled her wish to take the Canadian side, and pass starboard to starboard. The New York had three times neglected to give her assent to this arrangement. The Conemaugh *had construed her failure to reply as an acquiescence in her own signals. The New York might have construed such failure as a refusal to acquiesce. In such a case it was clearly incumbent upon the Conemaugh to stop until the mystery of her silence was explained. and in failing so to do she was guilty of fault. Instead of that, while running under cheek and under a port helm, she steadied and almost immediately lost the green light of the New York, whereupon she sounded an alarm whistle, put her helm hard-a-starboard, and endeavored to shoot across the bows of the New York. The two steamers were then upon converging courses and about a quarter of a mile apart. Even then, if the Conemaugh had put her helm hard-a-port and reversed her engines she would probably have avoided a collision, although her final error, being apparently *in extremis*, perhaps ought not to be attributed to her as a fault. But she kept on her course at full speed, with her helm hard-a-starboard, while the New York came up the river, under a port wheel and at full speed, displaying her masthead and red light to the Conemaugh. Just before the collision the wheel of the New York was starboarded, but too late to avert the blow. She struck the Conemaugh on her starboard side near the gangway, and sank her within ten minutes. The place of the collision seems to have been very near the Canadian bank, and about 1,000 feet from and a little upon the port quarter of the Furguson, the stern barge of the Burlington's tow.

The fault of the Conemaugh appears the more flagrant from the fact that the two steamers were crossing vessels within the meaning of rule 19 (Rev. Stat. § 4233), and that the Conemaugh, having the New York upon her starboard side, was bound to keep out of her way. The supervising inspectors' rules require that this manœuver shall be

performed by porting the wheel and passing under the stern of the preferred vessel. But, irrespective of this rule, prudent seamanship ordinarily requires that the obligated vessel shall take a course which, if the preferred vessel perform her own duty, will certainly avoid a collision, *viz.*, port and go astern. If, upon the other hand, she elects to starboard and cross the *bows of the other vessel. [203] she incurs the manifest danger of not passing the point of intersection before the preferred vessel strikes her, and is justly considered as assuming the responsibility for the success of her manœuver. *The E. A. Packer*, 140 U. S. 360, 366, *sub nom. The E. A. Packer v. New Jersey Lighterage Co.* 35 L. ed. 453, 457, 11 Sup. Ct. Rep. 794; *The Nor*, 2 Asp. M. L. Cas. 264. Of course, there may be such conduct on the part of the favored vessel as would show that she was alone guilty of fault, but the greater safety of porting is so manifest that the circumstances must be quite exceptional to justify a different course. The failure of the Conemaugh's manœuver in this case only emphasizes her original fault in failing to come to a standstill when her two first signals to the New York were disregarded.

The conduct of the Conemaugh, as we shall hereafter show in the navigation of the New York, was not even consistent with her own theory, which was that she would cross the course of the New York and pass down between her and the Canadian bank. Instead of doing so, however, as soon as she had "picked up" the stern barges and ascertained their exact location, she ported her helm sufficiently to display to these barges a glimmer of her red light, and as the New York was about the same time starboarding to clear these barges, the result was that neither gave the other sufficient room to pass. These circumstances were most favorable to the collision which almost immediately ensued.

3. Inasmuch as no witnesses were sworn from the New York we are compelled to judge of the propriety of her manœuvres from the admissions in her answer and from the other testimony in the case. From these it appears that the propeller, a vessel of 1,700 tons, was bound up the river, and, when nearing the point below where the river Ronge empties into the Detroit just above Smith's Coal Dock, she descried the Burlington and her tow beginning to round to from the Canadian side of the river to the coal dock on the American side, exhibiting to the New York her masthead and red lights as well as the red side lights of the barges in tow. The answer avers that thereupon "the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about 4 miles an hour, and then porting her *helm so as to pass under the stern of the [204] last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not

answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and the bank."

If there were no other evidence in the case than these allegations, and the contradicted testimony of the Conemaugh that she blew three signals to the New York, none of which were answered, it is sufficient to show the latter to have been guilty of a grievous fault. The night was clear, and there appears to have been no difficulty in seeing the white and colored lights of the Burlington and her tow, and should have been none in seeing the lights of the Conemaugh. No reason is given why the signals of the Conemaugh were not heard, and as the New York was not more than a mile distant from her when her first signal was blown, and considerable less than that when the second signal was blown, her inability to hear them is inexplicable, except upon the theory that no sufficient lookout was maintained, or that such lookout did not attend properly to his duties. Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout. *The Sea Gull*, 23 Wall. 165, *sub nom. The Sarah Watson v. The Sea Gull*, 23 L. ed. 90; *The James Adger*, 3 Blatchf. 515, Fed. Cas. No. 7,188; *The Fanita*, 14 Blatchf. 545, Fed. Cas. No. 4,636; *The Sunnyside*, 91 U. S. 208, *sub nom. Miner v. The Sunnyside*, 23 L. ed. 302; *Spencer, Collisions*, § 175.

[205] The force of this presumption of a defective lookout is greatly strengthened by the fact that the claimant did not see fit to put upon the stand the officers and crew of the New York, who certainly would have been able to explain, if any explanation were possible, why the lights of the Conemaugh were not seen and distinguished or her signals heard. It was said by this court in the case of *Clifton v. United States*, 4 How. 242, 246, 11 L. ed. 957, that "to withhold testimony

wise determine the identity and course of the approaching vessel.

Her only excuse for her omission is that she was the preferred vessel within the 19th American and 16th Canadian rule, and that by the 23d American and 22d Canadian rule it was her duty to keep her course. But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty. As was said in the case of *The Sunnyside*, 91 U. S. 208, 222, *sub nom. Miner v. The Sunnyside*, 23 L. ed. 302, 307: "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters." See also *The Delaware*, 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; *The Maria Martin*, 12 Wall. 47, *sub nom. Martin v. Northern Transp. Co.* 20 L. ed. 255. Both the Canadian and American Codes provide that in construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid *immedi-[206] ate danger. There is another rule pertinent in this connection, namely, rule 21 American, and article 18 Canadian, that every vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. That the obligation to observe this rule attached to the New York under the peculiar circumstances of this case is entirely clear. Her attention had been called to the fact that a steamer was coming down the river between the rear barge and the Canadian bank. The channel was narrow, and the descending vessel had signified her intention to starboard her helm and pass the New York to the left. The New York avers in her answer that there was not room enough for any vessel to safely pass between her and the Canadian bank, but, notwithstanding this, she kept her course toward that bank, and was thus constantly narrowing the channel through which the Conemaugh signified her intention of passing. She averred that her speed in passing the tow was about 4 miles an hour, but the District Judge was of opinion that she maintained double that speed until the vessels came together. However this may be, her failure to answer the whistles of the Conemaugh, or to stop and reverse, after her white light was seen, was wholly inexcusable, and, under the particular circumstances, cannot be justified by her general duty as a favored vessel to keep her course or by anything that was said by this court in *The Britannia*, 153 U. S. 130, *sub nom. The Britannia v. Cleugh*, 38 L. ed. 660, 14 Sup. Ct. Rep. 795. The master of a pre-

ferred steamer cannot, by blindly adhering to her course, atone for the neglect of other precautions.

We do not wish to say that the New York was under any obligation to assent to the proposed arrangement, although in starboarding and passing close to the two rear barges she did in fact take the exact course she would have taken if she had assented. If she had blown one whistle she would have indicated her intention of pursuing her course under her port wheel as the privileged vessel; while if she had blown two whistles she would have starboarded, as she did starboard, and keep as near the rear barges as she safely could. What we do decide is that the duty to answer a signal is as im-

[207]perative *as the duty to give one. Not only does the 2d rule of the supervising inspectors require of crossing steamers that "signals by whistles shall be given and answered promptly," but ordinary prudence demands that an obligated steamer proposing by whistle to deviate from the customary course shall receive an immediate reply, that her wheel may be at once put to starboard or port, as the exigencies of the case may require. A delay of even a few seconds may seriously embarrass her as to the intention of the preferred vessel. This is now made obligatory upon vessels navigating the Great Lakes by the act of February 8, 1895 (28 Stat. at L. 645), the 23d rule of which declares that "every steam vessel receiving a signal from another shall promptly respond with the same signal, or as provided in rule 26." If the New York had promptly answered the Conemaugh's signals, probably no collision would have occurred.

The comments we have made upon the failure of the Conemaugh to stop and reverse are equally pertinent to the case of the New York. If she did not hear the whistles of the Conemaugh, she ought to have heard them; but irrespective of this, there was enough to apprise her of her danger in pursuing her course with unabated speed. She knew that she was about to meet in a narrow channel a steam vessel coming down upon her with the added speed given by a current of 2 to 2½ miles an hour. She heard her final signal of two blasts as she was passing the last barge, and should have known that if she continued her course a collision would be inevitable, and yet she did not stop or reverse. Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect. We cannot impress upon the masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels.

But, assuming the theory of the New York [208] to be true, and *that as the preferred vessel

she was bound to keep her course, under rule 19, the fulfilment of her duty in that regard undoubtedly added to the embarrassments of the Conemaugh. It is averred in her answer that after making the white light of the Conemaugh she continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded, so as to go close under her stern. For this change in her course she relies upon the case of *The John L. Hasbrouck*, 93 U. S. 405, *sub nom. Lyman v. The John L. Hasbrouck*, 23 L. ed. 962, in which we held that the obligation of a privileged vessel to keep her course does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation. In that case a sailing vessel descending the Hudson river at West Point was held to have been excused in changing her course to round a projection at that place, but in this case the New York had still from 500 to 800 feet before her before reaching the Canadian bank. Her original porting was undoubtedly to avoid the tow, but there seems to have been no immediate necessity for her starboarding to pass so close to the rear barges, though we should not condemn her upon this ground. See discussion of this in *The Velocity*, L. R. 3 P. C. 44; *The Banshee*, 6 Asp. M. L. Cas. 221. While the presence of the tow undoubtedly rendered it necessary for the New York to port, and thus to become a crossing vessel, and a preferred vessel under rule 19, there was no obstruction to her continuing under her port wheel until she had approached so near the Canadian bank as to make it necessary to turn.

The theory of the New York is an inconsistent one—as inconsistent as that of the Conemaugh. She argues that she was under no obligation to assent to the signals of the Conemaugh by starboarding her helm. But she did in fact starboard her helm, and now insists that she did this in discharge of her duty as a preferred vessel to resume her course after she had cleared the obstruction. But without deciding that she was in fault for starboarding, her conduct in so doing adds another to the many reasons why she should have indicated to the descending steamer her proposed course. If the Conemaugh *recognized the fact that she were the [209] preferred vessel and bound to hold her course it would naturally confuse her to see the New York suddenly starboarding, exhibit both her colored lights, and point directly toward her, as she must have done. The probable explanation of the course of the New York is that the officer of her deck was so intent upon watching the lights of the barges that he omitted to notice the lights of the Conemaugh until the vessels had approached so near that a collision became extremely probable. The fact that her lights were seen and her signals heard by the crews of the Burlington and her barges and by persons standing upon the coal dock, at a

greater distance from the Conemaugh than was the New York, only indicates more clearly that her lookout was either insufficient or incompetent. If he actually saw her and reported her to the officers of the deck, the responsibility is only shifted from the lookout to them.

Our conclusions are that the Conemaugh was in fault:—

For not stopping when the New York failed to answer her signals;

For porting and then starboarding in order to cross the bow of the New York;—and the New York:—

For an inefficient lookout;

For failing to answer the repeated signals of the Conemaugh; and—

For failure to stop, after she made the white light of the Conemaugh, until her course and movements had been satisfactorily ascertained.

4. The final question arises upon the insistence of the underwriters of the Conemaugh's cargo, that they are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision. They are correct in this contention. Indeed, this court has already so decided in the case of *The Atlas*, 93 U. S. 302, *sub nom. Phoenix Ins. Co. v. The Atlas*, 23 L. ed. 863. This was a libel against the *Atlas* by an insurer of the cargo of a canal boat in tow of the steam tug *Kate*, whereby the canal boat

[210] and her cargo were lost. It was insisted by the claimant that, as the libellant had failed to make the *Kate* a party, and as both vessels were found to be in fault for the collision, there could be a recovery of only a moiety of the damages. The case of *The Milan*, Lush. 388, was confidently relied upon as an authority. This court, however, was of opinion that a plaintiff who has suffered a loss by the negligence of two parties, was at liberty, both at common law and in admiralty, to sue both wrongdoers or either one of them at his election, and "it is equally clear that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately. . . . Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libellant, nor is it a question in this case whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act." A like ruling was made in *The Juniata*, 93 U. S. 337, *sub nom. United States v. Juniata*, 23 L. ed. 930, in which a libel was filed by the United States as owner of the cargo of a flatboat in tow of one of two vessels.

The decree of the Court of Appeals is therefore reversed, and the case remanded to the District Court for the Eastern District of Michigan for further proceedings in consonance with this opinion. Costs will be divided equally.

ADDYSTON PIPE & STEEL COMPANY[211] et al., Appts., v.

UNITED STATES.

(See S. C. Reporter's ed. 211-248.)

Power of Congress to restrict contracts in restraint of interstate commerce—constitutional guaranty of liberty of contract—combination to prevent competition and enhance prices—interference with combination affecting commerce within a state.

1. The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce.
2. The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of Congress so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.
3. An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the anti-trust act of Congress, passed July 2, 1890, so far as it applies to sales for delivery beyond the state in which the sale is made.
4. A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract.
5. A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, although the contract may be awarded to some party outside the state as the lowest bidder.

[No. 51.]

NOTE.—As to power of Congress to regulate commerce, see notes to *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 20 L. ed. U. S. 158; *Harmon v. Chicago*, 37 L. ed. U. S. 216.

As to illegal contracts; monopolies; restraint of trade; trade combinations; corporate trusts and combinations; stock-holding corporations,—see note to *United States v. Trans-Missouri Freight Asso.* 41 L. ed. U. S. 1007.

For other cases applying the act of Congress of July 2, 1890, prohibiting conspiracies in restraint of trade and commerce, and cases of combinations to regulate prices or prevent competition, see also *United States v. Jellico Mountain Coke & Coal Co.* (C. C. M. D. Tenn.) 12 L. R. A. 753; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, Reversing 53 Fed. Rep. 440. 24 L. R. A. 73; *Lowry v. Tille, Mantel, & Grate Asso.* 98 Fed. Rep. 817; *United States v. Coal Dealers' Asso.* 85 Fed. Rep. 252; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Argued April 26, 27, 1899. Decided December 4, 1899.

A PPEAL from the judgment of the Circuit Court of Appeals for the Sixth Circuit reversing a decision of the Circuit Court which dismissed a petition under the anti-trust act of Congress of July 2, 1890. *Modified and affirmed.*

See same case below, 54 U. S. App. 723, 85 Fed. Rep. 271, 29 C. C. A. 141, 46 L. R. A. 122.

Statement by Mr. Justice **Peckham**:

[212] *This proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, passed July 2, 1890. 26 Stat. at L. 209, chap. 647. It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale, and transportation of iron pipe at their respective places of business in the states of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the states, etc.

The trial court dismissed the petition (78 Fed. Rep. 712), but upon appeal to the circuit court of appeals the judgment of the court below was reversed, with instructions to enter a decree for the United States perpetually enjoining defendants from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination. 54 U. S. App. 723, 85 Fed. Rep. 271, 29 C. C. A. 141, 46 L. R. A. 122. The six defendants are the Addyston Pipe & Steel Company, of Cincinnati, Ohio; Dennis Long & Company, of Louisville, Kentucky; the Howard-Harrison Iron Company, of Bessemer, Alabama; the Anniston Pipe & Foundry Company, of Anniston, Alabama; *the South Pittsburg Pipe Works, of South Pittsburg, Tennessee; and the Chattanooga Foundry & Pipe Works, of Chattanooga, Tennessee; one company being in the state of Ohio, one in Kentucky, two in Alabama, and two in Tennessee.

[213] The following are in substance the facts upon which the judgment of the circuit court of appeals rested, as stated in the record:

It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement (comprising some thirty-six in all), in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had since that time operated their shops and had been selling and shipping the pipe manufactured by them into other states and territories, under contracts for the manufacture and sale of such pipe with citizens 175 U. S.

of such other states and territories. There was to be a "bonus" charged against the manufacture of the pipe, to the extent set forth in the agreements and to be paid as therein stated. The whole agreement was charged to have been entered into in order to enhance the price for the iron pipe dealt in by the defendants.

The petition prayed that all pipe sold and transported from one state to another, under the combination and conspiracy described therein, be forfeited to the petitioner and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants and perpetually enjoining them from operating under the same and from selling said cast-iron pipe in accordance therewith to be transported from one state into another.

The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of goods in transit, on the ground that such proceedings under the anti-trust act are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the existence *of an associa-[214] tion between them for the purpose of avoiding the great losses they would otherwise sustain, due to ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or that it was organized to create a monopoly, and denied it was a violation of the anti-trust act of Congress.

Testimony in the form of affidavits was submitted by petitioner and defendants, and by stipulation it was agreed that the final hearing might be had thereon.

From the minutes of the association, a copy of which was put in evidence by the petitioner, it appeared that, prior to December 28, 1894, the Anniston Company, the Howard-Harrison Company, the Chattanooga Company, and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership, and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops.

"Second. The bonuses on the next 75,000 tons, 30" and smaller, sizes to be divided among five shops, South Pittsburg not participating.

"Third. The bonuses of the next 40,000 tons, 36" and smaller, sizes to be divided among four shops, Anniston and South Pittsburg not participating.

"Fourth. The bonus on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg, and Anniston not participating.

[215] *—"The above division is based on the following tonnage of capacity:

South Pittsburg	15,000 tons.
Anniston	30,000 tons.
Chattanooga	40,000 tons.
Bessemer	45,000 tons.
Louisville	45,000 tons.
Cincinnati	45,000 tons.

"When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe & Steel Company, Dennis Long & Co., and the Howard-Harrison Company.

"It was thereupon resolved:

"First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

"Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

"Third. The Addyston Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

"Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities.

"Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities.

"Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in above-named cities.

"Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the

[216] *above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

"Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

"Note.—It is understood that all the shops who are members of this association shall handle the business of the gas and water com-

panies of the cities set apart for them, including all sizes of pipe made by them.

"The following bonuses were adopted for the different states as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of \$1 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of \$2 per ton.

List of Bonuses.

Alabama	\$3 00
B'gham, Ala.	2 00
Anniston, Ala.	2 00
Mobile, Ala.	1 00
Arizona Ter.	3 00
California	1 00
Colorado	2 00
Ind. Ter.	3 00
North C.	1 00
Tenn., east of C'land.	2 00
Tenn., middle and west.	3 00
Illinois, except Madison and East St. Louis, as previously provided	2 00
Wyoming	4 00
Oregon	1 00
Ohio	1 50
N. D.	2 00
S. D.	2 00
Florida	1 00
Georgia	2 00
Atlanta, Ga.	2 00
Ga. coast p'ts	1 00
Idaho	2 00
Nev.	3 00
Oklahoma	3 00
Wis.	2 00
Texas, interior	3 00
Texas coast	1 00
Wash'ton Ter.	1 00
Michigan	1 50
West Va.	1 00
Kansas	2 00
Ky.	2 00
La.	3 00
Miss.	4 00
Mo.	2 00
Montana	3 00
Nebraska	3 00
N. Mex.	3 00
S. C.	1 00
Minn.	2 00
Utah	4 00
Indiana	2 00
Iowa	2 00
All other territory free.	

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be \$2 per ton."

"The states for sale in which bonuses had to be paid into the association were called [217] "pay" territory as distinguished from "free" territory in which defendants were at liberty to make sales without restriction and without paying any bonus.

The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st

and 16th of each month he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same, and debt credit balance of each company."

The system of bonuses as a means of restricting competition and maintaining prices was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following:

"Whereas, the system now in operation in this association of having a fixed bonus on the several states has not in its operation resulted in the advancement in the prices of pipe as was anticipated, except in reserved cities, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops."

[218] In pursuance of the new plan it was further agreed "that all parties to this association having quotations out shall *notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st bonuses shall be fixed by the committee."

At the meeting of December 19, 1895, it was moved and carried that upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and bonuses should be fixed at a regular or called meeting of the principals.

At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into "pay" territory, rather than the totals shipped into "pay" and "free" territory.

To illustrate the mode of doing business the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given:

"It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for \$23.40, delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of \$8.

"Moved that 'bonus' on Anniston's Atlanta 175 U. S.

water works contract be fixed at \$7.10, provided freight is \$1.60 a ton. Carried."

An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2,800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company, of Bessemer, Ala. The price was fixed by the association at \$24 a ton, and the bonus at \$6.50. Before the letting the vice president of this company wrote to the other members of the association under date of January 24, 1896, as follows:

"I write to say that in view of the fact that I do not as yet know what the drayage will be on this pipe, I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than \$27 for the pipe, and 2¾ *cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders."

The contract was let to the Howard-Harrison Company, of Bessemer, at \$24, who allowed the Shickle, Harrison, & Howard Company, a pipe company of St. Louis not in the association, but having the same president as the Howard-Harrison Company, of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe & Steel Company and Dennis Long & Co., the former bidding \$24.37 and the latter \$24.57. The evidence shows that the Chattanooga foundry could have furnished this pipe, delivered in St. Louis, at from \$17 to \$18, and could have made a profit on it at that price. The record is full of instances of a similar kind, in which, after the successful bidder had been fixed by the "auction pool," or had been fixed by the arrangement as to reserve cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee. The letter is dated January 2, 1896, and is as follows:

"Dear Sir: Referring to our policy for 1896 in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in pay territory, and from estimates that we have made for business that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., *Cincinnati, and other shops, who have been bidding bonuses of \$6 or \$8 per ton, can come out and make any [220]

money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co. people on Jacksonville, Fla. The truth of the business is they are losing money at the prices they bid for this work. If they take the contract at \$19 delivered, it will only net \$16 at the shop after they have paid back the bonus of \$4.75; if they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they of course calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid and we only hope they will keep it up as it is only money in our pockets. As long as there is no money to us let them make the pipe, as we shall continue to do so.

"For the present you will adopt the following basis:

"On 16" and under standard weights, \$14.25 at shop.

"On 18" and 36" standard weights, \$13.

"On 16" and under light weights, \$14.50 to \$14.75 at shop.

"That is, you will bid all over \$13, \$14.25 and \$14.50 on work. If we get work at these prices it will be satisfactory. If the others run bonus above this point let them take it, as it will be more money to us to take the bonus.

"We note Mr. Thornton's report of average premiums from June 1st to December, that the average was \$3.63. The average bonuses that are prevailing to-day are \$7 to \$8. We cannot expect this to continue, and we think your estimate of \$6 ton average bonus is high, as we do not believe the premiums of '96 will average that price, unless there is a decided change for the better in business. We find there were sold and shipped into pay territory from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons, and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year: more than that, probably overrun 240,000 tons, from the fact that the city of Chicago and several other places that annually use large quantities of [221] pipe were not in the market last year, or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus,' which might be from \$3.50 to \$5 on our 40,000. If we cannot secure business in 'pay territory' at paying prices, we think we will be able to dispose of our output in 'free territory,' and of course make some profit on that.

"At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines, and one or two other points, they are losing from \$2.50 to \$3 per ton, that is, provided 'bonuses' would not be returned to them. Therefore when business goes at a loss, we are willing that other shops make it."

Another letter was written by the same

company pending a trouble over a letting at Atlanta. The Anniston Company, to whom Atlanta had been "reserved," made its bid so high (\$24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to underbid the Anniston Company in spite of difference in freights. All the bids had been rejected as too high, and upon a second letting Anniston's bid was \$1.25 a ton less, and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and reads as follows:

"Gentlemen: We are in receipt of a carbon copy of your favor of the 24th instant to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape, and that R. D. Wood & Company should make a lower bid by \$1 a ton than the southern shops. You know we have always been opposed to special customers and reserved cities, we do not think that it is the right principle and we believe, if the present association continues, that all special customers and reserved cities should be wiped out; there is no good reason why we should be allowed to handle New Orleans, you Atlanta, Howard-Harrison Iron Co. St. Louis, or [222] South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry, and we believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe if you will think over the matter carefully you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We cannot explain our position to the Atlanta people and we consider it is detrimental to our business, and think no combination should have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis, and other places. We think this matter should be considered seriously and some action taken that will result in re-establishing ourselves (I mean the four southern shops) in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man, has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected and have had all their business for the past two years is proof to them that such a 'combination' exists, and they state that if they find out positively that we are working together, they will never receive a bid from any one of us again. We cannot afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment, and no good reason exists why it should be so. We believe that, as a general thing, we have had our

prices entirely too high, and especially do we believe this has been the case as to prices in reserved cities. The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation against the combination. There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices

[223] for their pipe than other places near *them who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only, as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

It appears quite clearly from the prices at which the Chattanooga and South Pittsburg Companies offered pipe in free territory that any price which would net them from \$13 to \$15 a ton at their foundries would give them a profit. Pipe was freely offered by the defendants in freeterritory more than 500 miles from their foundries at less prices than their representative boards fixed prices for jobs let in cities in pay territory nearer to defendant's foundries by 300 miles or more.

The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies, who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable, but in not one of the affidavits was any attempt made to give figures as to cost of production and freight, and in not a single case were the specific instances shown by the evidence for the petitioner disputed.

There was some evidence as to the capacity of the defendants' mills. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable division of bonuses. Nowhere in the large mass of affidavits is there any statement of the *per diem* capacity of the defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the pay territory was 170,500 tons, and that of the mills in the free territory was 348,000 tons, according to the affidavit of the chief officer of one of the defendants.

[224] Of the nonassociation mills in the *pay territory one was at Pueblo, Colo., another was in the state penitentiary at Waco, Texas, and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another nonassociation mill was the Shickle, Howard, Harrison mill, of St. Louis, Mo., with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill at Bessemer, Ala., which was a member of the association, and it appears that an order

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taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the pay territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons, one at Cleveland, Ohio, of 69,000 tons, one at New Comerstown, in northeastern Ohio, of 8,000 tons, and one at Detroit, Mich., of 15,000 tons, and their aggregate annual capacity was 113,000 tons. In the free territory there was one mill in eastern Virginia with an annual capacity of 16,000 tons, four mills in eastern Pennsylvania with a capacity of 87,000 tons, three mills in New Jersey with a capacity of 210,000 tons, and two mills at New York, one at Utica and another at Buffalo, with an aggregate capacity of 35,000 tons.

The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, eastern Pennsylvania, and New Jersey in bidding on contracts to deliver pipe in nearly all of the pay territory varied from \$2 to \$6 a ton, according to the location.

The defendants filed the affidavits of their managing officers, in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants which would have carried prices far below a reasonable point; that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible and more than his due proportion; that the prices fixed by the association were always reasonable and *were always fixed, as they must [225] have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the free territory than in the pay territory was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices at a city like St. Louis, in which the specifications were detailed and precise, were higher because pipe had to be made especially for the job and they could not use stock on hand.

Mr. Frank Spurlock argued the cause and, with Mr. Foster V. Brown, filed a brief for appellants:

The freedom of contract is of paramount consideration, and is not lightly to be interfered with.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *National Benefit Co. v. Union Hospital Co.* 45 Minn. 272, 11 L. R. A. 437, 47 N. W. 806; *Greenhood*, Pub. Pol. 116.

Where the purpose of a contract is bona fide to prevent the ruinous consequences of competition, an agreement to divide a portion of the gross receipts among trading

firms is not illegal, and does not create a partnership.

Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; *Mayrant v. Marston*, 67 Ala. 453; *Fay v. Davidson*, 13 Minn. 298, Gil. 275; 3 Kent. p. 25, notes.

There is nothing illegal in an agreement effecting a division of territory, business, or customers among competitors, and confining each in his operations to a particular territory, or excluding each from a certain district.

Wickens v. Evans, 3 Younge & J. 318; *National Benefit Co. v. Union Hospital Co.* 45 Minn. 272, 11 L. R. A. 437, 47 N. W. 806; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Herriman v. Menzies*, 115 Cal. 16, 35 L. R. A. 318, 46 Pac. 730; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153.

Contracts by which a few manufacturers stipulate among themselves not to bid on contracts, except on certain terms and under certain regulations controlling the action of each, do not regulate commerce, nor are they illegal, even though they fix prices at which the parties must sell their goods.

Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 35 U. S. App. 16, 66 Fed. Rep. 637, 14 C. C. A. 14; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119.

Contracts not connected with or related to the transportation of an article of commerce from one state to another are no part of interstate commerce in the constitutional sense that they may be regulated by Congress.

Paul v. Virginia, 8 Wall. 183, 19 L. ed. 361.

Mr. John W. Warrington argued the cause and filed a brief for the Addyston Pipe & Steel Co. Messrs. Paxton, Warrington, and Boutet were on his brief.

Solicitor General John K. Richards argued the cause and filed a brief for appellee.

[226] *Mr. Justice Peckham, after stating the facts, delivered the opinion of the court:

The foregoing statement, which has been mainly taken from that preceding the opinion of Circuit Judge Taft, delivered in this case in the circuit court of appeals, comprises, as we think, all that is essential to the discussion of the questions arising in this case, and we believe the statement to be fully borne out as to the facts by the evidence set forth in the record.

Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the ap-

[227] pellants at the threshold of the inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the state by some political subdivision thereof, including also congressional power

over common carriers, elevator, gas, and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen, at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; and from the opinions of other justices of this court in the cases of *The State Freight Tax*, 15 Wall. 275, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 161; *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 589, 22 L. ed. 176; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 349; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; and *Kidd v. Pearson*, 128 U. S. at 21, 32 L. ed. 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation. The further remark is quoted from *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 589, 22 L. ed. 176, that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the court in the cases above cited. [228]

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes,

regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty, or property, without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *United States v. Joint Traffic Assn.* 171 U. S. 505, 572, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25. But it has never been, and in our opinion ought not to be, held that the word [229] included "the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states.

We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

While unfriendly or discriminating legislation of the several states may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as [230]

would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce.

If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate, interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some state had enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legis- [230] lation of a single state of the same character.

In *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, it was said by Mr. Justice Brewer, speaking for the court: "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

What sound reason can be given why Congress should have the power to interfere in the case of the state, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.

The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts might be the regulation of commerce among the states, possibly quite as effectually as if a state had passed a statute of like tenor as the contract.

The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which, from its general and great importance, has been granted to Congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even "though such regulation is effected [231] by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the state itself. In both cases it is an attempt to regulate a subject which, for the

purpose of regulation, has been, with some exceptions, such as are stated in *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 239; *Morgan's L. & T. R. & S. S. Co. v. Louisiana*, 118 U. S. 455, 465, 30 L. ed. 237, 242, 6 Sup. Ct. Rep. 1114; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 655, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934, exclusively granted to Congress, and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.

It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the states their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several states have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.

If it should be held that Congress has no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different states might and probably would differ in regard to the matter, according to what each state might regard as its own particular interest. One state might condemn all kinds of contracts of the class described, while another might permit the making of all of them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the states. These consequences would seemingly necessarily follow if it were decided that the state legislatures had control over the subject to the extent mentioned.

It is true, so far as we are informed, that no state legislature has heretofore authorized by affirmative legislation the making of contracts upon the matter of interstate commerce of the nature now under discussion. Nor has it, in terms, condemned them. The reason why no state legislation upon the

subject has been enacted has probably been because it was supposed to be a subject over which state legislatures had no jurisdiction. If it should be decided that they have, then the course of legislation of the different states on this subject would probably be as varied as we have already indicated.

On the other hand, if it be true that in no event could a state legislature enact a law affirmatively authorizing such contracts (even if Congress had no jurisdiction over the subject), because in so doing it would to a greater or less extent itself thereby, though indirectly, regulate interstate commerce, then the question whether such contracts were legal without legislative sanction would depend upon the decisions of the various state courts having jurisdiction in the cases, and, in that event, as the same question might arise in different states, there would be great probability of inconsistent and contradictory decisions among the courts of the different states, and that, too, upon questions of contracts amounting to the regulation of interstate commerce. It is true that under our system of government there are numerous subjects over which the states have exclusive jurisdiction, resulting in the enactment of different laws upon the same sub- [233] ject in various states, and also in varying and inconsistent judicial judgments in the different states upon the same subject. That condition has never been regarded as an end in itself desirable. It undoubtedly results in some confusion as to the law applicable to the particular case, and in many instances thereby increases the cost and renders doubtful the result of the litigation arising under such circumstances. They are results and the necessary accompaniment of the division of sovereignty between the states on the one hand and the Federal government on the other, and yet the enormous and inestimable benefits arising from the existence of separate, independent, and sovereign states have completely submerged the comparatively minor evils of inconsistent judgments and different laws upon many of the subjects over which the states have exclusive jurisdiction. But upon the matter of interstate and foreign commerce and the proper regulation thereof, the subject being not alone national but international in its character, the great importance of having but one source for the law which regulates that commerce throughout the length and breadth of the land cannot, in our opinion, be overestimated. Each state in that event would have complete jurisdiction over the commerce which was wholly within its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts of the nature we have been discussing.

The remark in *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 589, 22 L. ed. 176, that it was never intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments

[234] to interstate commerce, when read in connection with the facts stated in the report, is entirely sound. It therein appears that a contract had been made between the parties, as to the erection of an elevator and the business to be done by it, which contract was valid when made. Subsequently Congress passed acts relating to the construction of bridges over rivers and streams and authorizing railroads to carry passengers *on their way from one state to another. The railroad company, becoming tired of its contract with the elevator company, desired to take advantage of this legislation, and contended that under it the contract which it had theretofore made with the elevator company became void as an obstacle to or a regulation of commerce. The court held that contracts which were valid when made continue valid and capable of enforcement so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creation. It was then added that it never was intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce.

There is no intimation in this remark that Congress has no power to legislate regarding those contracts, which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them. If the necessary, direct, and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed.

[235] Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several *states includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power, as claimed by the appellants. We therefore think the appellants have failed in their contention upon this branch of the subject.

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We are thus brought to the question whether the contract or combination proved in this case is one which is either a direct restraint or a regulation of commerce among the several states or with foreign nations contrary to the act of Congress. It is objected on the part of the appellants that even if it affected interstate commerce the contract or combination was only a reasonable restraint upon a ruinous competition among themselves, and was formed only for the purpose of protecting the parties thereto in securing prices for their product that were fair and reasonable to themselves and the public. It is further objected that the agreement does not come within the act because it is not one which amounts to a regulation of interstate commerce, as it has no direct bearing upon or relation to that commerce, but that, on the contrary, the case herein involves the same principles which were under consideration in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, and, in accordance with that decision, the bill should be dismissed.

Referring to the first of these objections to the maintenance of this proceeding, we are of opinion that the agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them. Even if the objection thus set up would, if well founded in fact, constitute a defense, we agree with the circuit court of appeals in its statement of the special facts upon this branch of the case and with its opinion thereon as set forth by Circuit Judge Taft, as follows:

"The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, *and Virginia, constituting con-[236] siderably more than three quarters of the territory of the United States and significantly called by the associates 'pay' territory. Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga and South Pittsburg, and Anniston and Bessemer were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can

deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which eastern manufacturers would have to pay to deliver pipe in pay territory the defendants, by controlling two thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills of course somewhat affected their power in this respect in the northern part of the pay territory, but the further south the place of delivery was to be the more complete the monopoly over the trade which the defendants were able to exercise within the limits already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

"The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between the defendants, nearly equal to the advantage in freight rates enjoyed by defendants over eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret auction pool to become the lowest bidder of them at the public letting. Now the restraint thus imposed on themselves was only partial, it did not cover the United States, there was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States v. E. C. Knight Co.* 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249, Chief Justice Fuller, in speaking for the court, said: 'Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'

"It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe

in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their *opinion the prices at which pipe has been sold by the defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give to the defendants the power to charge unreasonable prices, had they chosen to do so. But if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry, written to the other defendants and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed \$15 a ton. It could have been delivered at Atlanta at \$17 to \$18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was \$24.25. The same thing was true all through pay territory to a greater or less degree, and especially at reserved cities." 54 U. S. App. 723, 85 Fed. Rep. 271, 29 C. C. A. 141, 46 L. R. A. 122.

The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed.

We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. It was there held that although the American Sugar Refining Company, by means of the combination referred to, had obtained a practical monopoly of the business of manufacturing sugar, yet the act of Congress did not touch the case, because the combination only related to manufacture, and not to commerce among the states or with foreign nations. The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, *commerce among the states might be thereafter somewhat affected. Mr. Chief Justice Fuller, in delivering the opinion of the court, spoke of the distinction between the two subjects, and said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that therefore the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it.

"Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it.

"It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

[240] "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we *have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The direct purpose of the combination in the *Knight Case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce.

We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct

and immediate result of the combination engaged in by the defendants.

While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles *manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, Was not this a direct restraint upon interstate commerce in those goods?

If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be), the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where by agreement among themselves the parties choose one of their number to make a bid for the supply of the pipe for delivery in another state, and agree that all other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration does not such a contract clearly violate that statute?

As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-203, 29 L. ed. 158-161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity

[242] among the several states, it is brought within the provisions of the statute. The power to regulate *such commerce, that is, the power to prescribe the rules by which it shall be governed, is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result.

The defendants allege, and it is true, that their business is not like a factory manufacturing an article of a certain kind for which there is at all times a demand, and which is manufactured without any regard to a particular sale or for a particular customer. In this respect as in many others the business differs radically from the sugar refiners. The business of defendants is carried on by obtaining particular contracts for the sale, transportation, and delivery of iron pipe of a certain description, quality, and strength, differing in different contracts as the intended use may differ. These contracts are, generally speaking, obtained at a public letting, at which there are many competitors, and the contract bid for includes, in its terms, the sale of the pipe and its delivery at the place desired, the cost of transportation being included in the purchase price of the pipe. The contract is one for the sale and delivery of a certain kind of pipe, and it is not generally essential to its performance that it should be manufactured for that particular contract, although sometimes it may be.

[243] If the successful bidder had on hand iron pipe of the kind specified, or if he could procure it by purchase, he could in most cases deliver such pipe in fulfilment of his contract just the same as if he manufactured the pipe subsequently to the making of the contract and for the specific purpose of its performance. It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce. Municipal corporations and gas, railroad, and water companies *are among the chief customers for the pipe, and when they desire the article they give notice of the kind and quality, size, strength, and purpose for which the pipe is desired, and announce they will receive proposals for furnishing the same at the place indicated by them. Into this contest (and irrespective of the reserved cities) the defendants enter, not in truth as competitors, but under an agreement or combination among themselves which eliminates all competition between them for the contract, and permits one of their number to make his own bid and requires the others to bid over him. In certain sections of the country the defend-

ants would have, by reason of their situation, such an advantage over all other competitors that there would practically be no chance for any other than one of their number to obtain the contract, unless the price bid was so exorbitant as to give others not so favorably situated an opportunity to snatch it from their hands. Under these circumstances, the agreement or combination of the defendants, entered into for that express purpose and to directly obtain that desired result, would inevitably and necessarily give to the defendant, who was agreed upon among themselves to make the lowest bid, the contract desired and at a higher price than otherwise would have been obtained, and all the other parties to the combination would, by virtue of its terms, be restricted from an attempt to obtain the contract.

The combination thus had a direct, immediate, and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

The cases of *Hopkins v. United States* and *Anderson v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, and 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, are not relevant. In the *Hopkins Case* it was held that the business of the members *of the [244] Kansas City Live Stock Exchange was not interstate commerce, and hence the act of Congress did not affect them; while in the *Anderson Case* it was held that whether the members of the Traders' Live Stock Exchange were or were not engaged in the business of interstate commerce was immaterial, as the agreement proved was not in restraint of trade and did not regulate such commerce. It was said that when it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce were only indirect and incidental. The agreement involved in that case was held to be of such a character. The case we have here is of an entirely different nature, and is not covered or affected by the decisions cited.

It is also urged that as but one contract would be awarded for the work proposed at any place, and therefore only one person would secure it by virtue of being the lowest bidder, the selection by defendants of one of their number to make the lowest bid as among themselves could not operate as any restraint of trade; that the combination or agreement operated only to make a selection

of that one who should have the contract by being the lowest bidder, and it did not in the most remote degree itself limit the number or extent of contracts, and therefore could not operate to restrain interstate trade. This takes no heed of the purpose and effect of the combination to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves.

We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made.

[245] Total suppression of the *trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.

If iron pipe cost \$100 a ton instead of the prices which the record shows were paid for it, no one, we think, would contend that the trade in it would amount to as much as if the lower prices prevailed. The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article. It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let the better for the combination. It was formed not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. And when by reason of the combination a particular contract may have been obtained for one of the parties thereto, but at a higher price than would otherwise have been paid, the charge that the combination was one in restraint of trade is not answered by the statement that the particular contract was in truth obtained and not prevented. The parties to such a combination might realize more profit by the higher prices they would secure than they could earn by doing more work at a much less price. The question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade.

Decisions regarding the validity of tax-
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tion by or under state authority, involving sometimes the question of the point of time that an article intended for transportation beyond the *state ceases to be governed ex-[246] clusively by the domestic law and begins to be governed and protected by the national law of commercial regulation, are not of very close application here. The commodity may not have commenced its journey, and so may still be completely within the jurisdiction of the state for purposes of state taxation, and yet at that same time the commodity may have been sold for delivery in another state. Any combination among dealers in that kind of commodity, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would, in our opinion, be one in restraint of trade or commerce among the states, even though the article to be transported and delivered in another state were still taxable at its place of manufacture.

It is said that a particular business must be distinguished from its mere subjects, and from the instruments by which the business is carried on; that in most cases of a large manufacturing company it could only be carried on by shipping products from one state to another, and that the business of such an establishment would be related to interstate commerce only incidentally and indirectly. This proposition we are not called upon to deny. It is not, however, relevant. Where the contract is for the sale of the article and for its delivery in another state, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture.

It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight Case*—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at *some time to sell, and possibly to sell in an-[247] other state; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided.

The views above expressed lead generally to an affirmance of the judgment of the court of appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Con-

gress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.

In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it.

[248] The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract *for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to someone outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the Federal power derived from the commerce clause in the Constitution.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character. *As thus modified the decree is affirmed.*

MAY HAYS, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 248-262.).

Mexican grant by justice of the peace—insufficient evidence of grant—effect of continued possession—possession since the treaty of cession.

1. A document purporting to be a grant of land in New Mexico by a justice of the peace, or alcalde, in 1842, making no reference to any grant or order of the governor, but certifying that the petitioner appeared before the magistrate, and that he found the petition to be just, etc., and made the donation in the

name of God and the Mexican nation, but without making any mention of the delivery of juridical possession, or of any of the formalities which under the Spanish and Mexican custom were observed by the officer delivering possession, is insufficient, together with oral testimony of witnesses stating their recollection of what took place thirty years before, though they state that a grant was made by the governor, to show that any valid grant was made,—especially when there is no evidence that any such grant was ever recorded or that any testimonio was ever delivered to the grantee.

2. Possession for six or seven years before the treaty of Guadalupe Hidalgo in 1848, of land by an alleged grantee, is not sufficient to constitute a title which can be confirmed under the court of private land claims act, where a valid grant is not proved to have been made.
3. Possession of land since the date of the treaty of Guadalupe Hidalgo, in 1848, cannot be considered as dispensing with the requirement that a title to lands, if not perfect at that time, must be one that the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States.

[No. 19.]

Argued October 10, 1899. Decided December 4, 1899.

APPEAL from the Court of Private Land Claims to review a judgment dismissing a petition for confirmation of a Mexican grant for land in New Mexico. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was a suit instituted by the appellant in the court of private land claims, for the confirmation of a grant of land situate in the county of San Miguel, New Mexico, known as *the "Apache Springs," or "Ojo del [249] Apache" grant, and alleged to contain 11 square leagues, or 47,743 square acres.

The amended petition alleged substantially that prior to June 2, 1842, Manuel Armijo, then governor of New Mexico, granted the tract in question to Ventura Trujillo, in accordance with his petition for the same, and by decree directed the constitutional alcalde of the demarcation of San Miguel del Bado to place the petitioner in possession; that said alcalde subsequently made return that he had placed the petitioner in juridical possession of the lands as directed, and that this return, with the original papers, was duly deposited in the archives of New Mexico.

Petitioner further alleged that he had neither the original of said petition, nor a copy thereof, nor the decree of the governor, nor the return of the alcalde, in his possession; and that neither of them is in the possession of the surveyor general of New Mexico; but he alleged that the archives of New Mexico, previous to the occupation of the territory by the United States, and for some time thereafter, were kept carelessly, and many of the papers and documents, including those therein mentioned, were lost and destroyed; and prayed that he might be permitted to give secondary evidence of the petition, decree, and order of the governor, and of the return of the alcalde.

He further alleged that on July 2, 1842, Damasio Salazar, a justice of the peace of the demarcation of San Miguel del Bado, now embraced within the limits of the county of San Miguel, acting in conformity with the laws and customs of Mexico, placed Ventura Trujillo in possession of the tract so granted; that he entered into such possession and occupied the same for about four years from July, 1842, and that, by sundry mesne conveyances from him to parties who continued such possession, the petitioner, by virtue of the original grant and these mesne conveyances, now claims the ownership of the whole of said tract; and that ever since the year 1842, and at the present time, the said grantee, Ventura Trujillo, and his legal representatives and those claiming under him and

[250] them, have held, claimed, used and *occupied, owned and grazed upon, peaceably and notoriously, the whole of said lands.

That no survey of the tract has ever been made; that petitioner cannot state the amount, but that it does not exceed 11 leagues; that one Taylor, who was then the owner of the grant and one of the mesne grantees, made application to the surveyor general of New Mexico for the approval of said grant under the law of July 22, 1854, which was rejected December 19, 1872, upon the ground that the grant was made by a justice of the peace, who, under the laws of New Mexico, had no power to make a grant of lands; that subsequently, and upon September 22, 1873, application was made to the surveyor general to reopen the application for confirmation, and to receive new testimony which had been discovered. The application was granted, so far as to permit the new testimony to be introduced, and the depositions of Guadalupe Miranda, secretary of New Mexico during the administration of Governor Armijo, and of Rafael Aragon, secretary of Damasio Salazar, the constitutional alcalde who placed Trujillo in possession, were taken and made a part of the petition. The application was again rejected by the surveyor general upon the ground that the depositions, being based entirely upon memory, were insufficient to establish a grant by the governor; that Miranda and Aragon are now dead; that the grant has, since July, 1842, remained in the possession of the grantee and his assigns, and has been generally recognized.

No question was made with regard to the intermediate conveyances to the petitioner or of the other formal allegations bringing the case within the provisions of the act establishing the court of private land claims.

The case was tried by the court upon the pleadings and evidence, the claim rejected, and the petition dismissed by a majority of the court. Petitioner thereupon appealed to this court.

Mr. T. B. Catron argued the cause and filed a brief for appellant:

The public acts of public officers purporting to be exercised in an official capacity and by public authority are not to be presumed to be usurped; but a legitimate authority

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previously given, or subsequently ratified, which is equivalent, must be presumed.

United States v. Arredondo, 6 Pet. 729, 8 L. ed. 561.

For more than twenty years the grantee and those holding and claiming under him had actual, adverse, continuous, exclusive, open, and notorious possession, claiming the same under the act of juridical possession and a grant made by the governor of New Mexico. A grant will therefore be presumed.

United States v. Chaves, 159 U. S. 464, 40 L. ed. 220, 16 Sup. Ct. Rep. 57.

Mr. William H. Pope argued the cause and, with Mr. Matthew G. Reynolds and Solicitor General Richards, filed a brief for appellee:

Testimony of the late officers of the Mexican government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives.

Luco v. United States, 23 How. 515, 16 L. ed. 545; *United States v. Bolton*, 23 How. 347, 16 L. ed. 571; *United States v. Castro*, 24 How. 346, 16 L. ed. 659; *United States v. Moorhead*, 1 Black, 228, 17 L. ed. 76; *United States v. Neleigh*, 1 Black, 298, 17 L. ed. 144; *Romero v. United States*, 1 Wall. 743, 17 L. ed. 633; *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221.

Possession under the Spanish or Mexican governments can never ripen into a prescriptive title against them.

2 Orozco's Legislation and Jurisprudence on Public Lands, p. 1007, title 3, pp. 993 *et seq.*; Hall, Mexican Law, §§ 53 *et seq.*, also §§ 612, 639; *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53; *Hayes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735; *Ely v. United States*, 171 U. S. 233, 43 L. ed. 147, 18 Sup. Ct. Rep. 840.

Whatever may have been the rule as to the operation of prescription against the Spanish and Mexican governments, it did not run, after the treaty, against the United States.

Lindsey v. Miller, 9 Pet. 672, 8 L. ed. 541; *Gibson v. Chouteau*, 13 Wall. 99, 20 L. ed. 534; *Weber v. Harbor Comrs.* 18 Wall. 70, *sub nom. Weber v. State Harbor Comrs.* 21 L. ed. 803; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83.

*Mr. Justice Brown delivered the opinion of the court:

The only documentary evidence of title which appears in the record is the following translation of a grant purporting to have been signed by Damasio Salazar, described therein as a justice of the peace. In the original Spanish he is described as *Jues de pas* (paz) and subsequently as "alcalde:"

Translation.

Seal fourth. (Seal.) One fourth real. For the years eighteen hundred and forty and eighteen hundred and forty-one.

In this second demarcation San Miguel del Bado, on the second day of the month of July of the present year, eighteen hundred and forty-two, before me, citizen Damasio Salazar, justice of the peace of said precinct, personally present appeared citizen Ventura Trujillo, citizen and resident of the first demarcation, soliciting the place and land commonly called the Ojito del Apache, to establish, in company with his children, a farm on which he believes he will have the means necessary for the support of a large family, and to give tithes (illegible) and the holy church their corresponding portions, and I, said alcalde, finding the petition to be a just one and acting in conformity with the supreme decrees, have made him said donation in the name of God and the supreme Mexican nation, so that as a good compatriot, he may make use of it, observing the requirements which our laws provide, under the condition and restrictions that if he does not provide a protection to prevent the damages which may result to him, he is under obligation to bear them, it being commons and pasture grounds of the inhabitants of the precinct; and the boundaries corresponding to said grant are on the north the mesa; on the south the old road to Los Chupaines; on the east the Mesa de los Chupaines; and on the west the hills bordering on Cañoncito de la Lagunita; and in order that this foregoing instrument may have the force and validity by law required

[252] the aforesaid Trujillo requested me *to interpose my authority and judicial decree, and I, the said justice, declared that I would interpose, and did interpose, as far as I am authorized by law, those of my attendants signing with me, with whom I act by appointment, for the notorious lack of a notary public, there being none of any kind in this department. In form of law, to all of which I certify.

Damasio Salazar.

Attending: Rafal. Aragon.

Attending: Salvador Gonzales.

And it is given on this ante-stamped paper, there being none of the proper stamp.

Salazar.

1. The theory of the petitioner is that, some time prior to the date of this document, there was a grant by Governor Armijo to Ventura Trujillo, in accordance with his petition, and that the governor by his decree directed Salazar, the alcalde, to deliver to the petitioner juridical possession of the land; that said alcalde afterwards made return to the effect that he had done so, and that these documents were deposited in the archives of New Mexico, but were subsequently, and about the time of the occupation of the territory by the United States, lost and destroyed. In support of this theory he produced the deposition of Guadalupe Miranda, secretary of the territory of New Mexico during the administration of Governor Armijo, taken November, 1873, to the effect that he was acquainted with Trujillo, and remembered that, about the year 1841 or 1842, he petitioned the governor for this grant of land; that the governor granted the petition, issued a decree to that effect, and directed the

constitutional alcalde to place him in possession, "which said decree he signed as governor of the territory, and I signed the same along with him as secretary of said territory;" that the alcalde, subsequently made return that he had placed the petitioner in possession, in obedience to the decree of the governor, and that these papers were duly deposited in the archives of New Mexico and remained under the charge of deponent as public records, he being at that time the legal custodian, and that *from this time [253] Trujillo was considered and reputed as the lawful owner and possessor of the lands by the people in general, as well as by the territorial authorities.

Petitioner also produced the deposition of Rafael Aragon, taken about the same time, a man seventy-seven years of age and a laborer by occupation, who testified that the grant was made to Trujillo and his children in the year 1841 by the Alcalde Damasio Salazar; that witness was at the time the secretary of the alcalde, wrote the grant, and that the same was made under and by virtue of an order of the governor. In his own words he says: "The order referred to was a written one addressed to said Alcalde Salazar through Guadalupe Miranda, secretary of state of the government, and was of about this tenor, to wit: I am directed by his excellency the governor to say to you that upon the receipt hereof you will proceed to the place called the Ojito del Apache and will there place the petitioner, Ventura Trujillo, in possession of that land. Salazar was addressed in this communication as the alcalde of the second demarcation of San Miguel, and the communication was deposited among the archives of the alcalde's office. The directions of the order were carried out by the alcalde by placing Trujillo in possession of the land, and the alcalde then reported to Secretary Miranda that the governor's order had been duly executed. Salazar went upon the spot in company with Trujillo and placed the latter in possession by pointing out and designating to him the boundaries of the tract. Trujillo went upon the land to occupy it, I think, in July, 1842. He occupied the place four years, having built upon it a small house, constructed some small tanks, and planted some ground. He was succeeded on the place by Juan Lucero, he by Jesus Casades, and he by John L. Taylor, here present."

Francisco Trujillo also testified that his father, who was Ventura Trujillo, had brought a very rich woman from the Comanches, and after that the Mexican government made this grant to his father, and that there was an order signed by the government (governor) with a man to go and deliver the land to his father. That he knows the order was signed by *Governor Armijo, and declared [254] (directed) Damasio Salazar to go and deliver the land. That the land was delivered in the year 1842. That he was present when it was delivered by Salazar and Rafael Aragon, his secretary, and that a communication was signed stating that it had been delivered. He also states that he heard Salazar say, in

respect to the order of the governor, that the order was to deliver the land to his father, and then he says that Damasio Salazar sent a communication to General Armijo, stating that the land had been delivered. That his father and Damasio Salazar both told him that it had been sent.

Upon the other hand, however, an inspection of the document signed by Salazar shows no reference whatever to a grant made by the governor or any order made by the governor directing him to put the grantee in juridical possession, although in making the grant he purports to be acting "in conformity with the supreme decrees," which means nothing more than he is acting in conformity with the laws of the land. The grant certifies that Trujillo personally appeared before him, solicited the land as a farm for the support of a large family, and that he, the alcalde, "finding the petition to be a just one, and acting in conformity with the supreme decrees, have made him said donation in the name of God and the supreme Mexican nation, so that as a good compatriot he may make good use of it," under certain conditions, and "in order that this foregoing instrument may have the force and validity by law required, the aforesaid Trujillo has requested me to interpose my authority and judicial decree, and I, the said justice, declared that I would interpose, and did interpose, as far as I am authorized by law."

Not only is there no reference to a decree of the governor, but it is doubtful whether the instrument was intended as an absolute grant of the land or anything more than a usufruct, as the donation is made "so that as a good compatriot he may make use of it," the land being declared to be "commons and pasture grounds of the inhabitants of this precinct."

[255] Indeed, it is doubtful whether the reference in the petition to a grant of the governor was not an afterthought, inasmuch *as in a petition made by John L. Taylor (then claimant of this tract) to the surveyor general of New Mexico, about the year 1870, the following allegation is made as to the title: "Your petitioner would further state that said grant of land was duly made according to law and the usage and customs of the laws of New Mexico on the second day of July, eighteen hundred and forty-two (1842) by one Demasio Salazar, a justice of the peace in the said county of San Miguel del Bado, to one J. C. Ventura Trujillo, a resident of said county of San Miguel del Bado." No reference was made in this petition to a grant by the governor. This petition having been rejected by the surveyor general, upon the ground that an alcalde had no power to make donation of vacant public lands, Taylor, in 1873, applied for a rehearing upon the ground of the newly discovered evidence of Miranda and Aragon to the effect that the governor had made such grant. The petition was again (December 19, 1872) denied, "the matter being now before Congress."

It further appeared and was stipulated that a certain index made by Antonio B. Vigil, completed in the year 1851, and entitled

"A general index of all documents of the government of Spain and Mexico up to the year 1846," contained no mention of any grant of the Ojo del Apache tract.

Upon the whole, we think it extremely improbable that, if a grant had been made by the governor, no reference whatever should have been made to it by the alcalde, who, upon the theory of the petitioner, was acting merely as the right hand of the governor in putting Trujillo into possession. The document is not in the usual form of a return to an order of a governor to put a grantee into juridical possession of the land, of which the reports and records of this court show many examples, but of an attempt by an alcalde to make a grant himself upon the petition of an applicant. But if the governor had already made the grant why should the alcalde undertake to make one, or state the reasons why in his opinion it should be made?

He does not pretend to be acting pursuant to a decree of the governor, and makes no mention of a delivery of juridical "possession" [256] by going upon the premises with the petitioner, pointing out the boundaries, plucking grass, or throwing stones, taking the grantee by the hand and leading him over the lands, or of any of the formalities which, under the Spanish and Mexican customs, were observed by the officer delivering possession. The document is such an one as the governor might have been expected to execute, but by no means such as to show that the alcalde intended to deliver juridical possession. In short, he assumed to do that which he had no right to do, and carefully omitted to do that for which he had complete legal authority.

When we consider what was required to be done under the regulations for the colonization of the territories of Mexico, made November 21, 1828 (Reynolds, Span. & Mex. Law, 141), in pursuance of the act of the Mexican Congress of August 18, 1824 (Reynolds, Span. & Mex. Law, 121), and the practice of the officers in that connection, the failure to conform to the recognized methods of disposing of public lands becomes still more important. These regulations are stated in *United States v. Cambuster*, 20 How. 59, 15 L. ed. 828, and *United States v. Bolton*, 23 How. 341, 16 L. ed. 569, and required—

1. That the governor of the territory should be empowered to grant vacant lands for the purposes of cultivation (Reg. No. 1, Reynolds, Span. & Mex. Law, 141);

2. That a petition should be addressed to the governor, describing the applicant by name, country, and profession, and, as distinctly as possible, the land requested (Reg. No. 2);

3. That the governor should proceed to obtain the necessary information with regard to the land and the petitioner, and whether there be any objection to making the grant (Reg. No. 3);

4. That, if the governor accede to the petition, he shall make a grant, describing the boundaries of the land, to serve as a title to the party interested, and refer it to a subor-

dinate officer, such as an alcalde, to make delivery of juridical possession (Reg. No. 8, Hall, Mex. Law, § 511);

[257] 5. A return by such officer to the governor that he accompanied the petitioner to the lands and delivered possession to *him with the usual formalities observed for the investiture of title;

6. That these papers should be placed of record in the archives of the territory, and that a copy or testimonio be delivered to the petitioner. Whether the grant of the governor required the approval of the departmental assembly or territorial deputation, is not a question which arises in this case. (Reg. 5, 6, 7, Hall, Mex. Law, § 580; *United States v. Reading*, 18 How. 1, 7, 15 L. ed. 291, 294; *Hornsby v. United States*, 10 Wall. 224, 19 L. ed. 900; *United States v. Vigil*, 13 Wall. 449, 29 L. ed. 602).

Not a single one of these formalities appears to have been observed, but we are left to infer from the testimony of two or three witnesses, who swore to their recollection of what took place thirty years before, that some of them were in fact observed. When we consider that this testimony is contradicted, or at least rendered exceedingly improbable, by the only document which the petitioner is now able to produce, we must admit that oral testimony of this kind forms a very uncertain basis upon which to sustain a grant of lands. As we said with respect to a somewhat similar state of facts connected with an alleged grant of land in California (*Luco v. United States*, 23 How. 515, 543, 16 L. ed. 545, 551): "It may be received as a general rule of decision, that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it, be found on file among the archives, where other and genuine grants of the same year are found; and that, owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives." In the case of *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221, it was said that written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, if coming from private hands, is insufficient to establish a Mexican grant if there be nothing in the public records to

[258] *show that such evidence ever existed. But it was intimated that, if the claimant can show to the satisfaction of the court that the grant had been made in conformity to law and recorded, and that the record has been lost or destroyed, he will then be permitted to give secondary evidence of its contents. See also *Fuentes v. United States*, 22 How. 443, 16 L. ed. 376; *United States v. Knight*, 1 Black, 227, sub nom. *United States v. Moorehead*, 17 L. ed. 76; *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232.

In this case, however, the same uncertainty

which exists with regard to a grant having been made by the governor necessarily attends the fact as to whether it was ever recorded, and as no testimonio was ever delivered to the grantee, it must be held that the existence of the grant has not been proved.

That a justice of the peace or an alcalde had no power to make a grant of public lands is evident from the character of his office, which appears to have been analogous to that of an ordinary justice of the peace (Decree of July 22, 1833, Reynolds, Span. & Mex. Law, 170, 176), and from the failure to find any evidence in the laws of Spain or Mexico that such power existed. Indeed, such want of power is admitted by the petitioner. See *Reynolds v. West*, 1 Cal. 322; *Crespin v. United States*, 168 U. S. 208, 213, 42 L. ed. 438, 440, 18 Sup. Ct. Rep. 53.

2. In further support of his petition, the depositions of several witnesses were introduced in evidence tending to show that the tract in question had been occupied by the original grantee and those claiming under him ever since the date of the alleged grant, and, indeed, for some years previous thereto. Upon the other hand, oral evidence was introduced by the government to the effect that the land in question had never been occupied by the original grantee, but that he and his family lived at the time of his death, and for many years prior thereto, several miles distant from the land in question. While Trujillo had been upon the land in 1842, he made no improvements thereon, and after remaining a few days left the premises with the remark that the document, for which he paid \$3 to Salazar, was worth more than the whole grant; also that the property at that time, and for years subsequent to the possession by the government of the *United States, [259] had been used as common pasturing ground for the people of the vicinity, the alleged grantee or his representatives making no claim to be the owner thereof.

That it should be used for pasturage by the neighboring inhabitants is certainly consistent with the alleged grant, which describes the lands as "commons and pasture grounds of the inhabitants of this precinct," and there is nothing upon the face of the grant indicating that this right of pasturage was intended to be taken away. The grantee was apparently to be allowed to establish a farm there for the support of his family, but there is no intimation that he was to have the power to exclude the inhabitants from their customary use of such tract as commons and pasture grounds. Indeed, giving the fullest credence to his testimony, there is little or nothing to indicate that the possession of the grantee, under the alleged grant, was characterized by the notoriety, openness, and exclusive character necessary to make out a title by adverse possession.

In addition to this, however, the possession did not begin until 1842, and at the date of the treaty of Guadalupe Hidalgo, in 1848, such possession had not lasted for more than six or seven years. In other words, the claim had not become "complete and perfect at

the date of the treaty, nor one that claimant would have had a lawful right to make perfect had the territory not been acquired by the United States," within the meaning of the court of private land claims act. In *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53, the plaintiffs claimed under a grant alleged to have been made in 1840, by a prefect, and also by adverse possession since that time. We held, however, that the language of the act creating the court of private land claims, above quoted, "would preclude the idea that possession since the date of the treaty, however exclusive and notorious, could be regarded as an element going to make up a perfect title. There was no evidence of more than six or eight years' possession prior to the date of the treaty, and this, under any construction of the Spanish or Mexican laws, would be insufficient to constitute a title as against the sovereign." See also *Bergere v. United States*, 168 U. S. 66, 77, 42 L. ed. [260] 383, 386, 18 Sup. Ct. Rep. 4; *Hayes v. United States*, 170 U. S. 637, 649, 653, 42 L. ed. 1174, 1179, 1181, 18 Sup. Ct. Rep. 735. In this last case it is said: "As the ordinary prescription could not apply, and as the necessary time for the extraordinary prescription under the Spanish law had not run at the time of the acquisition of the territory by the United States, and as, clearly, whatever may have been the rule as to the operation of prescription against the Spanish or Mexican governments, it did not run after the treaty against the United States, it follows that the claim of prescription is without foundation."

It would seem to follow from the general principle of law, so often asserted, that the statute of limitations does not run against the government, that no length of possession since the treaty of 1848 would of itself give a valid title to land. How far the long-continued possession prior to the date of the treaty would be operative against the Spanish or Mexican governments is a question which does not arise in this case, where the possession did not exceed six years. See *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 538; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Webber v. Harbor Comrs.* 18 Wall. 57, 70, 21 L. ed. 798, 803; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83.

In *United States v. De Haro*, 22 How. 293, 16 L. ed. 343, there was a grant made in 1843 by Governor Alvarado, of California, and, with a possession of sixteen years thereafter, was held to be sufficient presumption of a legal grant, but there was no requirement as above stated with regard to the court of private land claims act. In *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57, there was evidence of an original grant in 1833 by the government of New Mexico, although the original records had been lost. The grant was proved by secondary evidence and a possession of sixty years thereunder, and it was held that a legal grant might be

presumed upon proof of adverse possession for twenty years, the court observing: "Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record."

The doctrine at the foundation of that case is thus stated by Mr. Justice Story in *Ricard v. Williams*, 7 Wheat. 59, 109, 5 L. ed. 398, 410: "A *grant of land may as well be pre-[261]sumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may therefore be encountered and rebutted by contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant; *a fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant. In general, it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defense, independently of any presumption of a grant, and therefore it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations."

But this presumption is subject to the limitation that where title is claimed from a deed which is shown to be void, it will not be presumed that there was an independent grant (*Smith v. Higbee*, 12 Vt. 124); or where surrounding circumstances are inconsistent with the theory of a grant. *Townsend v. Downer*, 32 Vt. 183.

The substance of this doctrine is that lapse of time may be treated as helping out the presumption of a grant, but where a void grant is shown it affords no presumption that another valid grant was made. Nor does such presumption arise if the surrounding circumstances are incompatible with the existence of a grant. In the case under consideration we *cannot find any evidence which [262] justifies us in believing that a legal grant can have been made, and under those circumstances we cannot consider possession since the date of the treaty as dispensing with the requirement that the title, if not perfect at that time, was one which the claimant would have had a lawful right to make perfect had

the territory not been acquired by the United States.

In the view we have taken of this case, it becomes unnecessary to consider whether Governor Armijo had power or authority to make a grant of public lands without the assent of the territorial deputation or departmental assembly.

The judgment of the court below must therefore be affirmed.

CHARLES E. BOLLES, *Plff. in Err.*,

v.

OUTING COMPANY.

(See S. C. Reporter's ed. 262-268.)

Penalty under copyright law—forfeiture for sheets found in possession.

1. A penal statute, if ambiguous, will be construed more strongly in favor of the defendant than it would if the statute were remedial, but in such a way as to effect substantial justice and preserve the obvious intention of the legislature.
2. The penalty for infringement of copyright imposed by U. S. Rev. Stat. § 4965, of \$1 for every sheet found in defendant's possession, extends only to sheets found in his possession for the purposes of forfeiture and condemnation, and does not extend to sheets which are merely proved to have been in his possession at some time within two years before the action began.
3. A defendant who did not take out a writ of error cannot be heard to complain of any adverse rulings in the court below, on writ of error taken by the plaintiff.

[No. 47.]

Submitted October 16, 1899. Decided December 4, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment affirming the decision of the Circuit Court in an action for penalties for infringement of copyright. *Affirmed.*

See same case below, 45 U. S. App. 449, 77 Fed. Rep. 966, 23 C. C. A. 594, 46 L. R. A. 712.

Statement by Mr. Justice **Brown**:

This was an action begun April 18, 1894, by Charles E. Bolles, a resident of the city of Brooklyn, New York, for the penalty provided for the infringement of the copyright of a photograph by Rev. Stat. § 4965. This section enacts that "if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, . . . as provided by this chapter, shall, within the time limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, [263] etch, work, copy, print, publish, *or import, either in whole or in part, or . . . shall sell or expose to sale, any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further

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forfeit one dollar for every sheet of the same found in his possession," etc.

In August, 1893, plaintiff made a photograph of the yacht "Vigilant" under full sail, and copyrighted the same under the title "Vigilant, No. 4." The copyright stamp on the photograph was made by impressing at the lower end of the right-hand corner of the photographs, the words, "Copyright, 93, by Bolles, Brooklyn," Bolles being the trademark name used by the plaintiff.

Defendant made a photogravure of this photograph, and published it November, 1893, in a magazine published by it in New York known by the name of "The Outing." Defendant had no permission to use or copy the photograph.

One copy of this number of *The Outing* was purchased of the defendant by an employee of the plaintiff for the sum of twenty-five cents.

On the first trial in the circuit court the action was dismissed upon the ground that the copyright stamp on the photograph was insufficient notice of the copyright, because the year was not given in full, nor the full name of the owner.

Thereupon plaintiff sued out a writ of error from the circuit court of appeals, which held that the copyright stamp was sufficient, but sustained the trial court in its exclusion of certain evidence offered as to the number of copies found in the possession of the defendant. 45 U. S. App. 449, 77 Fed. Rep. 966, 23 C. C. A. 594, 46 L. R. A. 712.

Upon the new trial the same evidence as to the number of copies of the infringement found in the possession of the defendant was excluded, and a verdict directed for plaintiff for \$1 penalty for the one copy bought by plaintiff's employee from the defendant. Plaintiff moved for a new trial because of the refusal of the court to permit him to prove the number of copies which had been in the defendant's possession at any time within two years previous to the commencement of the suit. Upon his motion being denied, he *again sued out a writ of error from the circuit court of appeals, which affirmed the judgment. Whereupon plaintiff sued out a writ of error from this court. [264]

Mr. **George E. Waldo** submitted the cause for plaintiff in error:

Assuming that the statute is penal, it should nevertheless receive a reasonable construction effectuating the legislative intent.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Winn*, 3 Sumn. 209, 211, Fed. Cas. No. 16,740; *Sedgwick, Stat. & Const. L. 2d ed. 282*; *Atty. Gen. v. Sillem*, 2 Hurlst. & C. 532; *Maxer, Int. Stat. 2d ed. 318*; *Wiborg v. United States*, 163 U. S. 632, 647, 41 L. ed. 289, 294, 16 Sup. Ct. Rep. 1127, 1197.

This statute is remedial as well as penal.

Huntington v. Attrill, 146 U. S. 657, 36 L.

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ed. 1123, 13 Sup. Ct. Rep. 224; *Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491; *Dwight v. Appleton*, 1 N. Y. Legal Obs. 195; *Myers v. Callaghan*, 10 Biss. 139, 5 Fed. Rep. 726.

This case is distinguishable from *Backus v. Gould*, 7 How. 798, 12 L. ed. 919, in that the only proof in the latter case was of "copies sold by defendant." There was no evidence in that case that any of the copies so sold had ever been in the defendant's possession.

Mr. John R. Abney submitted the cause for defendant in error:

The statute is penal and must be strictly construed.

Backus v. Gould, 7 How. 798, 12 L. ed. 919.

The words "found in his possession" require proof that the copies were found in the actual possession of defendant. If the defendant has sold the copies before they are found in his possession, no action accrues to the plaintiff.

Thornton v. Schreiber, 124 U. S. 620, 31 L. ed. 580, 8 Sup. Ct. Rep. 618; *Backus v. Gould*, 7 How. 798, 12 L. ed. 919.

[264] *Mr. Justice Brown delivered the opinion of the court:

Whether the court erred in excluding the evidence offered by the plaintiff tending to show the number of copies of the issue of The Outing containing a reproduction of the plaintiff's photograph, which had been printed and delivered to the defendant at any time within two years prior to the commencement of this action, is the sole question presented by the assignments of error.

This is an action to recover a penalty of \$1 for every copy of the plaintiff's photograph, and is based upon Rev. Stat. § 4965, which declares that any person offending against its provisions "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale, . . . one half thereof to the proprietor and the other half to the use of the United States." This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually sustained by him, or of the profits realized by the defendant; and in the further provision that one half of the amount recovered shall be to the use of the United States. It makes no pretense of awarding damages, and simply imposes a forfeiture of a specified sum. In this respect it differs wholly from the following section (4966) recently considered by us in *Brady v. Daly*, 175 U. S. 148, ante, p. 109, 20 Sup. Ct. Rep. 62, which made a person performing or representing any [265] copyrighted dramatic composition "liable for damages therefor, . . . *to be assessed at such sum, not less than \$100 for the first and \$50 for every subsequent performance, as to the court shall appear to be just." There the award was of damages, and a min-

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imum sum was fixed apparently to cover cases where it was impossible to estimate such damages; but there was no limit to the amount which might be awarded if, in the opinion of the court, it were just to increase the minimum. The idea suggested by the learned judge who delivered the opinion of the court, that, as it would be difficult to prove the exact amount of damages suffered by reason of the unlawful representation, the statute provided a minimum sum, leaving it open for a larger recovery upon proof of greater damages, has no application to the section under consideration, where the plaintiff can recover no greater nor less damages than the penalty provided by the section. The penal character of the act is further emphasized by the fact that the plaintiff apparently recovers a moiety for the use of the United States, though perhaps this is not beyond a doubt suggested in *Thornton v. Schreiber*, 124 U. S. 612, 31 L. ed. 577, 8 Sup. Ct. Rep. 618. The act of 1831, for which this act is a substitute, and of the sixth section, of which § 4965 is a substantial copy, was said by this court in *Backus v. Gould*, 7 How. 798, 811, 12 L. ed. 919, 924, to give a *qui tam* action for the sum forfeited.

The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice. *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *United States v. Wittberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *American Fur Co. v. United States*, 2 Pet. 358, 7 L. ed. 450; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The language of this section when examined seems hardly susceptible of two interpretations, unless certain words which are not found there are treated as interpolated. It forfeits to the proprietor of the pirated publication all the plates on which the same shall be copied, and every sheet thereof, either *copied or printed, and shall further [266] forfeit \$1 for every sheet of the same found in his possession. No remedy is provided by the act, although by § 4970 a bill in equity will lie for an injunction: but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and in addition to the confiscation of the copies, for a recovery of \$1 for every copy so seized or found in the possession of the defendant. While the forfeiture is not limited as to the number of the copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant. Congress may have been perfectly willing to impose a forfeiture of \$1 for every such copy, and have been reluctant to impose it upon the thousands of such copies that may have previously been put in circulation. The construction

contended for would permit an author to lie by during the two years allowed him for bringing suit, permit another to publish the work during that time, and then recover for every copy so published. Not only this, but as the penalty is imposed upon any person who engraves, copies, prints, publishes, or sells a copy, not only the publisher, but the printer and bookseller might be liable for every copy traced to his possession. Indeed, the defendant might be made liable for every copy traced to his possession, even though he destroyed the whole edition for the purpose of relieving himself from the penalty.

This case is clearly controlled by that of *Backus v. Gould*, 7 How. 798, 12 L. ed. 919. That was an action of debt brought by Gould and Banks to recover penalties incurred by the invasion of plaintiff's copyright in twelve volumes of law reports. Defendant insisted that plaintiffs could only recover for such sheets as were proved to have been found in his possession, either printing or printed, published or exposed for sale. Plaintiffs insisted, as the plaintiff does here, that they were entitled to recover for every sheet which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not. The language of the forfeiting clause, § 6 of the act of February 3, 1831 (4 Stat. at L. 436, chap. 16), [267] was that "such *offender shall forfeit every copy of such book to the person legally, at the time, entitled to the copyright thereof, and shall also forfeit and pay fifty cents for such every sheet which may be found in his possession, . . . one moiety thereof to such legal owner of the copyright as aforesaid, and the other to the use of the United States." The recovery was held to be limited to the sheets in the possession of the defendant, and an instruction that he was liable for every sheet which he had published, or procured to be published, was held to be erroneous.

That case was decided in 1849, and must be regarded as overruling anything to be found to the contrary in *Reed v. Carusi*, Taney, Dec. 72, Fed. Cas. No. 11,642, decided by Chief Justice Taney in 1845; *Dwight v. Appleton*, Fed. Cas. No. 4,215, decided in 1843, and *Millett v. Snowden*, Fed. Cas. No. 9,600, decided in 1844.

The case of *Thornton v. Schreiber*, 124 U. S. 612, 31 L. ed. 577, 8 Sup. Ct. Rep. 618, was a *qui tam* action brought against Thornton under § 4965 for the unlawful reproduction of a certain copyrighted photograph. The case turned upon the fact whether the sheets were found in the possession of the defendant. They were actually found in the store of Sharpless & Sons, wholesale dealers in dry goods, were used by pasting them upon parcels of dry goods, and were their property. Thornton was employed for the purchase of goods sold by the firm, and he appears to have gotten up the plate, ordered fifteen thousand copies to be made, which were subsequently delivered to Sharpless & Sons, who paid for them. Attempt was made to estab-

lish the fact that Thornton had the possession of these prints, by showing that he was the man who first conceived the idea of getting them up and using them in the business of the firm. It was held that Thornton could not be considered to have held possession of them, but that an action of replevin could have been sustained against the firm, and that they were the proper parties to be made defendants. The same argument was made as in *Backus v. Gould*, that the words, "found in his possession," meant simply that, where the sheets are ascertained by the finding of the jury to have *been at any time in [268] the possession of the defendant, the forfeiture attached; but it was held that the only possession defendant had was that of Sharpless & Sons, and that he held them merely as their employee, subject always to their order and control. While *Backus v. Gould* is not cited in the opinion, the case is a distinct affirmation of that. See also *Sarony v. Ehrlich*, 28 Fed. Rep. 79.

Had Congress designed the extended meaning claimed for these words "found in his possession," it would naturally have used the expression "found or traced to his possession," or "found to be, or to have been, in his possession." It is only by interpolating words of this purport that the statute can receive the construction claimed. We concur with the learned judge who spoke for the court of appeals that the words "found in his possession" aptly refer to a finding for the purposes of forfeiture and condemnation. "The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process, and where, as here, the forfeiture declared is against property of the offender, and it is only appropriate when it can be seized in his hands."

Two other defenses are interposed which go to the recovery of even the small judgment of \$1 and costs, and which, if sustained, would require the judgment of the court below to be reversed, and ultimately a verdict for the defendant. First, that the notice of the copyright, imprinted on the photograph, did not fill the requirements of the statute; and, second, that the copyright claimed by Bolles is not sanctioned by the Constitution. It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. *Canter v. American & O. Ins. Co.* 3 Pet. 307, 318, 7 L. ed. 688, 692; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. ed. 839; *The Maria Martin*, 12 Wall. 31, 40, 20 L. ed. 251, 252; *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266; *Clark v. Killian*, 103 U. S. 766, 26 L. ed. 706; *Loudon v. Shelby County Taxing Dist.* 104 U. S. 771, 26 L. ed. 923; *Cherokee Nation v. Blackfeather*, 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63.

The judgment of the court below is affirmed.

Mr. Justice White concurred in the result.

[269]ARKANSAS BUILDING & LOAN ASSOCIATION (Perpetual), *Appt.*,
v.

J. W. MADDEN, Secretary of State.

(See S. C. Reporter's ed. 269-274.)

Injunction against collection of franchise tax—remedy at law.

An injunction will not be granted against the collection of a franchise tax from a foreign corporation, where there is nothing to indicate inability of the corporation to pay the tax, or of the defendant to respond in judgment if the tax be found to have been illegally exacted, and no special circumstances are set up justifying the exercise of equity jurisdiction, other than consequences which the complainant can easily avert without loss or injury, by paying the tax, although the validity of the law might be more conveniently tested by the party denying it by bill in equity than by action at law.

[No. 68.]

Submitted October 26, 1899. Decided December 4, 1899.

APPEAL from the decree of the Circuit Court of the United States for the Western District of Texas, dismissing a bill for injunction against the collection of a franchise tax. *Modified to a dismissal without prejudice and as modified affirmed.*

Statement by Mr. Chief Justice Fuller:

By an act of the state of Texas approved April 3, 1889 (Tex. Laws 1889, chap. 78, p. 87), foreign corporations for pecuniary profit, with some exceptions not material here, desiring to do business in the state of Texas, were required to file with the secretary of state a duly certified copy of their articles of incorporation and obtain a permit to transact business in the state, paying a fee therefor, the permit not to be issued for a period longer than ten years from the date of the filing. By an act approved May 11, 1893 (Laws 1893, chap. 102, § 5, p. 158), it was provided "that each and every private domestic corporation heretofore chartered, or that may be hereafter chartered, under the laws of this state, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this state, in this state, shall pay to the secretary of state, annually, on or before the first day of May, a franchise tax of ten dollars. Any such corporation which [270] shall fail to pay the tax provided for in this action shall, because of such failure, forfeit their charter."

Section 17 of article 1 of the Constitution of Texas, ratified February 17, 1876, provided: "No person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such

person; and, when taken, except for the use of the state, such compensation shall be first made, or secured, by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

And article 8:

"Sec. 1. Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; . . ."

"Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; . . ."

"Sec. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the legislature, by any contract or grant to which the state shall be a party."

"Sec. 17. The specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

In July, 1896, the Arkansas Building & Loan Association, *a corporation of the state [271] of Arkansas, filed its charter with the secretary of the state of Texas, and paid the fee required by the act of 1889, as well as the franchise tax of \$10 required to be paid by the act of 1893, and received a permit to carry on its business in Texas for ten years.

The provisions of the acts of 1889 and 1893 were carried into the Revised Statutes of the state of Texas of 1895. By an act approved April 30, 1897 (Tex. Laws 1897, chap. 104, p. 140), and an act approved May 15, 1897 (Tex. Laws 1897, chap. 120, p. 168), these provisions were amended so as, among other things, to increase the annual franchise tax theretofore required, to graduate it according to the capital stock of the corporation, to provide that the failure to pay it should work a forfeiture of the right to do business in the state, and that the secretary of state should declare such forfeiture. The taxes imposed by these amendments were less upon domestic corporations than upon foreign corporations. Thereafter the Arkansas Building & Loan Association offered to pay the secretary of state the \$10 required by the prior law as the franchise tax for the ensuing year, but the secretary refused to accept that sum and to give to the company the franchise tax receipt therefor, and demanded the larger sum required by the law of 1897, which amounted to \$205.

NOTE.—As to when equity will restrain the collection of a tax, see notes to *Dows v. Chicago*, 20 L. ed. U. S. 65; *Ogden City v. Armstrong*, 42 L. ed. U. S. 445; *Odlin v. Woodruff* (Fla.) 22 L. R. A. 699.

The company then filed a bill in the circuit court of the United States for the western district of Texas against the secretary of state of Texas, setting up the foregoing facts, and charging that the act of 1897 was void because in contravention of the Constitution of Texas, and of the commerce clause of the Constitution of the United States and of the Fourteenth Amendment to that instrument, and praying an injunction against the secretary of state restraining him from the collection of said alleged illegal tax, and from declaring complainant's permit and right to do business in the state forfeited by failure to pay the tax, and for general relief. To this bill defendant demurred, assigning as grounds that it set up no cause of action; that it disclosed that complainant had an adequate remedy at law; and that it showed [272] that "the demand made of complainant was "in compliance with a valid existing law of the state of Texas." The circuit court held that the law was valid, and dismissed the bill.

Mr. F. E. Albright submitted the cause for appellant. Messrs. L. A. Smith and Drew Pruitt were with him on the brief.

Mr. M. M. Crane submitted the cause for appellee. Mr. T. A. Fuller was with him on the brief.

[272] *Mr. Chief Justice Fuller delivered the opinion of the court:

The rule is that the collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction. *Pittsburgh, C. C. & St. L. R. Co. v. West Virginia Bd. of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; *Shelton v. Platt*, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65.

In *Dows v. Chicago*, which has been frequently cited with approval, it was said by Mr. Justice Field, speaking for the court:

"The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights."

These decisions are in harmony with the 16th section of the judiciary act of 1789, now § 723 of the Revised Statutes, which declared [273] the rule as then and still existing. *That "suits in equity shall not be sustained in either of the courts of the United States in 160

any case where a plain, adequate, and complete remedy may be had at law."

And on principle, "the interference of the courts of the United States by injunction with the collection of state taxes, or with state administration of matters of internal police, can only be justified in a plain case not otherwise remediable.

The grievance complained of in this case is that the Arkansas corporation entered on the transaction of business in Texas at a time when the annual franchise or license tax was \$10 and that it is now required to pay \$205 by a subsequent law, which, it alleges, is unconstitutional.

The penalty denounced on failure to pay is the forfeiture of the right to do business in the state, and complainant averred that if that forfeiture were declared it would be subjected to irreparable injury and to a multiplicity of suits.

It is on these grounds of equity interposition that the aid of the circuit court was sought to restrain the discharge by a state officer of duties imposed on him by the law of the state, and to adjudicate as to the validity of that law.

But the bill of complaint did not set forth any facts tending to show that complainant could not escape the forfeiture by payment of the \$205 under protest, and recover back the money so paid if the law should be held void.

We assume that the payment would, under the circumstances detailed, be compulsory and not voluntary, and no reason is perceived why the rule permitting recovery back would not apply.

That rule as applicable here is that an action will lie for money paid, under compulsion, on an illegal demand, the person making it being notified that his right to do so is contested. *Elliott v. Swartwout*, 10 Pet. 137, 9 L. ed. 373; *Bend v. Hoyt*, 13 Pet. 263, 10 L. ed. 154; *Philadelphia v. The Collector*, 5 Wall. 720, 731, *sub nom. Philadelphia v. Diehl*, 18 L. ed. 614, 616; *Swift Co. v. United States*, 111 U. S. 22, 28 L. ed. 341. The principle is thus stated by Gaines, J., in *Taylor v. Hall*, 71 Tex. 213, 9 S. W. 141: "The law is established that when a person by the compulsion *of the color of legal process, or of seizure of his person or goods, pays money unlawfully demanded he may recover it back." [274]

The fact that the defendant is a state official is not in itself a defense, and our attention has been called to no statute of Texas which substitutes any other for the common-law rule.

Inasmuch as the bill contains nothing to indicate inability on the one hand to pay the franchise tax in question, or, on the other, to respond in judgment if it were found to have been illegally exacted, and sets up no special circumstances justifying the exercise of equity jurisdiction other than consequences which complainant can easily avert, without loss or injury, we are of opinion that it cannot be sustained.

It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by

a bill in equity than by an action at law, but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding.

Decree modified to a dismissal without prejudice, and as so modified affirmed.

ANTHONY F. SEEBERGER *et al.*, Plffs. in
Err.,
v.

LEANDER J. MCCORMICK.

(See S. C. Reporter's ed. 274-281.)

Federal question on writ of error to state court—question of general law.

The decision of a state court holding that by reason of their false assumption of corporate authority the officers, directors, and shareholders of what purported to be a national bank, but which never obtained legal authority to do business, became liable as partners, on the principle of agency, for contracts entered into in the name of the corporation, does not involve any Federal question which will sustain a writ of error from the Supreme Court of the United States, but only a question of general law.

[No. 322.]

Submitted October 16, 1899. Decided December 4, 1899.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming the decision of the appellate court against the defendants in an action to hold them liable as partners for false assumption of power as a national banking association. On motion to dismiss for lack of Federal question. *Dismissed.*

See same case below, 178 Ill. 404.

Statement by Mr. Justice Shiras:

[275] *This was an action brought in a state court of Illinois in which Leander J. McCormick sought to hold Seeberger and others as partners for an alleged false assumption of power as a national banking association.

On January 31, 1893, articles of association were signed, and an organization certificate was signed and acknowledged by nine citizens of Illinois, and both were transmitted to the Comptroller of Currency, as required by the Revised Statutes of the United States, for the purpose of making them a national banking association at Chicago by the name of the Market National Bank. At a meeting of the directors of the bank, chosen by the stockholders, and named in the articles of association, a president and cashier were duly elected, and the directors caused a seal to be made for the bank. On February 9, 1893, the president, pursuant to a resolution of the directors, signed and sealed with the corporate seal a lease in writ-

ing from Leander J. McCormick to the bank of certain offices in Chicago, "to be used and occupied by said Market National Bank as a banking office, and for no other purpose," for the term of five years from May 1, 1893, at a yearly rent of \$13,000. By an agreement made part of the lease, McCormick was to make certain alterations and repairs at his own expense; either party might cancel the lease on May 1 of any year by giving ninety days' notice in writing; and no rent was to be charged until the bank took possession. On April 12, 1893, the parties made a supplemental agreement by which McCormick was to make further alterations, the bank paying half the cost thereof. All the alterations and repairs were made by McCormick as agreed; the cost, paid by him, of the *altera- [276] tions of April 12, 1893, being \$2,475. On June 22, 1893, the president and cashier, in the name of the bank, took possession of the demised premises, and put in the fixtures and furniture, blank books and stationery, necessary to carry on a banking business, and they were not removed until April 30, 1895.

Of the whole capital stock of \$1,000,000, called for in the articles of association, but \$331,594 was ever paid in; and the bank was never authorized by the Comptroller of the Currency to commence, and never did commence, the business of banking. The officers of the bank, from time to time, corresponded with McCormick, using letter heads with the name, location, and place of business of the bank and the names of the officers printed thereon, and signing in their official capacity. On August 15, 1893, the officers of the bank informed McCormick that the bank had never been authorized to commence the business of banking, and had no power to enter into the lease, and had abandoned all further proceedings, and offered to surrender the lease. McCormick refused to accept the surrender, and on September 20, 1893, the president caused the key of the office to be left on the desk of McCormick's agent, he refusing to accept it.

On October 4, 1893, the parties agreed in writing that, without prejudice to the rights of either, McCormick should take possession of the premises, and endeavor to lease them and to collect the rent thereof. He made every effort to obtain a tenant accordingly, but was unable to do so. On January 3, 1895, McCormick gave written notice to the president of the bank of his intention to terminate the lease in May, 1895, in accordance with its terms. The cashier paid the rent, according to the lease, until July 22, 1893; but the bank refused to pay any rent subsequently accruing, and never paid its half of the cost of the alterations made under the agreement of April 12, 1893. Thereupon McCormick brought an action against the Market National Bank on July 17, 1895, in the superior court of Cook county, Illinois, claiming that he was entitled to recover judgment, at the rate agreed upon in the lease, from July 22, 1893, up to May 1, 1895, and for half of the *cost of changing and repair- [277] ing the premises. That court refused to hold that McCormick could recover upon the

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998, and Hamblin v. Western Land Co. 37 L. ed. U. S. 267.

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lease as a valid contract, but gave judgment in his favor for the rent from July 22 to August 15, 1893, and for half the cost of the alterations, with interest, amounting in all to the sum of \$2,548.85. This judgment was affirmed on successive appeals of McCormick, by the appellate court and by the supreme court of Illinois. 61 Ill. App. 33; 162 Ill. 100. Thereupon McCormick sued out a writ of error and brought the case to the Supreme Court of the United States, where the judgment of the Illinois courts was affirmed. 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

On November 19, 1895, McCormick brought an action in the supreme court of Cook county, Illinois, against Anthony F. Seeberger and fifteen persons, as copartners doing business in Chicago, Illinois, under the firm name and style of the Market National Bank of Chicago. The defendants were officers, directors, and shareholders of the Market National Bank, and in this action McCormick sought to hold them personally for the balance of the rent due under the terms of the lease. The superior court rendered judgment for the defendants. McCormick appealed, and the appellate court of Illinois reversed the judgment, "found the facts as set forth in the stipulation in the record," and entered judgment against the defendants, and assessed the damages at the amount of the rent stipulated in the lease from August 15, 1893, to May 1, 1895, to wit, \$22,208.33. The defendants then took the case to the supreme court of Illinois, which affirmed the judgment of the appellate court. Thereupon the defendants sued out a writ of error and brought the case to this court; and on October 16, 1899, a motion was made and submitted by the defendant in error to dismiss the writ of error on the alleged ground that no Federal question, sufficient to give this court jurisdiction to review the decision of the state court, was shown by the record.

Mr. Hiram T. Gilbert submitted the cause for plaintiffs in error:

There is a Federal question involved in this case.

U. S. Rev. Stat. § 5136; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

Plaintiffs in error specially set up and claimed immunity by reason of § 5136 of the Revised Statutes of the United States.

Armstrong v. Athens County Treasurer, 16 Pet. 281, 10 L. ed. 965; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

The decision of the state court was decisive of the case and was erroneous.

McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

Mr. A. M. Pence submitted the cause for defendant in error (*Messrs. George A. Carpenter and Shirley T. High* were with him on the brief):

This court cannot review the facts in the case, but only questions of law, and assuming the facts in the case to be as found by the state court, then the decision of the state

court turned upon a general principle of law and not upon a Federal statute.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Constructive notice to McCormick of the want of power on the behalf of the bank to make the contract in question is not binding in a suit brought against the officers of the bank based upon their acts, conduct, or false representations.

Weidler v. Farmers' Bank, 11 Serg. & R. 134; *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84; *Bigelow v. Gregory*, 73 Ill. 197; *Cherry v. Colonial Bank*, L. R. 3 P. C. 24; *Medill v. Collier*, 16 Ohio St. 599; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290; *Merchants' Nat. Bank v. Robison*, 8 Utah, 256, 30 Pac. 985; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 437, 34 N. E. 625; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Miller v. Reynolds*, 92 Hun, 400, 36 N. Y. Supp. 660; *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Corwith v. Culver*, 69 Ill. 503; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Bigelow, Estoppel*, 5th ed. 462; *Herman, Estoppel*, § 1250.

***Mr. Justice Shiras** delivered the opinion [278] of the court:

In the suit brought by McCormick against the Market National Bank of Chicago it was held by the supreme court of Illinois that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation, and therefore, by virtue of § 5136 of the Revised Statutes, having been executed by the defendant before being authorized by the Comptroller of the Currency to commence the business of banking, did not bind the defendant. That decision, being arrived at upon a consideration of the legal import of a statute of the United States, was plainly one involving a Federal question. But it was contended that this court had no jurisdiction to review the action of the state court, because its decision was in favor, in respect to the Federal statute, of the party who had set up and claimed an immunity under it. It was, however, clearly shown by this court that, as the defendant had relied on the statutory prohibition to transact any business until it had been authorized by the Comptroller of the Currency to commence the business of banking, and as the plaintiff had relied on the exception out of that prohibition, that is, had claimed that the lease was "incidental and necessarily preliminary to the organization," and as the decision was against the plaintiff on the latter contention, it was therefore a decision against a right claimed by him under a statute of the United States, and reviewable by this court on writ of error. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 546, 41 L. ed. 817, 820, 17 Sup. Ct. Rep. 433.

McCormick's recovery in that action having been restricted to rent for the time of the bank's actual occupancy of the premises, he brought the present suit against the persons who had taken part in the proposed organi-

zation of the bank, charging them as partners doing business in the firm name and style of the Market National Bank of Chicago. He recovered a judgment in the appellate court of Illinois. That judgment has been affirmed by the supreme court of Illinois, and the case is now before us on a writ of error to the judgment of the state supreme court.

[279] *The theory upon which this action was maintained in the state courts can be best made to appear by a quotation from the opinion of the supreme court:

"The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of the lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*.

"The appellate court was authorized to find, and doubtless did find, that this was not such a case. These directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the Comptroller necessary to confer power to make the lease, and it was a fair inference for the appellate court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893, several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error canceled their articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty.

"We are of opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty,

[280] *express or implied, that he is authorized by his principal to execute that contract when he has no such authority, we know of no principle in law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach."

Did such a state of facts and law present a Federal question? Certainly there was no formal allegation in the assignments of error to the judgment of the appellate court

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that the plaintiffs in error were claiming any immunity under the laws or Constitution of the United States; nor is there any allusion, however distant, in the opinion of the supreme court, to any such question. And surely the fact that the defendants had proposed, but had failed, to effect an organization as a banking association under the laws of the United States, did not bestow a Federal character upon their transactions. By withdrawing from their futile attempt to create a corporation under the statutes of the United States, these individual defendants must be deemed to have renounced any right, title, or immunity they might have possessed under such organization had it been perfected.

It has been frequently held that the contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give us jurisdiction to review the judgment of the supreme court of a state where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Eustis v. Rolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Kemington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

We think that the question whether the plaintiffs in error rendered themselves liable to McCormick by reason of their false assumption of corporate authority was one of general law, and not one to be solved by reference to any law, statutory or constitutional, of the United States.

As well, then, because no Federal question was in form presented to or passed upon by the supreme court of Illinois, as because the judgment of that court was based upon matter of general, and not Federal, law, we are unable to see that we have *jurisdiction to re- [281] view that judgment; and the writ of error is accordingly dismissed.

John F. MALONY, Appt.,

v.

O. H. ADSIT.

(See S. C. Reporter's ed. 281-291.)

Bill of exceptions signed by successor of trial judge—stipulation by counsel as to correctness of bill—pleading nature of estate in land—statute of limitations.

1. No bill of exceptions can be deemed sufficiently authenticated under U. S. Rev. Stat. § 953, unless signed by the judge who sat at the trial, or by the presiding judge, if more than one sat.
2. Counsel cannot stipulate the correctness of a bill of exceptions not signed by the trial judge.
3. The nature of plaintiff's estate in land is sufficiently pleaded under Hill's (Or.) Code, § 318, which is made applicable to Alaska under the act of Congress of May 17, 1884.

requiring him to set forth the nature of his estate, whether "in fee, for life, or for a term of years," when he alleges that his ownership is by right of prior occupancy and actual possession, and that is in fact the only kind of estate that it is possible to have in the land claimed.

4. The three years' possession which may be pleaded in bar to an action for forcible entry and detainer under Hill's (Or.) Code, § 3524, does not bar an action of ejectment.

[No. 67.]

Argued October 25, 26, 1899. Decided December 4, 1899.

APPEAL from a judgment of the District Court of the United States for the District of Alaska in favor of the plaintiff in an action to recover possession of real estate. *Affirmed.*

Statement by Mr. Justice Shiras:

- [281] *In May, 1896, Ohlin H. Adsit filed a complaint against John F. Malony in the United States district court for the district of Alaska, to recover possession of the undivided one half of a tract of land in the town of Juneau, district of Alaska. The complaint averred that on the 29th day of April, 1891, and for more than nine years prior thereto, the plaintiff and his grantors were the owners by right of prior occupancy and actual possession of the land in question, and that plaintiff was entitled to the possession thereof; that one James Weim was the owner of the other undivided one-half part of said land; that on or about the 29th day of April, 1891, the defendant and his grantor, without right or title so to do, entered thereon, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto have wrongfully withheld possession from the plaintiff.

The plaintiff prayed judgment for the recovery of the possession of an undivided one-half part or interest of, in, and to the whole of the described premises, and for his costs and disbursements in the action.

- [282] *On June 8, 1896, the defendant demurred to the complaint, on the alleged ground that the same did not state facts sufficient to constitute a cause of action.

On October 9, 1896, the court overruled the demurrer, and gave leave to the defendant to file an answer. An answer and replication thereto were filed. The case was tried August 10, 1897, before Arthur K. Delany, district judge, a jury having been waived. Judge Delany made the following findings of facts and conclusions of law:

"This cause having been regularly called for trial before the court,—a jury trial having been expressly waived by stipulation in open court of the respective parties appearing herein,—Johnson & Heid appeared as attorneys for the plaintiff, and John F. Malony, the defendant herein, appeared in proper person; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the cause and the arguments of the respec-

tive attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

"I. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece, or parcel of land described in the complaint as lot numbered four (4), in block numbered four (4), in the town of Juneau, district of Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau, claiming said lot, piece, or parcel of land in their own right; and the said plaintiff and his grantors have, ever since the date last aforesaid, occupied, used, and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the defendant.

"II. That the plaintiff is the owner of an undivided one-half ($\frac{1}{2}$) part or interest of, in, and to said lot No. 4, in said *block No. 4, [283] hereinbefore described, and that the whole of said lot, piece, or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

"III. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece, or parcel of land in the complaint described, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff.

"As conclusions of law from the foregoing facts the court now hereby finds and decides:

"1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in, and to said lot, piece, or parcel of land as the same is described in the complaint on file herein, as against the defendant and all persons claiming or to claim the same or any part of said right or interest of the plaintiff in and to said lot, piece, or parcel of land under him, the said defendant, and that the defendant has no right, title, or interest in or to said land or any part thereof.

"2. That the plaintiff is entitled to a judgment, as prayed for in his complaint, for the recovery of the possession of an undivided one-half part or interest of, in, and to said lot No. 4, in said block No. 4, in said town of Juneau, against said defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant.

"3. That the plaintiff is entitled to a judgment for costs, to be taxed herein, against the defendant.

"And judgment is hereby ordered to be entered accordingly."

On August 11, 1897, a motion for a new trial was made and overruled. Judgment for the plaintiff was duly entered, and on September 20, 1897, the plaintiff was put in possession of the premises in dispute, in pursuance of a writ of possession allowed by Hon. Charles S. Johnson, judge of the United States district court, who had succeeded Hon. Arthur R. Delany to that office.

[284] On September 6, 1897, the defendant gave notice of an *appeal to the United States circuit court of appeals for the ninth circuit. On January 4, 1898, the defendant, acting on a decision of the Supreme Court of the United States, wherein it was held that such causes were not appealable to the circuit court of appeals, but that appeals in such cases should be prosecuted to the Supreme Court of the United States, prayed for an appeal to this court, which was on said day allowed as prayed for by Judge Johnson.

On January 4, 1898, a bill of exceptions was filed, to which was appended a statement, signed by the counsel of the respective parties, that the bill of exceptions was correct and in accordance with the proceedings had in the trial of the cause; and the record discloses that, on said 4th of January, 1898, the bill of exceptions was settled and allowed by Judge Johnson.

Mr. L. T. Michener argued the cause and, with *Messrs. W. W. Dudley* and *Oscar Foote*, filed a brief for appellant:

Having failed to comply with the statutory provisions it will be considered that plaintiff endeavored to bring the action as in forcible entry and detainer.

Thompson v. Wolf, 6 Or. 308.

Plaintiff in ejectment must recover on the strength of his own title, and can take nothing by reason of defects in the title of the defendant.

Watts v. Lindsey, 7 Wheat. 158, 5 L. ed. 423.

Actual and not constructive possession must be averred and proved to support the action.

Russell v. Desplous, 29 Ala. 308; *Singleton v. Finley*, 1 Port. (Ala.) 144; *Stringfellow v. Cain*, 99 U. S. 616, 25 L. ed. 423; 3 Wait, Act. & Def. 396.

Plaintiff in ejectment who rests his claim upon prior possession must allege and prove that he had such possession within the time fixed by the statute of limitations.

Young v. Irwin, 3 N. C. (2 Hayw.) 9; 3 Wait, Act. & Def. 22.

Mr. S. M. Stockslager argued the cause and, with *Mr. George C. Heard*, filed a brief for appellee:

The nature of plaintiff's title, "whether in fee, for life, or for a term of years," as required by the Oregon Code, is sufficiently described by the allegation in the complaint that "the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession," etc. If plaintiff was the owner by right of prior occupancy and actual possession of the premises in dispute, it was the highest and best title which could be acquired.

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Johnson v. Crookshanks, 21 Or. 339, 28 Pac. 78; *Leprell v. Kleinschmidt*, 112 N. Y. 364, 19 N. E. 812; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.* 6 Ill. 236; *Jarrot v. Vaughn*, 7 Ill. 132; *Hadlock v. Hadlock*, 22 Ill. 384; *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

*Mr. Justice **Shiras** delivered the opinion [284] of the court:

An inspection of this record discloses that the bill of exceptions was not settled, allowed, and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge.

Section 953 of the Revised Statutes is as follows: "A bill *of exceptions allowed in [285] any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of court or judge being annexed thereto."

We understand this enactment to mean that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat.

In *Mussina v. Cavazos*, 6 Wall. 363, 18 L. ed. 813, after the case had been elaborately argued on the merits, it was discovered by the court that the bill of exceptions had not been either signed or sealed by the judge below. Thereupon the court delivered the following opinion: "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the cause; and there is nothing which shows that it was submitted to him or in any way received his sanction. We are therefore constrained to affirm the judgment."

Borrowscale v. Bosworth, a case reported in 98 Mass. 34, presented a somewhat similar question. There a judge of the trial court took a bill of exceptions that had been substantially agreed on by the parties and duly filed, to examine whether the statement of his rulings was correct, with the understanding that if correct he should allow the bill. However, the judge retained the bill without allowing it for more than a year, and resigned his office without having done so. Afterwards, in such circumstances, a motion was made for a new trial in the trial court,

and allowed. To the ruling which allowed a new trial the plaintiffs took an exception and carried the case to the supreme judicial court. That court refused to disturb the order of the court below awarding a new trial, and held that where it appears to the court that a party has been deprived, without his [286] fault, of a right *or remedy which the law gives him, it would generally be held a legal reason for granting a new trial. The court cited the English cases of *Nind v. Arthur*, 7 Dowl. & L. 252, where upon the death of Mr. Justice Coltman, before allowing a bill of exceptions which had been presented to him, a new trial was granted; also *Benett v. Peninsular & O. S. B. Co.* 16 C. B. 29, where the settling of a bill of exceptions having been delayed by the appointment of Chief Justice Wilde as Lord Chancellor, and afterwards by reason of his infirm health all hope of it having been lost, a new trial was granted by the trial court; also the case of *Newton v. Boodle*, 3 C. B. 796, where the death of Chief Justice Tindal prevented the sealing of a bill of exceptions, without laches of the excepting party, which was regarded as good ground for a motion for a new trial.

The rationale of these cases evidently was that the court of errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial.

Those cases were cited with approval by this court in *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582, where it was held that where the judge presiding at the trial of a cause in the supreme court of the District of Columbia at circuit dies without having settled a bill of exceptions, it is in order for a motion to be made to set aside the verdict and order a new trial, and that, where such an order is made by the court in general term, it is not a final judgment from which an appeal may be taken to this court. It is true that there is a rule of the supreme court of the District of Columbia which provides that in case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted, and that this court regarded that rule as applying to the case in hand, and that hence a new trial was a matter of course.

In *Young v. Martin*, 8 Wall. 357, 19 L. ed. 419, where the exceptions were noted by the [287] clerk of the trial court and so appeared *in the record, it was held that "to be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court."

In *Origet v. United States*, 125 U. S. 243, 31 L. ed. 745, 8 Sup. Ct. Rep. 846, the record contained a paper headed "Bill of Exceptions." At the foot of the paper appeared the following: "Allowed and ordered on file, Nov. 22, '83. A. B." And it was held:

"This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. . . . Section 953 of the Revised Statutes . . . merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore the questions purporting to be raised by the paper cannot be considered."

In *State Use of Samuel v. Weiskittle*, 61 Md. 51, it was said: "In this state it is not admissible for another judge to pass upon the correctness of his predecessor's ruling in such case. The new trial will go as a matter of course."

It certainly cannot be contended that if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. In *Lynch v. Craney*, 95 Mich. 199, 54 N. W. 879, it was said that the practice of stipulating a bill of exceptions without the sanction of the judge cannot be commended; and if such fact be brought to the attention of the court before the argument of the case, the appeal will be dismissed.

In *Coburn v. Murray*, 2 Me. 336, it was held that a bill unauthenticated by the trial judge cannot be given validity by consent of counsel.

*We are referred to no decision of this court [288] on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we regard the cases just cited as sound statements of the law.

Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial, cannot be considered by us.

The defendant's demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, and the defendant not having elected to stand on his demurrer, but having availed himself of the leave of the court to file an answer, and his several objections to the admission of evidence at the trial not having been brought before us by a proper bill of exceptions, all that is left for us to consider is whether, on the facts found by the court below, the plaintiff was entitled to judgment.

Those facts, briefly stated, were that the plaintiff and his grantors on April 19, 1881, entered in actual possession of the land in dispute; put substantial improvements thereon; and continued in possession, under claim of right, and adversely against the defendant and all others, till on April 29, 1891, the defendant, without right or title so to do, en-

tered upon the said land, and ejected the plaintiff therefrom; that the plaintiff was the owner of an undivided one-half part or interest of, in, and to said land in the complaint described, and that the defendant wrongfully withheld the same from him.

From their findings the court drew the conclusions of law that the plaintiff was entitled to recover possession of the said land in dispute, being the undivided one-half part or interest of, in, and to said lot No. 4, in said block No. 4, in said town of Juneau, against said defendant and all persons claiming under him, and to recover a judgment for said possession and for costs.

The appellant now contends that, under § 318 of Hill's Oregon Code (which by the act of May 17, 1884—23 Stat. at L. 24—was made applicable to Alaska, and which is in [289] the following *terms: "The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage such sum as may be therein claimed"), the plaintiff failed to plead the nature of his estate in the property, whether it be in fee, for life, or for a term of years.

Without stopping to consider whether the defendant could be heard to again raise a question that had been decided against him on his demurrer to the complaint, we think that the objection is not a sound one. The plaintiff alleged, and the court has found, that for more than nine years prior to April 29, 1891, he and his grantors were the owners by right of prior occupancy and actual possession of the land in dispute.

In the condition of things in Alaska under the act of May, 1884, providing a civil government for Alaska, and under the 12th section of the act of March 3, 1891 (26 Stat. at L. 1100), the only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee-simple title under letters patent issued to such prior claimant when Congress might so provide by extending the general land laws or otherwise. *Davenport v. Lamb*, 13 Wall. 418, 20 L. ed. 655.

In *Bennett v. Harkrader*, 158 U. S. 447, 39 L. ed. 1048, 15 Sup. Ct. Rep. 863, brought to this court by a writ of error to the district court of the United States for the district of Alaska, it was said by Mr. Justice Brewer, in disposing of a somewhat similar objection: "Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be es- 175 U. S. 8.

established. That remains in the United States, and the only question presented is the priority of right to purchase *the fee. Hence [290] the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action."

This principle applies more strongly to the present case, in which the real nature of the plaintiff's estate in the property is truly alleged as ownership by right of prior occupancy and actual possession, and was so found to be by the trial court.

The same view of the nature of a title to a lot in a townsite in Alaska, under these acts of Congress, was expressed by the district court of the United States for the district of Alaska, in the case of *Carroll v. Price*, 81 Fed. Rep. 137. As, then, the only kind of estate that could be held was that of possession, it was sufficient for the plaintiff to allege that his was of that nature.

It is next contended on behalf of the plaintiff in error that, even if the complaint should be held otherwise sufficient, yet the action must fail because coming within § 3524, Hill's (Oregon) Code, which is as follows: "In an action to recover the possession of any land, tenement, or other real property, where the entry is forcible, or where the possession thereof is unlawfully held by force, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party in the premises is ended."

It is argued that, as the complaint was filed in the court below May 25, 1896, more than five years from the day of entry alleged in the complaint, and as the defendant pleaded in bar of the action the three years' quiet possession of the premises immediately preceding its commencement, the defendant is entitled to a judgment of reversal.

If this were indeed an action in forcible entry and detainer, and as the complaint shows on its face that the defendant's possession was longer than three years prior to the commencement *of the action, then the de- [291] fendant was entitled to have had his demurrer sustained. But he did not stand on his demurrer, but availed himself of the court's leave to answer; and hence it might well be questioned whether it was competent for him to again raise in his answer a question already ruled against him under his demurrer.

But this it is unnecessary to consider, because it is altogether clear that, on the complaint and the facts found, this was not an action for a forcible entry and detainer, under the section of the Oregon Code pleaded by the defendant, but was an action of ejectment to which the statute pleaded did not apply.

The judgment of the District Court of the United States for the District of Alaska is affirmed.

JOSEPH BRADFIELD, *Appt.*,

v.

ELLIS H. ROBERTS, Treasurer of the
United States.

(See S. C. Reporter's ed. 291-300.)

Appropriation of money to hospital—sectarian character of hospital—constitutional provision against religious establishment.

The appropriation by Congress of money to a hospital, as compensation for the treatment and cure of poor patients under a contract, does not constitute an appropriation to a religious society in violation of the constitutional provision against laws respecting an establishment of religion, where the hospital is incorporated under an act of Congress, and its property is acquired in its own name and for its own purposes, and its business managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever, although the members of the corporation may be also members of a church and of a monastic order or sisterhood of that church, conducting the hospital under its auspices.

[No. 76.]

Argued October 27, 1899. Decided December 4, 1899.

APPPEAL from a judgment of the Court of Appeals of the District of Columbia reversing the decision of the Supreme Court in favor of the complainant in a suit to enjoin the payment of moneys to a hospital under an appropriation by act of Congress. *Affirmed.*

See same case below, 12 App. D. C. 453.

Statement by Mr. Justice **Peckham**:

[292] *This is a suit in equity, brought by the appellant to enjoin the defendant from paying any moneys to the directors of Providence Hospital, in the city of Washington, under an agreement entered into between the commissioners of the District of Columbia and the directors of the hospital, by virtue of the authority of an act of Congress, because of the alleged invalidity of the agreement for the reasons stated in the bill of complaint. In that bill complainant represents that he is a citizen and taxpayer of the United States and a resident of the District of Columbia, that the defendant is the Treasurer of the United States, and the object of the suit is to enjoin him from paying to or on account of Providence Hospital, in the city of Washington, District of Columbia, any moneys belonging to the United States, by virtue of a contract between the surgeon general of the army and the directors of that hospital, or by virtue of an agreement between the commissioners of the District of Columbia and such directors, under the authority of an appropriation contained in the sundry civil appropriation bill for the District of Columbia, approved June 4, 1897.

Complainant further alleged in his bill:

"That the said Providence Hospital is a private eleemosynary corporation, and that to the best of complainant's knowledge and belief it is composed of members of a monastic order

or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; that the title to its property is vested in the 'Sisters of Charity of Emmitsburg, Maryland;' that it was incorporated by a special act of Congress approved April 8, 1864, whereby, in addition to the usual powers of bodies corporate and politic, it was invested specially with 'full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of said corporation.'

"That in view of the sectarian character of said Providence Hospital and the specific and limited object of its creation, the said contract between the same and the surgeon general of the army and also the said agreement between the same and *the commissioners of [293] the District of Columbia are unauthorized by law, and, moreover, involve a principle and a precedent for the appropriation of the funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment, and also a precedent for giving to religious societies a legal agency in carrying into effect a public and civil duty which would, if once established, speedily obliterate the essential distinction between civil and religious functions.

"That the complainant and all other citizens and taxpayers of the United States are injured by reason of the said contract and the said agreement, in virtue whereof the public funds are being used and pledged for the advancement and support of a private and sectarian corporation, and that they will suffer irreparable damage if the same are allowed to be carried into full effect by means of payments made through or by the said defendant out of the Treasury of the United States, contrary to the Constitution and declared policy of the government."

The agreement above mentioned, between the commissioners of the District of Columbia and the directors of Providence Hospital, is annexed to the bill, and is as follows:

"Articles of agreement entered into this sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, by and between the commissioners of the District of Columbia and the directors of Providence Hospital, a body corporate in said District, whereby it is agreed on the part of the commissioners of the District of Columbia—

"That they will erect on the grounds of said hospital an isolating building or ward for the treatment of minor contagious diseases, said building or ward to be erected without expense to said hospital, except such as it may elect, but to be paid out of an appropriation for that purpose contained in the District appropriation bill approved March 3, 1897, on plans to be furnished by the said commissioners, and approved by the health officer of the District of Columbia, and that when the said building or ward is fully completed it shall be turned *over to [294]

the officers of Providence Hospital, subject to the following provisions:

"First. That two thirds of the entire capacity of said isolating building or ward shall be reserved for the use of such poor patients as shall be sent there by the commissioners of the District from time to time through the proper officers. For each such patient said commissioners and their successors in office are to pay at the rate of two hundred and fifty dollars (\$250) per annum, for such a time as such patient may be in the hospital, subject to annual appropriations by Congress.

"Second. That persons able to pay for treatment may make such arrangements for entering the said building or ward as shall be determined by those in charge thereof, and such persons will pay the said Providence Hospital reasonable compensation for such treatment, to be fixed by the hospital authorities, but such persons shall have the privilege of selecting their own physicians and nurses, and in case physicians and nurses are selected other than those assigned by the hospital, it shall be at the expense of the patient making the request.

"And said Providence Hospital agrees to always maintain a neutral zone of forty (40) feet around said isolating building or ward and grounds connected therewith to which patients of said ward have access.

"As witness the signatures and seals of John W. Ross, John B. Wight, and Edward Burr, acting commissioners of the District of Columbia, and the corporate seal of the said The Directors of Providence Hospital and the signature of president thereof, this sixteenth day of August, A. D. 1897."

The contract, if any, between the directors and the surgeon general of the army is not set forth in the bill, and the contents or conditions thereof do not in any way appear.

The defendant demurred to the bill on the ground that the complainant had not in and by his bill shown any right or title to maintain the same; also upon the further ground that the complainant had not stated such a case as entitled him to the relief thereby prayed or any relief as against the defendant.

[295] *Complainant joined issue upon the demurrer, and at a term of the supreme court of the District of Columbia the demurrer was overruled and the injunction granted as prayed for. 26 Wash. Law Rep. 84. Upon appeal to the court of appeals of the District the judgment was reversed, and the case remanded to the supreme court, with directions to dismiss the bill. 12 App. D. C. 453. Whereupon the complainant appealed to this court.

Mr. Joseph Bradfield, P. P., argued the cause and filed a brief for appellant.

Assistant Attorney General Hoyt argued the cause and, with Attorney General Griggs, filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

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*Mr Justice Peckham, after stating the facts, delivered the opinion of the court: [295]

Passing the various objections made to the maintenance of this suit on account of an alleged defect of parties, and also in regard to the character in which the complainant sues, merely that of a citizen and taxpayer of the United States and a resident of the District of Columbia, we come to the main question as to the validity of the agreement between the commissioners of the District and the directors of the hospital, founded upon the appropriation contained in the act of Congress, the contention being that the agreement if carried out would result in an appropriation by Congress of money to a religious society, thereby violating the constitutional provision which forbids Congress from passing any law respecting an establishment of religion. Art. 1 of the Amendments to Constitution.

The appropriation is to be found in the general appropriation act for the government of the District of Columbia, approved March 3, 1897, 29 Stat. at L. 665, 679, chap. 387. It reads: "For two isolating buildings, to be constructed, in the discretion of the commissioners of the District of Columbia, on the grounds of two hospitals, and to be operated as a part of such hospitals, thirty thousand dollars." Acting under the authority of this appropriation the commissioners entered into the agreement in question. [296]

As the bill alleges that Providence Hospital was incorporated by an act of Congress approved April 8, 1864 (13 Stat. at L. 43, chap. 50), and assumes to give some of its provisions, the act thus referred to is substantially made a part of the bill, and it is therefore set forth in the margin.†

The act shows that the individuals named therein and their successors in office were incorporated under the name of "The Directors of Providence Hospital," with power to receive, hold, and convey personal and real property, as provided in its 1st section. By the 2d section the corporation was granted "full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation." The [297]

†An Act to Incorporate Providence Hospital of the City of Washington, District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Lucy Gwynn, Teresa Angela Costello, Sarah McDonald, Mary E. Spalding, and Mary Carroll, and their successors in office, are hereby made, declared, and constituted a corporation and body politic, in law and in fact, under the name and style of the directors of Providence Hospital, and by that name they shall be and are hereby made capable in law to sue and be sued, to plead and be impleaded, in any court within the county of Washington, in the District of Columbia; to have and use a common seal, and to alter or amend the same at pleasure; to have, purchase, receive, possess, and enjoy any estate in lands, tenements, annuities, goods, chattels, moneys, or effects, and to grant, devise, or dispose of

3d section gave it full power to make such by-laws, rules, and regulations that might be necessary for the general accomplishment of the objects of the hospital, not inconsistent with the laws in force in the District of Columbia. Nothing is said about religion or about the religious faith of the incorporators of this institution in the act of incorporation. It is simply the ordinary case of the incorporation of a hospital for the purposes for which such an institution is generally conducted. It is claimed that the allegation in the complainant's bill, that the said "Providence Hospital is a private eleemosynary corporation, and that to the best of complainant's knowledge and belief it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; that the title to its property is vested in the Sisters of Charity of Emmitsburg, Maryland," renders the agreement void for the reason therein stated, which is that Congress has no power to make "a law respecting a religious establishment," a phrase which is not synonymous with that used in the Constitution, which prohibits the passage of a law "respecting an establishment of religion."

If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not.

The above-mentioned allegations in the complainant's bill do not change the legal character of the corporation or render it on that account a religious or sectarian body. [298] Assuming *that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The statute provides as to its property and makes no provision for its being held by anyone other than itself. The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out

of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence. There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people [299] who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution. All that can be said of the corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to. As stated in the opinion of the court of appeals, this corporation "is not declared the trustee of any church or religious society. Its property is to be acquired in its own name and for its own pur-

the same in such manner as they may deem most for the interest of the hospital: *Provided*, That the real estate held by said corporation shall not exceed in value the sum of one hundred and fifty thousand dollars.

Sec. 2. *And be it further enacted*, That the said corporation and body politic shall have full power to appoint from their own body a president and such other officers as they may deem necessary for the purposes of their creation; and in case of the death, resignation, or refusal to serve, of any of their number, the remaining members shall elect and appoint other persons in lieu of those whose places may have been vacated; and the said corpora-

tion shall have full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation.

Sec. 3. *And be it further enacted*, That the said corporation shall also have and enjoy full power and authority to make such by-laws, rules, and regulations as may be necessary for the general accomplishment of the objects of said hospital: *Provided*, That they be not inconsistent with the laws in force in the District of Columbia: *And provided, further*, That this act shall be liable to be amended, altered, or repealed, at the pleasure of Congress.

poses; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever, but only to that of the government which created it. In respect, then, of its creation, organization, management, and ownership of property it is an ordinary private corporation whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry."

It is not contended that Congress has no power in the District to appropriate money for the purpose expressed in the appropriation, and it is not doubted that it has power to authorize the commissioners of the District of Columbia to enter into a contract with the trustees of an incorporated hospital for the purposes mentioned in the agreement in this case, and the only objection set up is the alleged "sectarian character of the hospital and the specific and limited object of its creation."

The other allegations in complainant's bill are simply statements of his opinion in regard to the results necessarily flowing from the appropriation in question when connected with the agreement mentioned.

The act of Congress, however, shows there is nothing sectarian in the corporation, and "the specific and limited object of its creation" is the opening and keeping a hospital in the city of Washington for the care of [300] such sick and invalid persons as *may place themselves under the treatment and care of the corporation. To make the agreement was within the discretion of the commissioners, and was a fair exercise thereof.

The right reserved in the third section of the charter to amend, alter, or repeal the act leaves full power in Congress to remedy any abuse of the charter privileges.

Without adverting to any other objections to the maintenance of this suit, it is plain that complainant wholly fails to set forth a cause of action, and the bill was properly dismissed by the Court of Appeals, and its decree will therefore be affirmed.

GERTRUDE J. NILES, *Appt.*,

v.

CEDAR POINT CLUB.

(See S. C. Reporter's ed. 300-309.)

Public lands—survey of fractional sections—boundary on marsh—litigating title of stranger to suit.

1. Patents for fractional sections of land facing on a marsh, which recite the number of acres granted, and refer to the official plat of the survey, by which plat the marsh is shown as the boundary, while the computed areas conform to the area included within the surveyed lines, without including any part of the marsh, must be limited by the surveyed boundaries, without including any land which is a part of the marsh.

NOTE.—As to public lands; surveys; meander lines,—see note to *Stoner v. Rice* (Ind.) 6 L. R. A. 387.

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2. The fact that a meandered line was run along the edge of a marsh in surveying fractional sections of public land does not conclusively show that they bordered on a body of water so as to give the purchaser riparian rights, but the meandered line is only an irregular line, beyond which may be forest or prairie, land or water, government or Indian reservation.
3. A legal title passed by patent for public lands is good as against a stranger with no equities, whether it is valid or not as against some other party.

[No. 80.]

Argued November 16, 17, 1899. Decided December 4, 1899.

APPEAL from a decree of the Circuit Court of Appeals for the Sixth Circuit affirming a decision of the Circuit Court in favor of the plaintiff in a suit for lands claimed under a patent from the United States. *Affirmed.*

See same case below, 54 U. S. App. 668, 35 Fed. Rep. 45, 29 C. C. A. 5.

Statement by Mr. Justice Brewer:

This controversy is between two claimants to land, one holding a patent therefor from the United States and the other claiming it by virtue of its contiguity to other land for which *a United States patent was held. A [301] statement of facts was agreed upon by the parties, and that statement, with some slight additional testimony, formed the basis of a decree in the circuit court in favor of the plaintiff, which was affirmed by the court of appeals (54 U. S. App. 668, 35 Fed. Rep. 45, 29 C. C. A. 5), to review which last decision this appeal was taken.

The facts are these: In the years 1834 and 1835 Ambrose Rice, a deputy surveyor, surveyed and subdivided into sections and quarter sections fractional township 9 south, in range 9 east, and townships 9 and 10 south, in range 10 east, the same being situated in the northern part of Ohio and adjacent to Lake Erie. From his field notes, duly certified to the surveyor general of that land district, the latter prepared a correct plat of the townships, showing the subdivisions thereof, and marking all the actual survey lines and the corners designated by said survey. By the field notes and plat certain sections appear to be fractional, the line on the north being meandered in a general direction from the northwest to the southeast. The tract to the north of this line was described as "flag marsh" and "impassable marsh and water." Paragraphs 4, 5, and 6 of said agreed statement of facts are as follows:

"4. Said plat showed the northerly line of the mainland portion of said survey, a line with its intersection of each township and section line evidenced by a post placed at such intersection, as the said line was actually surveyed and marked as shown by said certified field notes, beginning on the west line of section 19, in town 9 south, range 9 east, and thence running in a general east-

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erly and southerly, but meandering and tortuous course to and across the south line of section 11, in town 10 south, range 10 east.

[302] "5. The said plat showed the said line of said survey from the west line of said township to a point 2 chains easterly from its intersection of the line between sections 21 and 22 in town 9, range 9, to be the shore of Maumee bay; and from that point southerly and easterly the plat shows this line on the northerly and easterly sides of fractional sections 22, 27, 26, and 25 in town 9, range 9, sections 30, 31, and 32 in town 9, range 10, and sections 4, 9, 10, and 11 in town 10, range 10, to be the boundary *of what is called the 'flag marsh' and 'impassable marsh and water.'

"6. As shown in and upon said original plat, somewhat east of north from the point where this line of the survey crosses the north and south quarter line through section 22, town 9, range 9, and about a mile and a half from it, began an island called 'Cedar Island.' This extended northerly for more than half a mile, and then southeasterly to a point opposite the said line along the northerly side of section 25 in said township. A short distance southeast of this another island began and extended southeasterly beyond the north line of section 5, in town 10, range 10, projected easterly. Then there was a narrow inlet. A third island began on the easterly side of this inlet, and extended southeasterly almost to what would be the east line of section 11, town 10, range 10. Between these islands and the tortuous line above described was the space designated 'flag marsh' and 'impassable marsh and water.' No surveyed lines other than the township lines crossed either the intervening marsh or the islands. The northwestern island was named 'Cedar' and was the largest. The plat showed it as containing 53.83 acres, all in town 9, range 9. The one next east of it was marked as 'Sandy Island.' The plat showed that 7.52 acres of it were in town 9, range 9; 28.49 acres in town 9, range 10; and 1.18 acres in town 10, range 10. The southeastern island was marked as 'Crane Island,' containing 18.38 acres, all in town 10, range 10. From the northwest end of Cedar island to the southeast end of Crane island was about $9\frac{1}{2}$ miles. Norman strait separated Cedar and Sandy islands. Lily strait lay between Sandy and Crane, and Crane creek entered the lake at the east end of Crane island.

"The field notes on the plat showed that the circumference of each island was surveyed or meandered. The plat and marginal field notes also show that the southerly edge of the 'flag marsh,' 'impassable marsh and water' was surveyed, and that the lines of the fractional sections southerly of the said marsh and water were identical with the southerly edge of the marsh. The computed areas of the fractional sections and of their respective subdivisions, as shown upon the [303] said plat, conformed *to the area included within the said surveyed lines, and did not

nor any thereof include any part of either marsh, water, or islands."

In July, 1844, patents for several of these fractional sections facing on this marsh were issued to Margaret Bailey, under whom the appellant claims. The patents each recite the number of acres granted, and each states that the tract is a fractional section "according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey."

In 1852 the state of Ohio applied under the swamp land act of September 28, 1850 (9 Stat. at L. 519, chap. 84), for several thousand acres of lands within the state, among them these marsh lands. This application was, so far as these lands are concerned, rejected by the land department, the official minute on the application being "not swamp and nearly all sold." In 1881 John B. Marston, under instruction from the General Land Office, surveyed and subdivided into sections and quarter sections the area marked upon the surveyor general's plat, above referred to, as "flag marsh" and "impassable marsh and water." The field notes of this survey were returned to the General Land Office and approved, and a plat made, as required. Thereafter the lands thus surveyed and platted were patented by the United States, and the title so conveyed passed by subsequent deeds to the plaintiff below, appellee here. Disclosing the condition of these lands, paragraphs 16 and 17 of the statement of facts are as follows:

"16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage, and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from the large bodies of land now in Ottawa, Wood, and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein.

"17. The general character, description, and condition of the said land surveyed by said Marston was by him correctly set forth under the title 'General Description' in the field *notes of the said survey so as aforesaid [304] by him certified to the commissioner of the General Land Office.

"That concerning the portion of said survey in town 9 south, range 9 east, reciting, to wit:

"The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it, particularly in the south and west parts, are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which, without any well-defined channel, finds its way across the marsh to the lake. Again, in heavy gales of wind it is subject to inundations from the lake, which, upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded

along the lake by a sand beach averaging 1 chain in width and 3 feet in height.'

"That concerning the portion of said survey in town 9 south, range 10 east, reciting, to wit:

"The surface of this fractional township is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the township south. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the drainage from woods on the south and west, which spreads over the entire surface and without any positive channel finds its way to the lake.

"Again the township is subject to inundations from the lake during heavy gales of wind, which, upon the termination of the gale or a change in the direction of the wind, slowly finds its way back into the lake.

"This fractional township is bounded on the northeast by Lake Erie; between the lake and the marsh proper is a sand beach, averaging 3 feet high and 1 chain in width, generally covered with bushes and small trees of oak, poplar, willow, and cottonwood."

"That concerning the portion of said survey in town 10 south, range 10 east, reciting, to wit:

[305] "The description for this township must necessarily be similar to that of the two preceding townships. The surface of that part of the township comprised in this survey is one large swampy marsh, land, generally very wet and boggy. Its surface is covered with grass, canes (or joint grass), wild rice, and such like marsh productions, reaching to a height of 10 or more feet. Some parts, especially on sections 10 and 11, can be pastured, but the larger portion is filled with bogs and pond holes, connected by narrow and tortuous channels.

"It receives the drainage from the woods on the south and west, and is subject to inundations from the lake. On the prevalence of strong southwest winds this water flows from the marsh into the lake, and upon the occurrence of northeast winds the lake floods the marsh. The principal outlets and inlets are Crane creek and Ward's canal. This canal is an improvement made by C. B. Ward, of Detroit, Michigan, on section 4, and running across section 5 for the purpose of getting vessels and ship timber from his shipyard on section 5. It is built without locks and is really only a great ditch. Waterway, 50 feet; depth, 7 feet. The buildings (or sheds) at the fishing stations 4 and 11 are the only other improvements.

"A comparison of the survey made by Ambrose Rice in 1834 and 1835 with that made by John B. Marston in 1881 indicates that Sandy and Crane islands washed somewhat shoreward during the period intervening between the making of said respective surveys."

Mr. Henry T. Niles argued the cause and, with Mr. Frank C. Daugherty, filed a brief for appellant.

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Mr. Thomas Emery argued the cause, and Messrs. Potter & Emery filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Brewer delivered the opinion of the court: [305]

But little can be added to the opinion of the court of appeals, whose conclusions we approve. The meander line *run by surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary (*St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808 and 838; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 998), but it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey. Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this "marsh," as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh. "The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument." *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808 and 838. In *James v. Howell*, 41 Ohio St. 696, 707, the supreme court of Ohio, speaking of these very patents and this marsh, said: "The 'meander' line along the southerly border of the marsh was, in fact, intended to be the boundary line of the fractional sections."

It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale.

*It may be true that under his contract, the requirements of the statute, and the regulations of the land department, Rice should have extended his surveys to the shores of Lake Erie, but he did not do it; he stopped at the borders of this marsh, and the land

department, in effect, approved his action. He evidently thought that the marsh was to be treated as a body of water, a conclusion not unwarranted in view of the finding of excessive high water at that time, but a conclusion which other findings show was not correct. And it may be remarked in passing that the letter of the statute would not limit the surveys to the shores of the lake, for § 2395, Rev. Stat., declares that surveys shall be by running lines at right angles "so as to form townships of 6 miles square unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

But Lake Erie is not an Indian reservation, nor a tract of land heretofore surveyed and patented, nor a navigable river. It is true § 2396, which provides how the boundaries and contents of the several sections, half sections, and quarter sections of the public lands of the United States shall be ascertained, says, after stating the rule where all the corners are established, that "in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township."

If this recognizes any other external boundary than that which is indicated in § 2395 it does not prescribe what that external boundary shall be; and if the land department treats either a marsh or a lake as such external boundary, who can declare that its action is void?

[308] It is impossible to hold that the lower courts erred in the conclusion that this marsh was not to be regarded as land *continuously submerged, either under Lake Erie, a navigable lake, and in that case belonging to the state of Ohio (*Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Weber v. Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248), or under a pond or other similar body of non-navigable inland waters, and therefore generally the property of riparian owners. It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the conditions as disclosed by the agreed statement indicate that it was a body of low, swampy land, partly boggy and partly dry, sometimes subject to inundations from Lake Erie or the overflow of the adjacent streams, but not permanently covered with water.

Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more

or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line into the territory north.

But it is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was "flag marsh," or "impassable marsh and water." But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation.

With respect to the contention that the character of this marsh, as it was found to have been, shows that it should have passed to the state of Ohio under the swamp land act, *it is enough to say that the state of [309] Ohio applied for it as such, that the application was denied, that this denial was made in 1852, that the land was never patented to the state and without such patent no fee ever passed (*Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208), that subsequently the land department treated it as land subject to its control, as public land of the United States, had it surveyed, sold and patented. Whatever claims the state of Ohio may have cannot be litigated in this suit. The legal title passed by the patent to the appellee's grantors, and that title is certainly good as against a stranger with no equities.

We see no error in the decree, and it is affirmed.

CITY OF NEW ORLEANS, Board of Assessors for the Parish of Orleans, and George B. Penrose, Treasurer of the City of New Orleans, *Appts.*,

v.

MARY G. T. STEMPEL (Wife of Edward Stempel), Guardian of the Infants Fannie Tobin McCan *et al.*

(See S. C. Reporter's ed. 309-323.)

Injunction against collection of tax on property of nonresident—situs of money in bank, notes, and mortgages owned by nonresident.

1. The fact that an assessment for taxes was in the name of "the estate of" a decedent, while the administration of his estate had been finally closed and the property put into possession of the heirs, will not justify equi-

NOTE.—*Situs for taxation of debts evidenced by notes or mortgages held by agent residing in different state from principal.*

Where the investment of funds of a nonresident is controlled by his agent, who loans and

table relief by injunction, though it was technically in the wrong name.

2. Moneys collected as interest and principal of notes, mortgages, and other securities kept within the state for use or reinvestment, though the owner is domiciled in another state, and the moneys are deposited in a bank to his credit, are subject to taxation under La. Acts 1890, chap. 106, providing for taxation of credits arising from business done in the state, at the business domicile of a non-resident owner, his agent, or representative.
3. Notes and mortgages, the owner of which is domiciled in another state, when they are kept within the state by an agent, may be subjected to taxation by the laws of the state in which they are held.

[No. 65.]

Argued October 25, 1899. Decided December 4, 1899.

APPPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of the plaintiff in a suit to restrain the collection of taxes. *Reversed.*

Statement by Mr. Justice **Brewer**:

[310] *This case comes on appeal from the circuit court of the United States for the eastern district of Louisiana. It is a suit brought by the appellee to restrain the collection of taxes levied upon certain personal property which she claims was exempt from taxation. The important facts are these: The plaintiff, as well as the infants whose guardian she is, and for whose benefit she brings this suit, are residents of the state of New York, in which state she has been duly appointed the guardian of their estates. The infants inherited certain property from their grandfather, a resident of Louisiana, whose estate was duly settled in the proper court of that state. By regular proceedings these infants had been adjudged his legal heirs, and she, as guardian, had been put in possession of

reloans them to citizens of the state, the notes and securities taken and held in the possession and under the control of the agent have a situs within the state that makes it competent for the state to subject them to taxation. *Catlin v. Hull*, 21 Vt. 152; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; *Walker v. Jack*, 60 U. S. App. 124, 88 Fed. Rep. 576; 31 C. C. A. 462, Reversing 79 Fed. Rep. 138; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272; *NEW ORLEANS V. STEMPER*.

This is called a "business situs," and is an exception to the rule that the situs of credits is at the domicile of the owner. *Re Jefferson*, 35 Minn. 215, 28 N. W. 256.

So, contracts for the sale of land which are in the possession of the agent of a nonresident vendor are taxable at the agent's domicile. *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390.

But contracts for the sale of land which are in the possession of an agent are not taxable at the agent's residence where his principal has a residence within the same state. *Lord v. Arnold*, 18 Barb. 104.

While, in this case, no stress is laid on the fact that the principal resided within the same state, and in fact the language used indicates that the same rule would apply were he a non-

their property thus inherited. The order of the court, in this respect, was rendered February 14, 1896, and the taxes which were sought to be restrained were those for that year. The assessment, as appears by the assessment roll, was in the name of "the estate of D. C. McCan;" was of \$15,000, "money in possession, on deposit, or in hand," and of \$800,000, "money loaned on interest, all credits and all bills receivable for money loaned or advanced, or for goods sold; and all credits of any and every description." The principal contentions of the plaintiff were: First, that included within this personal property was some \$228,000 of bonds of the state of Louisiana, *taxation of which [311] by the state or any of its municipalities was void, as impairing the obligation of a contract made by the state. Second, that the situs of the loans and credits was in New York, the place of residence of the guardian and wards, and, therefore, being loans and credits without the state of Louisiana they were not subject to taxation therein.

Mr. F. C. Zacharie argued the cause and, with **Mr. J. J. McLoughlin**, filed a brief for appellants:

The doctrine *Mobilia sequuntur personam* will only govern where its invocation does not conflict with the positive law of the state where the movables are actually situated.

Story, Conf. L. 8th ed. chap. 9; *Wharton*, Conf. L. 2d ed. p. 414, § 334; *United States v. Bank of United States*, 8 Rob. (La.) 414; *Railey v. Board of Assessors*, 44 La. Ann. 770, 11 So. 93; *Blucfields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 So. 627; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329.

The decision in *Meyer v. Pleasant*, 41 La. Ann. 646, 6 So. 258, that a judgment could only be taxed at the domicile of the owner, for there alone was it located, was correct under the then existing law, which in

resident, it is only with this limitation that the decision harmonizes with the others of New York state.

Under a statute taxing credits and investments within the state, in the possession or under the control of an agent of the owner, notes for the purchase price of land secured by the land, which are actually within the state, are taxable there though the owner be a nonresident. *Redmond v. Rutherford Comrs.*, 87 N. C. 122.

In this case it is said: "The theory of taxation is that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds; and so far as they have any substantial existence they are in this state, and not elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicile. It is but just, therefore, that they should contribute toward the support of the only government which affords them protection, and help to defray the expenses incurred in so doing."

But before a nonresident can be taxed for

no wise conflicted with the doctrine *Mobilia sequuntur personam*.

The proviso of the Louisiana act of 1890 only puts in force a principle which has long been established in the other states of the Union and maintained as constitutional.

Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; *Callin v. Hull*, 21 Vt. 161; *Smith v. Burrey*, 9 N. H. 428; *State v. St. Louis County Ct.* 47 Mo. 600; *People v. Home Ins. Co.* 29 Cal. 533; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Wileox v. Ellis*, 14 Kan. 602, 19 Am. Rep. 107; *Tazewell County Supers. v. Davenport*, 40 Ill. 198; *Douglas v. New York*, 2 Duer, 110; *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390; *Poppleton v. Yamhill County*, 18 Or. 377, 7 L. R. A. 449, 23 Pac. 253; *McCutchen v. Rice County*, 7 Fed. Rep. 561, 2 McCrary, 337; *Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1*, 19 Fed. Rep. 360; *Kirtland v. Hotchkiss*, 100 U. S. 496, 25 L. ed. 561; *Savings & Loan Soc. v. Multnomah*, 169 U. S. 431, 42 L. ed. 806, 18 Sup. Ct. Rep. 392, 60 Fed. Rep. 31; *Price v. Hunter*, 34 Fed. Rep. 356; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The contrary doctrine is not sustained by *Oliver v. Washington Mills*, 11 Allen, 268; *De Vignier v. New Orleans*, 4 Woods, 207, 16 Fed. Rep. 11; *Herriman v. Stowers*, 43 Me. 497; *People ex rel. Mygatt v. Chenango County Supers.* 11 N. Y. 563; *Phelps v. Thurston*, 47 Conn. 477.

These cases present the same facts as the *Meyer Case*, 41 La. Ann. 646, 6 So. 258; that is, that there was no positive law modifying the rule.

The situs of personal property owned by a nonresident, but employed in business in the state and under control and management of an agent, is at the residence of such agent for the purposes of taxation.

Goldgart v. People ex rel. Goar, 106 Ill.

credits It must be shown that they are actually at the place where they are assessed, under the actual control of his agent, and it is not enough to show that an indebtedness to him, evidenced by a promissory note, was negotiated through an agent at the place. *People use of Christian County v. Davis*, 112 Ill. 272.

Nor is connection with loans in the way of clerical aid rather than as agent in possession and control for investment and reinvestment sufficient, but the resident agent must have an actual and effective control over the credits in order to give them a tax situs. *Jack v. Walker*, 96 Fed. Rep. 578.

A note and account in the hands of attorneys for collection and bonds deposited for safe-keeping belonging to a nonresident are not taxable. *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

And a statute requiring every person to list for taxation "all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person," does not warrant taxing mortgages of a nonresident held by a resident agent for the purpose of collection and transmission to his principal. *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796; *Williams v. Wayne County Supers.* 78 N. Y. 561.

25; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 276.

Mr. E. Howard McCaleb argued the cause and filed a brief for appellees:

The fact that the evidences of debt, choses in action, or "incorporated rights" were, at the time the assessment was made, in the possession of an agent in New Orleans, does not affect the principle that they could only be taxed at the domicile of the owner, under the maxim *Mobilia sequuntur personam*.

State Tax on Foreign-held Bonds, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Clason v. New Orleans*, 46 La. Ann. 1, 14 So. 306; *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258; *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, 6 So. 794; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91; *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 So. 93; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329; *Kirtland v. Hotchkiss*, 100 U. S. 496, 25 L. ed. 561.

**Mr. Justice Brewer* delivered the opinion of the court: [311]

A preliminary question made by the plaintiff is that she had applied to have the assessment in the name of the estate of D. C. McCan stricken off on the ground that the administration of the estate had been finally closed and the property put into the possession of the heirs, which application was denied; that, therefore, the assessment was in the wrong name and could not be sustained. We are of the opinion, however, that there was no error in the ruling of the circuit court in this respect, for, conceding that as a matter of fact the assessment was technically in the wrong name, the error is not one that will justify the equitable relief by injunction.

The important question is whether the

In *Lee v. Dawson*, 8 Ohio C. C. 365, it was held that under the Ohio statute the fact that promissory notes are jointly owned by three persons, one of whom is a nonresident of Ohio, does not make the interest of the nonresident subject to taxation in that state, although it appears that under the general directions of the nonresident owner the resident joint owner manages the fund evidenced by the notes.

But this construction of the Ohio statute was disapproved in *Walker v. Jack*, 60 U. S. App. 124, 88 Fed. Rep. 576, 31 C. C. A. 462, in which on the authority of *dicta* in *Grant v. Jones*, 39 Ohio St. 506, and *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796, it was held that the statute warrants the taxation of moneys and credits owned by a nonresident which are held, invested, and controlled for him by an agent residing in the state.

Notes given for the purchase price of lands in another state and left there with an agent for collection, and which have never been in the state where the owner resides, cannot be taxed there. *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107. To the same effect is *Fisher v. Rush County Comrs.* 19 Kan. 414.

So, notes and mortgages taken by a nonresident agent for loans made by such agent at the latter's residence, which are held by him there,

property was subject to taxation. With regard to the contention that certain bonds were included in the assessment which were not subject to taxation on account of the supposed contract of the state of Louisiana, it is sufficient to say that the assessment does not purport to include any bonds. The assessment roll is prepared so as to show in separate columns the different kinds of property included in the assessment. One column is entitled "bonds of all kinds, specifying each kind and their value," and under this heading there is no mention of any property. So, while it would seem probable from the testimony as to the amount of personal property belonging to the estate that *the assessor may have in fact included the bonds, yet upon the face of the record the only assessment is of credits and money. It may be a case of overvaluation of assessable property, but under the issue presented by the pleading that question was not before the court.

[312] Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. The question, therefore, is distinctly presented whether, because the owners were domiciled in the state of New York, the moneys so deposited in a bank within the limits of the state of Louisiana, and the notes secured by mortgages situated and held as above described, were free from taxation in the latter state. Of course, there must be statutory warrant for such taxation, for if the legislature omits any property from the list of taxables the courts are not authorized to

correct the omission and adjudge the omitted property to be subject to taxation. We need not extend our inquiries back of the year 1890, for in that year the legislature passed an act amending the revenue statutes of prior years, and the questions, therefore, are whether, under that statute, as interpreted by the supreme court, these properties were subject to taxation, and, if so subjected, whether any rights secured by the Federal Constitution were thereby infringed. That act is chapter 106 of the Statutes of 1890 (La. Acts 1890, 121).

Section 1 enumerates among the property subject to taxation "all rights, credits, bonds, and securities of all kinds, promissory notes, open accounts, and other obligations; all cash."

Section 7 (p. 124), after declaring "that it is made the duty of the tax assessors throughout the state to place upon the assessment list all property subject to taxation," closes with this provision:

*"And this shall apply with equal force to [313] any person or persons representing in this state business interests that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent, or representative."

This statute came before the supreme court in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91, where the question was whether a foreign insurance company could be taxed for the amount of the premiums due from its insured living in Louisiana, and it was held that those premiums were simply cred-

and which have never been in the state in which the principal resides, are not taxable there. *Poppleton v. Yamhill County*, 18 Or. 377, 7 L. R. A. 449, 23 Pac. 253.

Nor is such an assessment warranted by Hill's (Or.) Ann. Code, § 2731, providing that personal property shall include money, notes, or mortgages "either within or without this state; . . . all debts due or to become due from solvent debtors." The "debts" mentioned include only domestic debts, since the latter clause does not contain any words similar to those of the previous clause relating to property and interests outside the state. *Poppleton v. Yamhill County*, 18 Or. 377, 7 L. R. A. 449, 23 Pac. 253.

So, securities taken by a nonresident agent for loans made by him in foreign states, and held by such agent, are not taxable in the state of the owner's domicile. *People ex rel. Jefferson v. Gardner*, 51 Barb. 352; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576. This rule is changed by statute in New York.

Under the statute it is held that securities in the actual possession and control of a nonresident trustee, the beneficiaries also being nonresidents, are not "due and owing to persons residing within the state," so as to be subject to taxation within the state, although two of

the three trustees are residents thereof. *People ex rel. Darrow v. Coleman*, 119 N. Y. 137, 7 L. R. A. 407, 23 N. E. 488, Reversing 53 Hun, 482, 6 N. Y. Supp. 285.

But under Vt. Rev. Laws, § 270, exempting personal property situated in another state, a debt evidenced by a promissory note owned by an inhabitant of Vermont is taxable there, although secured by a mortgage on lands in another state, and the note and mortgage are in the possession of an agent living where the land is situated. *Bullock v. Guilford*, 59 Vt. 516.

So, notes secured by mortgages on land in a foreign state, in the hands of an agent, there to be collected and reloaned, are property of the owner within the state of his residence for the purpose of taxation, under a statute subjecting "all debts due from solvent debtors," unless such notes are expressly exempted. *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 316, 41 N. W. 521.

The court said: "When, as here, there is an absence of any statute prescribing a different rule, and an absence of any evidence of any injustice by reason of double taxation, we must hold, under our statutes cited, that for the purposes of taxation a debt has its situs at the residence of the creditor, and may be taxed there."

its and therefore not taxable, the court saying (page 765):

"We are dealing exclusively with the question of credits as assessed, and we hold, as decided in *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258, *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, 6 So. 794, 'that debts have their situs at the domicile of the creditor,' because debts are property and have a value which is inseparable from the creditor, and because the state has no greater power or jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresidents which is not situated in the state."

The same proposition was affirmed in the succeeding case, *Rayley v. Board of Assessors*, 44 La. Ann. 765, 11 So. 93, the court, however, calling attention to this distinction (page 770):

"There is no doubt of the legislative power to modify the rule of comity, *Mobilia personam sequuntur*, in many respects. Movable having an actual situs in the state may be taxed there, though the owner be domiciled elsewhere. Even debts may assume such concrete form in the evidences thereof that they may be similarly subjected when such evidences are situated in the state, as in the case of bank notes, public securities, and, possibly, of negotiable promissory notes, bills of exchange, or bonds.

[314] "But as to mere ordinary debts, reduced to no such concrete *forms, they are not capable of acquiring any situs distinct from the domicile of the creditor, and no legislative power exists to change that situs so far as nonresident creditors are concerned. As said by the Supreme Court of the United States: 'To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things, in debts, belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due.' *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179."

In *Clason v. New Orleans*, 46 La. Ann. 1, 14 So. 306, the court affirmed the same proposition in respect to a deposit in a bank to the credit of the nonresident, saying: "We cannot distinguish between the debt due to the plaintiffs by a bank as arising from a deposit to the credit of the firm in money, and that due to it from any other cause."

This decision was, however, qualified in *Bluefields Banana Co. v. New Orleans Bd. of Assessors*, 49 La. Ann. 43, 21 So. 627, the court there saying that the decision rested upon the special facts of that case; that there was really no general deposit, but that the local bank was simply a medium through which the funds of the nonresident kept at the place of his residence were drawn against for the purpose of making payments in Louisiana, and in this latter case it was held that, where a nonresident had an agent in New Orleans who disposed of the property of his principal as it was forwarded in the

course of business, and deposited the proceeds thereof in bank to the credit of his principal, the sum thus deposited was subject to taxation. This is the language of the court after its reference to the *Clason Case*, 46 La. Ann. page 48, 14 So. 306:

"The case is different here. The foreign corporation had an agent here, where it received and where it sold fruit and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent; also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company *transacted business in [315] New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the state and city governments which residents received, and we see no reason why it should not be taxed, as claimed in this proceeding, unless there be insuperable legal objections in the way. We find a statute of the state, which by its terms brings them under the operation of state and city taxation, and we are bound to give effect to its provisions unless they be in derogation of the Constitution. The unconstitutionality of the act is not pleaded, and we, of ourselves, see no unconstitutional features in it. The rule *Mobilia sequuntur personam* is a fiction of the law, not resting of itself upon any constitutional foundation, and which gives way before express laws, destroying it in any given case where constitutional requirements themselves do not stand in the way."

This was reaffirmed in *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329, in which the court says (page 1175):

"The revenue act, in entire accordance with the conceded extent of the taxing power, taxes the movable property of the foreigner. We cannot hold that cash thus liable to taxation is exempted because for convenience it is deposited in bank and checked on by the owner. It would be a strain to apply to the deposited cash the exemption from taxation accorded to debts in their ordinary significance, due to the foreign creditor."

The last case to which our attention has been called is that of *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 25 So. 970. In that case the court reaffirmed its prior rulings that "a debt due to a nonresident (still in nonconcrete form) has its situs at the domicile of the creditor, and not at the domicile of the debtor," and therefore is not subject to taxation by the state which is the latter's domicile. At the same time it observed, in its discussion of the question, that the law requiring debts to be assessed for taxation "was intended for all such debts as are evidenced by note or by mortgage, or that are in such other concrete form as to render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions *were [316] rendered to localize 'debts' or 'open accounts'

such as those upon which the taxes are now claimed."

From this review of the decisions of the supreme court of the state it is obvious that moneys, such as these referred to, collected as interest and principal of notes, mortgages, and other securities kept within the state and deposited in one of the banks of the state for use or reinvestment, are taxable under the act of 1890. They are property arising from business done in the state; they were tangible property when received by the agent of the plaintiffs, and, as such, subject to taxation, and their taxability was not, as the court holds, lost by their mere deposit in a bank. It is true that when deposited the moneys became the property of the bank, and for most purposes the relation of debtor and creditor arose between the bank and the depositor, yet as evidently the moneys were to be kept in the state for reinvestment or other use they remained still subject to taxation, according to the decision in 49 La. Ann. 43. With regard to the notes and mortgages, it may be conceded that there is no express decision of the supreme court to the effect that they were taxable under the law of 1890, yet the reasoning of that court in several cases and its declarations, although perhaps only *dicta*, show that clearly in its judgment they had a local situs within the state, and were by the statute of 1890 subject to taxation.

When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the state, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the state. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the state from its liability to state taxation unless it is obvious that the statutes of the state warrant such exemption, or unless the mandates of the Federal Constitution compel it.

[317] *If we look to the decisions of other states we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state in the hands of an agent of the nonresident owner, to be by him used for the purposes of collection and deposit or reinvestment within the state, its taxable situs is in the state. See *Catlin v. Hull*, 21 Vt. 152, in which the rule was thus announced (pages 159, 161):

"It is undoubtedly true that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his *domicil*; and, in general, any conveyance of

chattels, good by the law of his own *domicil*, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without their being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact, which contravenes the law of his *domicil*; for if there is, the law of the owner's *domicil* must yield to the law of the state where the property is in fact situate."

"We are not only satisfied that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable, that, if persons residing abroad bring their property and invest it in this state, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

In *Goldgart v. People ex rel. Goar*, 106 Ill. 25, 28, the court said:

*"If the owner is absent, but the credits [318] are in fact here, in the hands of an agent, for renewal of collection, with the view of reloading the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing."

In *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107, the power of the state to tax a citizen and resident of Kansas, on money due him in Illinois, evidenced by a note, which was left in Illinois for collection, was denied, the court saying (603), after referring to the maxim *Mobilia sequuntur personam*:

"This maxim is at most only a legal fiction; and Blackstone, speaking of legal fictions, says, 'This maxim is invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience that might result from the general rule of law.' 3 Bl. Com. 43. Now as the state of Illinois, and not Kansas, must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debts, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois, and not Kansas, should tax it, and that we should not resort to legal fictions to give the state of Kansas the right to tax it."

The same doctrine was affirmed in *Fisher v. Rush County Comrs.* 19 Kan. 414, and again in *Blain v. Irby*, 25 Kan. 499, 501, in which the court said, referring to promissory notes: "They have such an independent situs that they may be taxed where they are situated."

The decisions of the highest courts of New

York, in which state these plaintiffs reside, are to the same effect. In *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390, 397, the court said:

"That the furniture in the mansion and the money in the bank were, under these provisions, properly assessable to the relators is not seriously disputed. And I am unable to see why the money due upon the land contracts must not be assessed in the same way. The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held. Notes, bonds, [319] and other contracts for the *payment of money have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while, for some purposes in the law, by legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that for the purpose of taxation this legal fiction does not, to the full extent, apply, and that such property belonging to a nonresident creditor may be taxed in the place where the obligations are held by his agent. *People ex rel. Hoyt v. Commissioners of Taxes*, 23 N. Y. 238; *People ex rel. Jefferson v. Gardner*, 51 Barb. 352; *Catlin v. Hull*, 21 Vt. 152."

This proposition was reaffirmed in *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, in which the court of appeals of that state held that a resident of New York was not liable to taxation on moneys loaned in the states of Wisconsin and Minnesota on notes and mortgages, which notes and mortgages were held in those states for collection of principal and interest and reinvestment of the funds, it appearing that property so situated within the limits of those states was there subject to taxation. See also *State v. St. Louis County Ct.* 47 Mo. 594, 600; *People v. Home Ins. Co.* 29 Cal. 533; *Billinghurst v. Spink County*, 5 S. D. 84, 98, 58 N. W. 272; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Poppleton v. Yamhill County*, 18 Or. 377, 7 L. R. A. 449, 23 Pac. 253; *Redmond v. Rutherford Comrs.* 87 N. C. 122; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741.

With reference to the decisions of this court it may be said that there has never been any denial of the power of a state to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the situs of personal property from the domicile of the owner. In *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179, it was held that while the taxing power of the state may extend to property within its territorial limits, it cannot to that

which is outside those limits, and therefore that bonds issued by a railroad company, although secured by a mortgage on property *within the state, were not subject to taxa- [320] tion while in the possession of their owners who were nonresidents, the court saying: "We are clear that the tax cannot be sustained; that the bonds, being held by nonresidents of the state, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the state." But in the same case, on page 323, L. ed. 188, the court declared: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession. It was held in that case that a statute requiring the railroad company, the obligor in such bonds, to pay the state tax, and authorizing it to deduct the amount of such taxation from the interest due by the terms of the bond, was as to nonresidents a law impairing the obligation of contracts. The same proposition was affirmed in *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, where the city of Charleston attempted to tax its obligations held by nonresidents of the state. In *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189, the ruling was that although shares of stock in national banks were in a certain *sense intangible and in- [321] corporeal personal property, the law might separate them from the persons of their owners for purposes of taxation, and give them a situs of their own. See also *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 22, 35 L. ed. 613, 617, 11 Sup. Ct. Rep. 876, where the question of the separation of personal property from the person of the owner for purposes of taxation was discussed at length. As also the case of *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 427, 42 L. ed. 803, 805, 18 Sup. Ct. 175 U. S.

Rep. 892, in which a statute of Oregon taxing the interest of a mortgagee in real estate was adjudged valid, although the owner of the mortgage was a nonresident. Nor is there anything in the case of *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, conflicting with these decisions. It was there held that a state might tax one of its citizens on bonds belonging to him, although such bonds were secured by mortgage on real estate situated in another state. It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicile of the owner. There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs. On the contrary, the legislature of the state of Connecticut, from which the case came, plainly reaffirmed the rule, and the court in its opinion summed up the case in these words (p. 499, L. ed. 562): "Whether the state of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that state, with which the Federal government cannot rightfully interfere."

This matter of situs may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, but by the statutes of many states they are made so subject to seizure and sale, as any tangible personal property. 1 Freeman, Executions, § 112; 4 Am. & Eng. Enc. Law, 2d ed. 282; 11 Am. & Eng. Enc. Law, 2d ed. 623. Among the states referred to in these authorities as having statutes warrant-
[322]ing *such levy and sale are California, Indiana, Kentucky, New York, Tennessee, Iowa, and Louisiana. *Brown v. Anderson*, 4 Mart. N. S. 416, affirmed the rightfulness of such a levy and sale. In *Fluker v. Bullard*, 2 La. Ann. 338, it was held that if a note was not taken into the actual possession of the sheriff a sale by him on an execution conveyed no title to the purchaser, the court saying:

"In the case of *Simpson v. Allain* it was held that, in order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession. 7 Rob. (La.) 504. In the case of *Goubeau v. New Orleans & N. R. Co.* the same doctrine is still more distinctly announced. The court there says: 'From all the different provisions of our laws above referred to can it be controverted that, in order to have them carried into effect, the sheriff must necessarily take the property seized into his possession? This is the essence of the seizure. It cannot exist without such possession.' 6 Rob. (La.) 348. It is clear, under these authorities, that the sheriff effected no seizure of the note
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in controversy, and consequently his subsequent adjudication of it conferred no title on Bailey."

The same doctrine was reaffirmed in *Stockton v. Stanbrough*, 3 La. Ann. 390. Now if property can have such a situs within the state as to be subject to seizure and sale on execution, it would seem to follow that the state has power to establish a like situs within the state for purposes of taxation.

It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. *Graff v. Shannon*, 7 Iowa, 508; *Smith v. Eals*, 81 Iowa, 235, 46 N. W. 1110; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80.

It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they *have such a concrete form that [323] we see no reason why a state may not declare that if found within its limits they shall be subject to taxation.

It follows from these considerations that the decree of the Circuit Court must be reversed, and the case remanded for further proceedings.

Mr. Justice Harlan and Mr. Justice White dissented.

NEW ENGLAND RAILROAD COMPANY, Plff. in Err., v.

ROBERT T. CONROY, Admr.

(See S. C. Reporter's ed. 323-347.)

liability for negligence of fellow servant— conductor as fellow servant of brakeman.

The conductor of a freight train is not a vice principal, unless special and unusual powers have been conferred upon him, but is a fellow servant of the engineer and brakemen, within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another.

[No. 42.]

Argued April 3, 4, 1899. Decided December 4, 1899.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the First Circuit for answer to questions as to whether a conductor was (1) a fellow servant of a brakeman, or (2) whether he was a vice principal, for whose negligence his employer is responsible. First question an-

NOTE.—As to when a conductor is deemed to be a coservant of other railway employees,—see *Jackson v. Norfolk & W. R. Co.* (W. Va.) 46 L. R. A. 337, and note.

swered in the affirmative. The second in the negative.

Statement by Mr. Justice **Shiras**:

[324] *This was an action against a railroad corporation by a brakeman in its employ to recover damages for a personal injury caused by the negligence of the conductor of one of its trains.

The facts in this case, as stated in the certificate of the circuit court of appeals, were as follows:

"On the 15th day of December, 1894, a freight train of the defendant company, drawn by a steam locomotive, and carrying an engineer, a fireman, three brakemen, and a conductor, set out from Worcester, in the commonwealth of Massachusetts, for the city of Providence, in the state of Rhode Island. The train, which consisted of the locomotive and tender, thirteen or fourteen freight cars, and a caboose car, was heavily loaded with freight. The train left Worcester at about 7.15 P. M. and proceeded on its way without accident, until when, at a point on the railroad in the state of Rhode Island, away from telegraphic communication and not at a station, and distant from Providence about 16 miles, the engineer discovered by the motion and behavior of the locomotive that the train had broken apart. He immediately gave signals with the whistle to indicate to the trainmen upon the rear portion of the train that it was broken off, and continued to repeat those signals, which consisted of three rapid blasts of the whistle with very brief intervals between the different threes, while the locomotive and the one car which remained connected ran $\frac{3}{4}$ of a mile. The locomotive with the connected car ran about $2\frac{3}{4}$ miles when the engineer, not being able to see anything of the separated part of the train, and supposing that his signals had been heard and its advance stopped, slowed up the engine preparatory to sending the fireman back [325] *with the lantern and to take steps for restoring the connection of the parts of the train. Before speed had been so reduced that the fireman could alight from the train, the rear portion was discovered close at hand and approaching at great speed. The fireman gave notice of this fact and a signal for the locomotive to go ahead, but before it could gain speed to get away a collision between the two parts of the train took place, and one Gregory, a brakeman, who was on the top of the car still attached to the engine, was thrown from the car by the shock and instantly killed.

"The three brakemen on the train were a head, a middle, and a rear brakeman. Gregory was the head brakeman, and at once, on discovery of the separation of the train, went to the top of the only car left with the engine. The conductor and the middle and rear brakemen had been riding in the caboose car at the rear end of the train, and did not hear the warning signals which the engineer gave with the whistle, nor know that the train had broken until the collision, but remained all the time in the caboose. The

night was cold and clear. The accident was near midnight.

"The negligence complained of consisted in the alleged failure of the conductor in control of the men and in charge of the train, in view of the character of the night, the character of the road in respect to grades and curves, the speed at which the train was run, and the liability of the train to part asunder at that place, to properly watch and supervise its movements, and the fact that he, in the full knowledge that the rear and middle brakemen were in the caboose, away from their brakes, permitted them to remain there, and failed to order them to the brakes."

The jury were instructed: "The conductor of the train, under the rules laid down by the rules of the Supreme Court of the United States, is in a peculiar and special condition. The conductor of the train, as I understand the theory of the rule of the Supreme Court of the United States, is, in a certain sense, between stations, at least, is in a certain sense like the master of a ship on a voyage; he is beyond the reach of orders when running his train between stations; and therefore *as a matter of necessity, as a matter of [326] public policy, I suppose, he must be held to stand in the place of the corporation itself.

. . . If you find in this particular case, from the evidence in the case and such common knowledge as jurymen are entitled to use, that by the rules of this road . . . the conductor gave directions to the people who worked on the train, gave directions to start the train, gave directions to stop the train, gave directions as to the location and position of the different men on the train, and also had the general management of the train and control over it when running between stations, then I say to you, gentlemen, that he for this case represents the company, and if injuries resulted from his negligent acts the company is responsible."

The jury returned a verdict for the plaintiff, and assessed damages in the sum of \$4,250.

The defendant brought the case by writ of error to the United States circuit court of appeals for the first circuit.

And, upon consideration of the case, after full argument, the judges of that court desired the instructions of the Supreme Court upon the following questions of law arising on the facts as before stated:

1st. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman?

2d. Whether the negligence of the conductor was the negligence of its vice or substituted principal or representative, for which the corporation is responsible?

Mr. Frank A. Farnham argued the cause and filed a brief for plaintiff in error:

Where a business becomes so vast and diversified that it necessarily separates into departments of service, the individuals placed in charge of these departments and given entire management and control therein are practically considered, as to their sub-

ordinates, vice principals. This rule can be fairly applied only when the different branches and departments are in themselves separate and distinct.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Alaska Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

The decision in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, rests on the peculiar view entertained by the court as to the scope of a conductor's power.

Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

If the conductor had been a vice principal while the train held together, this relation to the head brakeman was severed when the train broke apart and the engineer became in command of that portion of the train upon which the brakeman was riding.

Newport News & M. Valley Co. v. Howe, 6 U. S. App. 172, 52 Fed. Rep. 362, 3 C. C. A. 121.

So far as concerns the authority of a conductor to direct the specific acts of the men under him, he has never been held to be a representative of the principal, but is merely a fellow servant with the rest.

Quinn v. New Jersey Lighterage Co. 23 Blatchf. 209, 23 Fed. Rep. 363; *Hoke v. St. Louis, K. & N. R. Co.* 11 Mo. App. 574.

Mr. James E. Cotter argued the cause and filed a brief for defendant in error:

The case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, was not overruled by *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, but, on the contrary, was expressly affirmed therein.

Northern P. R. Co. v. Beaton, 29 U. S. App. 88, 64 Fed. Rep. 563, 12 C. C. A. 30; *Mason v. Richmond & D. R. Co.* 114 N. C. 718, 19 S. E. 362.

The principle of the *Ross Case* has been applied to a master of a vessel "while she is at sea beyond the reach and control of the owners, and the seaman is subject to the absolute control of the master, and cannot, if he would, leave the vessel and throw up his engagement."

The A. Heaton, 43 Fed. Rep. 592; *The Titan*, 23 Blatchf. 177, 23 Fed. Rep. 413; *McCullough v. New York & N. S. B. Co.* 20 U. S. App. 570, sub nom. *The Transfer No. 4*, 61 Fed. Rep. 364, 9 C. C. A. 521; *The Julia Fowler*, 49 Fed. Rep. 277; *The Frank & Willie*, 45 Fed. Rep. 494.

The *Ross Case* has been approved or followed in many cases both in the Federal and state courts.

Northern P. R. Co. v. Herbert, 116 U. S. 175 U. S.

642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Canadian P. R. Co. v. Johnston*, 26 U. S. App. 85, 61 Fed. Rep. 738, 9 C. C. A. 587, 25 L. R. A. 470; *Northern P. R. Co. v. Beaton*, 29 U. S. App. 88, 64 Fed. Rep. 563, 12 C. C. A. 30; *McCullough v. New York & N. S. B. Co.* 20 U. S. App. 570, sub nom. *The Transfer No. 4*, 61 Fed. Rep. 364, 9 C. C. A. 521; *Borgman v. Omaha & St. L. R. Co.* 41 Fed. Rep. 667; *The A. Heaton*, 43 Fed. Rep. 592; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Northern P. R. Co. v. Cavanaugh*, 10 U. S. App. 197, 51 Fed. Rep. 517, 2 C. C. A. 358; *Union P. R. Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. Rep. 988, 6 C. C. A. 205; *Au v. New York, L. E. & W. R. Co.* 29 Fed. Rep. 72; *The Titan*, 23 Blatchf. 177, 23 Fed. Rep. 413; *Howard v. Delaware & H. Canal Co.* 40 Fed. Rep. 195; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 616; *Baltimore & O. R. Co. v. Reynolds*, 6 U. S. App. 75, sub nom. *Baltimore & O. R. Co. v. Andrews*, 50 Fed. Rep. 728, 1 C. C. A. 636, 17 L. R. A. 190; *Mason v. Richmond & D. R. Co.* 114 N. C. 718, 19 S. E. 362; *Louisville & N. R. Co. v. Moore*, 83 Ky. 675; *Boatwright v. Northeastern R. Co.* 25 S. C. 128; *Daniel v. Chesapeake & O. R. Co.* 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776; *Wooden v. Western N. Y. & P. R. Co.* 43 N. Y. S. R. 218, 16 N. Y. Supp. 840.

The same principle was recognized in *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739; *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486.

It was decided on its own peculiar facts (*Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848), and rests upon a principle peculiar to those facts (*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914), and was intentionally limited to the case of a railway conductor (*Van Avery v. Union P. R. Co.* 35 Fed. Rep. 40, per Brewer, J.), of a certain dignity and situation. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

The principle of the *Ross Case* is supported by public policy and is recognized by subsequent legislation holding railroad corporations responsible to their servants for all injuries caused by the negligence of those having charge or control of trains, locomotives, switches, and signals.

7 Am. & Eng. Enc. Law, 1st ed. p. 858, note 1; 43 & 44 Vict. chap. 42; Ala. Code 1886, §§ 2590, 2591, 2592; Mass. Acts 1887, chap. 270; Colo. Sess. Laws 1893, chap. 77; Ind. Acts 1893, chap. 130.

Irrespective of the *Ross Case*, or the reasoning upon which it is based, the conductor was a vice principal to whom was delegated the master's personal duty to assign and keep employed on the work to which the deceased was assigned a sufficient number of competent fellow workmen to perform the task in safety.

Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Flike*

v. Boston & A. R. Co. 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Mason v. Edison Mach. Works*, 28 Fed. Rep. 228.

And to refrain from exposing the deceased to unnecessary and unusual perils of which he had no knowledge.

Union P. R. Co. v. Fort, 17 Wall. 553, 21 L. ed. 739; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Perry v. Marsh*, 25 Ala. 659; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Chicago, B. & Q. R. Co. v. Blank*, 24 Ill. App. 438; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Luebke v. Chicago, M. & St. P. R. Co.* 59 Wis. 127, 17 N. W. 870; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Neilon v. Marinette & M. Paper Co.* 75 Wis. 579, 44 N. W. 772; *Lasky v. Canadian P. R. Co.* 83 Me. 461, 22 Atl. 367; *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Stephens v. Hannibal & St. J. R. Co.* 86 Mo. 221; *Kelley v. Cable Co.* 7 Mont. 70, 14 Pac. 633; *Galveston, H. & S. A. R. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562; *Augusta Factory v. Hill*, 83 Ga. 709, 10 S. E. 450.

question, Would, in such a state of facts, the company be liable to the injured brakeman for the negligence of the conductor?

There is a general rule of law, established by a great preponderance of judicial authority in the English and in the state and Federal courts, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. But there have been conflicting views expressed in the application of this rule in cases where the employer is a railroad company, or other large organization, employing a number of servants engaged in distinct and separate departments of service; and our present inquiry is whether the relation between *the [328] conductor and the brakeman of a freight train is that of fellow servants, within the rule, or whether the conductor is to be deemed a vice principal, representing the railroad company in such a sense that his negligence is that of the company, the common employer.

Unless we are constrained to accept and follow the decision of this court in the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule.

We shall refer to a few of the authorities which establish these principles. *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, is the leading case in Massachusetts. The question was thus stated by Chief Justice Shaw:

"This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties and the labor and skill required for their proper performance. The question is *whether, for dam- [329] ages sustained by one of the persons so employed, by means of the carelessness and neg-

[326] *Mr. Justice Shiras delivered the opinion of the court:

It may be doubted whether the questions of law presented to us are really raised by the facts as certified. No facts are stated from which the jury might have found that, at the *time and place of the accident, there [327] was any special reason why the brakemen should have been ordered by the conductor to take their places at the brakes, and therefore it is by no means evident that there was any dereliction of duty on the part of the conductor.

Nor is it clear that the negligence of the conductor, if negligence it was, in permitting the brakemen to ride in the caboose, was the proximate cause of Gregory's injuries. When the train parted the engineer had charge and control of the locomotive and attached cars, and it would seem to have been his duty, as it was within his power, to have prevented the subsequent collision of the detached parts. And, in that event, the case would be ruled by *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, where it was held that the engineer and fireman of a locomotive engine, running alone on a railroad and without any train attached, are fellow servants, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

However, waiving these suggestions, and proceeding on the assumptions of the courts below that it was the duty of the conductor, at the time and place of the accident, to have the brakemen on the top of the cars where they could apply the hand brakes, and that his failure to do so was the proximate cause of the injury to the plaintiff's intestate resulting from the subsequent collision of the detached portions of the train, we meet the

ligence of another, the party injured has a remedy against the common employer."

After discussing the principles of law and reason applicable to the case, the chief justice proceeded:

"In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment, and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion.

"It was strongly pressed in the argument that, although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately

[330] arise, How *near or how distant must they be to be in the same or different departments? In a blacksmith's shop persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but him-

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self; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers, for the negligence of a servant. . . . The responsibility which one is under for the negligence of his servant, in the conduct of his business, toward third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good."

*In *Holden v. Fitchburg R. Co.* 129 Mass. [331] 268, 37 Am. Rep. 343, which was a case in which damages were claimed by a person employed to act as a laborer in the removal of a mass of earth overhanging the defendant's railroad, on the alleged ground of negligence on the part of a roadmaster who had charge of that portion of the railroad, the case of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, was followed, and it was held, on the principles established in that and subsequent cases, that it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff; and, in discussing the cases, Chief Justice Gray cited the case of *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 332, 334, 335, 336, and some of the observations made by the justices who delivered judgments therein in the House of Lords. Thus Lord Chancellor Cairns said:

"The master is not, and cannot be, liable to his servants unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business." "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of

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negligence this is not the negligence of the master." Lord Colonsay said: "I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself; or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty; or the failure to provide or supply the means of providing proper machinery or materials,—may furnish grounds of liability."

[332] *And see, likewise, the case of *Clifford v. Old Colony R. Co.* 141 Mass. 564, 6 N. E. 751, in which it was held that a section hand in the employ of a railroad corporation cannot maintain an action against the corporation for personal injuries caused by a collision between a hand car on which he was at work and an engine of a train run by servants of the corporation, if the accident was occasioned by the negligence of the section boss and the engineer of the train.

In *Shearman v. Rochester & S. R. Co.* 17 N. Y. 153, it was held by the New York court on appeals that a servant who sustains an injury from the negligence of a superior agent engaged in the same general business can maintain no action against their common employer, although he was subject to the control of such superior agent, and that, accordingly, a brakeman upon a railroad whose duty it is not to apply the brakes except when directed by the engineer or conductor cannot maintain an action against their common employer for an injury resulting from the culpable speed at which the engineer and conductor ran the train. And this appears to be the settled doctrine in the state of New York. *Besel v. New York C. & H. R. R. Co.* 70 N. Y. 173; *De Forest v. Jewett*, 88 N. Y. 264.

The supreme court of Pennsylvania has held, in numerous cases, and it is settled law in that state, that a fellow servant, within the meaning of the rule, is anyone serving the same master, and under his control, whether equal, inferior, or superior to the injured person in his grade or standing, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference. *Weger v. Pennsylvania R. Co.* 55 Pa. 460; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432.

In *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615, the supreme court of Indiana held, reversing some previous cases to the contrary, that it is the duty of a railroad company to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, and in the selection of competent subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operation of the road; and that if

[333] *these duties are performed with care by the

company, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the master, and the company is not responsible.

Without following further the history of this subject in the courts of the several states, we may state that, generally, the doctrine there upheld is that of the cases herein previously cited, except in the courts of the states of Ohio, Kentucky, and perhaps others, in which the rule seems to obtain that while the master is not liable to his servant for any injury committed by a servant of equal degree in the same sphere of employment, unless some negligence is fixed on the master personally, yet that he is liable for the gross negligence of a servant superior in rank to the person injured, and is also liable for the ordinary negligence of a servant not engaged in the same department of service.

Leaving the decisions of the state courts, and coming to those of this court, we find the latter to be in substantial harmony with the current of authority in the state and English courts. From this statement the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, must, perhaps, be excepted, and to it we shall revert after an examination of our other cases.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, was the case of an action in the circuit court of the United States for the district of West Virginia against a railroad corporation by a brakeman in its employ for personal injuries received, while working a switch, by being struck by one of its locomotive engines; and it was unanimously held by this court, affirming the court below, that the plaintiff could not recover, although the injury was occasioned by the negligence of the engine-man in running his engine too fast, or not giving due notice of its approach. In the course of the opinion, which was pronounced by Mr. Justice Gray, he said:

"The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This court has not hitherto had *occasion to de-

[334] cide who are fellow servants, within the rule. . . . Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states, because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may

injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains.”

Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, was a case wherein it appeared that a brakeman suffered an injury by reason of the fact that the brakes which he was called upon to apply were broken and out of order, and it was held, per Mr. Justice Field, that it was the duty of the company to furnish sufficient and safe materials, machinery, or other means by which service is to be performed, and to keep them in repair and order, and that as this duty had not been fulfilled the plaintiff was entitled to recover. There was another question in that case as to the import and effect of a statute of Dakota, in which territory the accident took place, providing that “an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee,” and that “an employer must, in all cases, indemnify his employee for losses caused by the former’s want of ordinary care.”

[335] It was held, by a majority of the court, that these provisions *of the Dakota Code expressed the general law that an employer is responsible for injury to his employees caused by his own want of ordinary care; that his selection of defective machinery, which is to be moved by steam power, is of itself evidence of a want of ordinary care, and allowing it to remain out of repair, when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence; that the cars, in that case, had been defective for years; that the brakes were all worn out, and their condition had been called to the attention of the yard master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars; that, in such circumstances, the company had not exercised ordinary care to keep the cars and brakes in good condition; and that, therefore, under the provisions of the statute, the company was bound to indemnify the plaintiff. The minority of the court considered that the case was governed by the local statute, and that the statute, properly construed, relieved the employer, under the facts of the case, from liability to the injured employee. They declined to express any opinion upon the question of liability apart from the statute.

Quebec S. S. Co. v. Merchants, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397, was an action brought in the circuit court of the United States for the southern district of New York by one Merchant, who was employed as a stewardess of the steamship *Bermuda*, belonging to the defendant company. It appeared that the ship’s company consisted of

thirty-two persons, divided into three classes of servants, called three departments—the deck department, the engineers’ department, and the steward’s department. The captain, the first and second officers, the purser, the carpenter, and the sailors were in the deck department; the engineers, the firemen, and the stokers were in the engineers’ department; the steward, the waiters, the cooks, the porter, and the stewardess were in the steward’s department. At the close of the evidence the defendant’s counsel requested the court to charge the jury to find a verdict for the defendant on the ground that the injury sustained by the plaintiff was occasioned, if there was *any negligence, by [336] the negligence of a fellow servant. This the court refused to do. There was a verdict for the plaintiff, and the case was brought to this court. Here it was contended that as the carpenter, whose negligence was alleged as the cause of the accident, was in the deck department, and the stewardess in the steward’s department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But Mr. Justice Blatchford, speaking for the entire court, said:

“The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow servants who were in a common employment with her, and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence the negligence of the employer. The case, therefore, falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant, and does not fall within any exception to that rule which destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer.”

The next notable case is that of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, in which it was held that an engineer and fireman of a locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former. In the course of the opinion Mr. Justice Brewer said:

“It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master’s liability. On the contrary, all the cases proceed on the ground of some *breach of positive duty resting upon the [337] master, or upon the idea of superintendence

or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants."

We shall have occasion to revert to this case when we come to consider the decision in *Chicago, M. & St. P. R. Co. v. Ross*.

In *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, it was held that a common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow servant with such engineer and such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted; and Mr. Justice Brown, in delivering the opinion of the court, observed:

"To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank on the same ship, are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless

[338] the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."

In *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269, *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, was approved and followed in respect to its statement as to what constitutes a vice principal.

In *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, an action had been brought in the circuit court of the United States for the district of Minnesota by Peterson to recover damages against the railroad company, alleged to have

been caused by the negligence of the foreman of a gang of laborers, engaged in putting in repair sections of the railroad. The foreman had power to hire and discharge the hands who composed the gang, and had exclusive charge of their direction and management in all matters connected with their employment. The plaintiff recovered a verdict, and the judgment of the circuit court thereon was affirmed by the circuit court of appeals of the eighth circuit. The cause was brought to this court, and the judgments of the courts below were reversed. The opinion of this court was by Mr. Justice Peckham, in which he reviewed the authorities, and expressed the following conclusions:

"The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow servants, and, prima facie, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably *safe and [339] competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employees and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. . . . The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

"When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered,

with respect to employees under them, vice principals and representatives of the master as fully and completely as if the entire business of the master were placed by him under one superintendent. . . . This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master as would be necessary to *render the master liable to a coemployee for his neglect. He was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen."

The last case we shall refer to is that of *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345, where it was declared to be the settled law of this court that the relation of fellow servants exists between an engineer operating a locomotive on one train, and the conductor on another train on the same road; and *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, where it was held that a brakeman on a regular train of a railroad and the conductor of a wild train, on the same road, are fellow servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter and by his disregard of the rules of the company.

Without attempting to educe from these cases a rule applicable to all possible circumstances, we think that we are warranted by them in holding in the present case that, in the absence of evidence of special and unusual powers having been conferred upon the conductor of the freight train, he, the engineer, and the brakemen, must be deemed to have been fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another.

This conclusion is certainly sound unless we are constrained to hold otherwise by the decision in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, already referred to. That was a case wherein an action was maintained, [341] brought by a locomotive *engineer to recover damages received in a collision caused by the negligence of the conductor of the train; and it must be admitted that the reasoning employed by Mr. Justice Field, in his opinion 175 U. S.

expressing the views of a majority of the court, and the conclusion reached by him, cannot be reconciled with the other decisions of this court hereinbefore cited. We do not think that it would be proper to pass by the case without comment, nor yet to attempt to distinguish it by considerations so narrow as to leave the courts below in uncertainty as to the doctrine of this court on a subject so important and of such frequent recurrence. The case in hand exemplifies the perplexity caused by the *Ross Case*. The trial court gave effect to it as establishing the proposition that the conductor of an ordinary freight train, with no other powers than those assumed to belong to such an employee by virtue of such a position, is a vice principal, against whose negligence the company is bound to indemnify all the other employees on the train. Yet it is evident that the judges of the circuit court of appeals did not find themselves able to either accept or reject such a proposition, as they have certified it to us as one on which they desire our instructions. Such a course plainly evinces doubts whether, in view of the decisions both before and since, the case of *Chicago, M. & St. P. R. Co. v. Ross*, furnishes a safe and approved rule to guide the trial courts.

While the opinion in the *Ross Case* contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employees, we think it went too far in holding that a conductor of a freight train is, *ipso facto*, a vice principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains. Thus it was said:

"We know from the manner in which railroads are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management *of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation."

We think these statements attribute duties and powers to conductors of freight trains much greater than ordinarily exist. Several of the instances of control assigned to the conductor really belong to the engineer, who, as railroads are now operated, is a much more important functionary in the actual movements of the train, when in motion, than the conductor. It is his hand that regulates the application of the brakes that control the speed of the train, and in doing so he acts upon his own knowledge and observa-

tion, and not upon orders of the conductor. Particularly has this become the case since the introduction of the air train-brake system. We can take notice of the act of March 2, 1893 (27 Stat. at L. 531), which enacted "that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train-brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand-brake for that purpose." We do not refer to this statute as directly applicable to the case in hand, but as a legislative recognition of the dominant position of the engineer.

Cases are cited in the opinion in the *Ross Case* in which it has been held by the supreme court of Ohio and by the court of appeals of Kentucky that railroad companies are responsible for negligence of conductors [343] to other employees. *But those courts do not accept the ordinary rule exempting the master from liability to a servant for the negligent conduct of his fellows. At least, they do not apply such a rule to the extent that this and other courts have done. They hold that no service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other.

In so far as the decision in the *Case of Ross* is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & O. R. Co. v. Baugh*, before cited. There Mr. Justice Brewer, in commenting upon the proposition applied in the *Ross Case*, that the conductor of a train has the control and management of a distinct department, said:

"But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as that of those who are simply coworkers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employee, it includes all coworkers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of

no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty *in the ques- [344] tion. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, What is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employee with fit and careful coworkers, and the employee has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and therefore an improper, employee is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a coservant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employee is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employees who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant, does not of itself prove any omission of care on the part of the master in his employment; and *it is only when there is such [345] omission of care that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employee's negligence.

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which

he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of

[346] providing *safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged, when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

Accordingly, the conclusion reached was that, although the party injured was a fireman, who was subject to the orders and control of the engineer, in the absence of any conductor, there was no liability on the company for negligence of the *ad interim* conductor.

That this reasoning and conclusion were inconsistent with those in the *Ross Case* is not only apparent on comparing them, but further appears in the dissenting opinion in the *Baugh Case* of Mr. Justice Field, who was the author of the opinion in the *Case of Ross*. He said:

"The opinion of the majority not only limits and narrows the doctrine of the *Ross Case*, but, in effect, denies, even with the 175 U. S.

limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a coworker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service. A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine. . . . The principle in the *Ross Case* covers this case, and requires, in my opinion, a judgment of affirmance."

So, likewise, Mr. Chief Justice Fuller dissented in the *Baugh Case* for the express reason that, in his opinion, the case came within the rule laid down in *Chicago, M. & St. P. R. Co. v. Ross*.

To conclude, and not to subject ourselves to our own previous criticism, of proceeding upon assumptions not founded on *the evi- [347] dence in the case, we shall content ourselves by saying that, upon the facts stated and certified to us by the judges of the circuit court of appeals, we cannot, as a matter of law, based upon those facts and upon such common knowledge as we, as a court, can be supposed to possess, hold a conductor of a freight train to be a vice principal within any safe definition of that relation.

Accordingly we answer the first question put to us in the affirmative, and the second question in the negative.

Let it be so certified.

Mr. Justice Harlan dissenting:

I concurred in the opinion and judgment of this court in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, and do not now perceive any sound reason why the principles announced in that case should not be sustained. In my judgment the conductor of a railroad train is the representative of the company in respect of its management, all the other employees on the train are his subordinates in matters involved in such management, and for injury received by any one of those subordinates during the management of the train by reason of the negligence of the conductor the railroad company should be held responsible. As the conductor commands the movements of the train and has general control over the employees connected with its operation, the company represented by him ought to be held responsible for his negligence resulting in injury to other employees discharging their duties under his immediate orders. If in such case the conductor be not a vice principal, it is difficult to say who among the officers or agents of a corporation sued by one of its employees for personal injuries ought to be regarded as belonging to that class. Having these views, I am compelled to withhold my assent from the opinion and judgment in this case.

[348] HOSEA B. TULLIS, *Plff. in Err.*,
v.

LAKE ERIE & WESTERN RAILROAD
COMPANY.

(See S. C. Reporter's ed. 348-354.)

*Equal protection of laws to corporations—
statute changing fellow-servant rule in
case of railroad employees.*

1. A statute making a railroad company liable to an employee injured by the negligent act of a fellow servant is not unconstitutional as a denial to such corporation of the equal protection of the laws, since there are peculiar hazards in the operation of a railroad.
2. The interpretation of a state statute affixed to it by the state court of last resort will not be disregarded by the United States Supreme Court, and a different construction given to the statute, which will make it repugnant to the Federal Constitution.

[No. 71.]

*Argued and Submitted October 26, 27, 1899.
Decided December 11, 1899.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit presenting the question of the constitutionality of a state statute which makes railroad companies liable to employees injured by negligence of fellow servants. *Statute upheld.*

Statement by Mr. Chief Justice **Fuller**:

This case comes to this court on the following certificate of the United States circuit court of appeals for the seventh circuit:

[349] "In this case, duly argued and submitted to this court, there arises a question of law concerning which this court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow servant, for which the defendant in error is alleged to be responsible by force of an act of the legislature of Indiana approved by the governor of the state March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

"First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition.

"Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the

injury was bound to conform, and did conform.

"Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employee, or fellow servant engaged in the same common service in any of the several departments of the *service of any such cor- [350]
poration, the said person, coemployee, or fellow servant, at the time acting in the place, and performing the duty, of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury having the authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

"For the entire act reference is made to Session Laws of 1893, page 294, Burns's Annotated Indiana Statutes, Revision of 1894, paragraphs 7083 to 7087, inclusive.

"The Lake Erie & Western Railroad Company is a corporation of the state of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the state of Indiana. It is contended that the statute referred to is invalid because inconsistent with the 14th Amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid or violates the 14th Amendment of the Constitution of the United States the court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision."

Mr. Addison C. Harris argued the cause and filed a brief for plaintiff in error:

It is too late to say that a state may not regulate the liability of railroad companies towards their employees for injuries suffered by the negligence of a coemployee or fellow servant.

Chicago & N. W. R. Co. v. McLaughlin, 119 U. S. 566, 30 L. ed. 477, 7 Sup. Ct. Rep. 1366; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Magoun v. Illinois* 175 U. S.

Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The act being valid as to the railroad company, it cannot question the constitutionality of the act as applied to others. Only those whose rights would be prejudiced by the enforcement of an unconstitutional act, provision, or clause will be heard to question its validity.

Brown v. Ohio Valley R. Co. 79 Fed. Rep. 176; *Pittsburgh, C. O. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 587; *Wagner v. Garrett*, 118 Ind. 116, 20 N. E. 706; *Henderson v. State ex rel. Stout*, 137 Ind. 564, 24 L. R. A. 469, 36 N. E. 257; *Switzerland County Comrs. v. Reeves*, 148 Ind. 476, 46 N. E. 995; *McKinney v. State*, 3 Wyo. 719, 16 L. R. A. 710, 30 Pac. 296; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Marshall v. Donovan*, 10 Bush, 681; *Wellington, Petitioner*, 16 Pick. 96, 26 Am. Dec. 631; *Norman v. Boaz*, 85 Ky. 557, 4 S. W. 316; *Sinelair v. Jackson ex dem. Field*, 8 Cow. 543; *Shehane v. Bailey*, 110 Ala. 308, 20 So. 360; *Black, Const. L.* 2d ed. p. 58; *Cooley, Const. Lim.* 6th ed. p. 196; *State v. Becker*, 3 S. D. 29, 51 N. W. 1023; 6 Am. & Eng. Enc. of Law, 2d ed. 1090, where the cases are well collected and arranged under note 1; *State v. McNulty*, 7 N. D. 169, 73 N. W. 87.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, unless the prohibited parts are unseverable. A severance is easy in this case, if it should be thought that some corporations might question its validity as to other clauses, which is not admitted, but denied.

Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; *Penniman's Case*, 103 U. S. 716, *sub nom. Vial v. Penniman*, 26 L. ed. 604; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; *Henderson v. State ex rel. Stout*, 137 Ind. 552, 24 L. R. A. 469, 36 N. E. 257; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Presser v. Illinois*, 116 U. S. 263, 29 L. ed. 618, 6 Sup. Ct. Rep. 580; *Cooley, Const. Lim.* 6th ed. p. 209; *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 23 L. R. A. 139, 36 N. E. 80; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 254.

Mr. W. H. H. Miller argued the cause and, with Messrs. *John B. Elam* and *John B. Cockrum*, filed a brief for defendant in error.

Any legislation based on classification must rest on a reasonable classification, and one having a just and proper relation to the subject-matter.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435; *Com. ex rel. Fertig v. Patton*, 88 Pa. 258; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 970; *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *People ex rel. Lee v. Chautauqua County Supers.* 43 N. Y. 10; *Smith v. Louisville & N. R. Co.* 75 Ala. 449; *Soon Hing v. Crowley*, 175 U. S. U. S., Book 44.

113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State ex rel. McCue v. Ramsey County Sheriff*, 48 Minn. 236, 51 N. W. 112.

The statute at bar is objectionable in that it makes a classification based, not on the character of the employment nor of the dangers to which the employees are exposed, but on the character only of the employers.

Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974.

Viewed from the standpoint of the servant, the statute gives to those who are in the employ of corporations rights which it denies to those who are in the employ of individuals, copartnerships, or joint stock companies, although they may be carrying on the same business under similar circumstances.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa. 52; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156.

The law is general and cannot be enforced by construction as to some where it is invalid as to others plainly within the scope of its language.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *Trade-Mark Cases*, 100 U. S. 82, *sub nom. United States v. Steffens*, 25 L. ed. 550; *State ex rel. Corwin v. Indiana & O. Oil, Gas. & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; *Logan v. Stogsdale*, 123 Ind. 372, 8 L. R. A. 58, 24 N. E. 135; *Griffin v. State ex rel. Griffiths*, 119 Ind. 520, 22 N. E. 7.

The court cannot say that the legislature would have enacted a part assumed to be valid except in connection with the other parts of the statute.

Meshmeyer v. State, 11 Ind. 482.

To strike out the provisions of the act relating to other corporations, and sustain it as an act applying to railroad corporations alone, does not remove the constitutional objection, as it would still discriminate between railroads owned by individuals, copartnerships, or joint stock companies and those owned by corporations.

To limit the statute in the manner asked would be to make a new law, not to enforce an old one.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *Warren v. Charlestown*, 2 Gray, 84; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

Legislation for the purpose of protecting railway employees against the peculiar danger incident to parts of that service must be limited to such dangers. This may be done by classification, but the classification must have reference to the hazardous position, and it must be reasonable.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; 13

State ex rel. Richards v. Hamner, 42 N. J. L. 435.

The exception of municipal corporations would also make the law invalid.

Macmillan v. New York, 62 N. Y. 160, 20 Am. Rep. 468; *Smith v. Rochester*, 76 N. Y. 506; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

As to the question whether a state statute is at war with the Federal Constitution, this court judges for itself.

Wright v. Nagle, 101 U. S. 794, 25 L. ed. 922; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

[350] *The contention is that the act referred to is in conflict with the 14th Amendment because it denies the equal protection of the laws to the corporations to which it is applicable.

[351] *In *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, the statute in question was held valid as to railroad companies, and it was also held that objection to its validity could not be made by such companies, on the ground that it embraced all corporations except municipal, and that there were some corporations whose business would not bring them within the reason of the classification. In announcing the latter conclusion the court ruled in effect that the act was capable of severance; that its relation to railroad corporations was not essentially and inseparably connected in substance with its relation to other corporations; and that, therefore, whether it was constitutional or not as to other corporations, it might be sustained as to railroad corporations.

In *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, and *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705, an act of Arkansas of March 25, 1889, was held unconstitutional by the supreme court of that state so far as affecting natural persons, and sustained in respect of corporations; and in *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, that view of the act was accepted by this court because that court had so decided.

Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the 14th Amendment. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Peirce v. Van Dusen*, 47 U. S. App. 339, 78 Fed. Rep. 693, 24 C. C. A. 280; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

In *Missouri P. R. Co. v. Mackey*, the validity of a statute of Kansas of 1874 providing that "every railroad company organized or doing business in this state shall be liable

for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage," was involved, and it was held that it did not deny to railroad companies the equal protection of the laws. Mr. Justice Field said: "The hazardous character of the business of operating a railway would seem to call for *special legisla-[352] tion with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

In *Minneapolis & St. L. R. Co. v. Herrick*, the same conclusion was reached in respect of a law of the state of Iowa, that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

In *Chicago, K. & W. R. Co. v. Pontius*, a bridge carpenter employed by a railroad company, who was injured through the negligence of employees of the company while assisting in loading timber, taken from the false work used in constructing a bridge, on a car for transportation to another point on the company's road, was held to be an employee of the company within the meaning of the statute of Kansas, and the validity of that act was again affirmed.

In *Peirce v. Van Dusen*, a similar statute of the state of Ohio applying to railroad companies was upheld by the circuit court of appeals for the sixth circuit, Mr. Justice Harlan delivering the opinion of the court.

In *Orient Ins. Co. v. Daggs*, in which an act of the state of Missouri in respect of policies of insurance *against loss or damage[353] by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that the power of the state to distinguish, select, and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably ar-

bitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. *Missouri P. R. Co. v. Mackey and Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207, were cited and approved. And see *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. Rep. 250; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

By reason of the particular phraseology of the act under consideration it is earnestly contended that the decisions sustaining the validity of the statutes of Kansas, Iowa, and Ohio are not in point, and that this statute of Indiana classified railroad companies arbitrarily by name and not with regard to the nature of the business in which they were engaged, but the supreme court of the state in the case cited has held otherwise as to the proper interpretation of the act, and has treated it as practically the same as the statutes of the states referred to. Indeed the Iowa statute is quoted from, and the case of *Beckwith*, as well as that of *Mackey*, relied on as decisive in the premises.

As remarked in *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. "But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

This being an action brought by Tullis to recover damages for an injury suffered while in the employment of the railroad company, caused by the negligent act of a fellow servant, *for which the company was alleged to be responsible by force of the act, we answer the question propounded that *the statute as construed and applied by the Supreme Court of Indiana is not invalid and does not violate the Fourteenth Amendment to the Constitution of the United States.*

Certificate accordingly.

THE PEDRO.

(See S. C. Reporter's ed. 354-382.)

Commencement of war with Spain—capture of prize—vessel owned by Spanish corporation—ownership of stock by British subjects—intent to take British registry.

1. War between the United States and Spain existed on April 21, 1898, when diplomatic relations were broken off, and Spain, in a communication to the United States minister at Madrid, accepted the resolution of Congress for intervention in Cuba as a declaration of war, although the formal decree by Spain and the declaration of war by Congress were not made until afterwards.

2. A vessel owned by a Spanish corporation, having a Spanish registry, sailing under the 175 U. S.

Spanish flag and a Spanish license, and officered and manned by Spaniards, must be deemed a Spanish vessel for the purpose of capture as a prize, although British subjects were the legal owners of some, and the equitable owners of the rest, of the stock in the corporation, and intended to restore the vessel to British registry if war rendered the change desirable.

3. A Spanish vessel sailing from Havana for Santiago on April 22, 1898, with no cargo except what was destined for the enemy's ports, was subject to capture, although her voyage began at Antwerp, Belgium, and she was under charter to proceed from Cuba to a port of the United States to get a cargo for a return voyage to Europe.

[No. 115.]

Argued November 2, 3, 1899. Decided December 11, 1899.

APPEAL from a decree of the District Court of the United States for the Southern District of Florida, condemning a Spanish vessel captured as a prize. *Affirmed.*

Statement by **Fuller**, Ch. J.:

*This is an appeal from a decree of the district court of the United States for the southern district of Florida condemning the steamer *Pedro* as lawful prize of war on a libel filed April 23, 1898. [355]

April 20, 1898, the President approved the following joint resolution:

"First. That the people of the island of Cuba are, and of right ought to be, free and independent.

"Second. That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect.

"Fourth. That the United States hereby disclaims any disposition *or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." 30 Stat. at L. 738. [356]

On the same day, the minister of Spain to the United States requested and obtained his passports; the text of the resolution was cabled to the minister of the United States at Madrid; and the Secretary of State by separate despatch directed him to communicate the resolution to the government of Spain with the formal demand of the United States therein made, and the notification that in the absence of a response by April 23 the President would proceed without further notice to use the power and authority enjoined and conferred upon him.

April 21 the minister of the United States at Madrid acknowledged the receipt of the Secretary's despatch that morning, but saying that before he had communicated it he had been notified by the minister of foreign affairs of Spain that diplomatic relations were broken off between the two countries, and that he had accordingly asked for his passports. The letter from the minister of foreign affairs of Spain referred to was as follows:

"In compliance with a painful duty I have the honor to inform Your Excellency that the President, having approved a resolution of both Chambers of the United States, which, in denying the legitimate sovereignty of Spain and threatening an immediate armed intervention in Cuba, is equivalent to an evident declaration of war, the government of His Majesty has ordered its minister in Washington to withdraw without loss of time from the North American territory, with all the personnel of the legation. By this act the diplomatic relations which previously existed between the two countries are broken off, all official communications between their respective representatives ceasing, and I hasten to communicate this to Your Excellency in order that on your part you may make such dispositions as seem suitable. I beg Your Excellency to acknowledge the receipt of this note at such time as you [357] deem *proper, and I avail myself of this opportunity to reiterate to you the assurances of my distinguished consideration."

The Secretary of the Navy at once gave instructions to the commander in chief of the North Atlantic squadron to "immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west; also, if in your opinion your force warrants, the port of Cienfuegos, on the south side of the island. . . . It is believed that this blockade will cut off Havana almost entirely from receiving supplies from the outside. . . . The department does not wish the defenses of Havana to be bombarded or attacked by your squadron."

April 22 Admiral Sampson, in command, instituted the blockade, and on that day the President issued the following proclamation:

"Whereas, by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the government of Spain, it was demanded that said government at once relinquish its authority and government in the island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters; and the President of the United States was directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as might be necessary to carry said resolution into effect; and

"Whereas, in carrying into effect said resolution, the President of the United States deems it necessary to set on foot and maintain a blockade of the north coast of Cuba, including all ports on said coast be-

tween Cardenas and Bahia Honda and the port of Cienfuegos on the south coast of Cuba:

"Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted, and will maintain, a blockade of the north coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on the *south coast of Cuba, aforesaid, [358] in pursuance of the laws of the United States and the law of nations applicable to such cases. An efficient force will be posted so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the commander of the blockading forces, who will indorse on her register the fact, and the date, of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize as may be deemed advisable.

"Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom." 30 Stat. at L. 1769.

April 23 the Queen Regent of Spain issued a decree, in which, among other things, it was stated:

"Art. I. The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795, the protocol of the 12th January, 1877, and all other agreements, compacts, and conventions that have been in force up to the present between the two countries.

"Art. II. A term of five days from the date of the publication of the present royal decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart."

April 25, in response to a message from the President, Congress passed the following act, which was thereupon duly and at once approved:

"First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"Second. That the President of the United States be, and *he hereby is, directed and em- [359] powered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry this act into effect." 30 Stat. at L. 364.

April 26 the President issued a further proclamation, as follows:

"Whereas, By an act of Congress approved April 25, 1898, it is declared that war exists, and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

"Whereas, It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this government will be, not to resort to privateering, but to adhere to the rules of the Declaration of Paris:

"Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

"3. Blockades in order to be binding must be effective.

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; *Provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for the voyage), or [360] any other article *prohibited or contraband of war, or any despatch of or to the Spanish government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade." 30 Stat. at L. 1770.

The steamship *Pedro* was built at Newcastle, England, in 1883, and, until 1887, sailed under British registry and the name of the *Lilburn Tower*. In the latter year her name was changed to the *Pedro*, and she was transferred to *La Compania la Flecha*, a Spanish corporation of Bilboa, Spain, and registered at that port in its name, and, on 175 U. S.

October 4, 1887, obtained a royal patent from the Crown of Spain, which was issued to her as the property of the company. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was engaged in the transportation of cargo for hire as a merchant vessel under the management of G. H. Fletcher & Company of Liverpool. Her voyages began in Europe, where she took cargo for Cuban ports, from which ports on discharge she proceeded to ports of the United States, where she took cargo for a port of discharge in Europe, the round trip occupying about three months. Between March 20 and March 25, 1898, she took on board at Antwerp, Belgium, some 2,000 tons of cargo for Havana, Santiago de Cuba, and Cienfuegos, Cuba, of which 1,700 tons was rice, and the rest hardware, empty bottles, paper, cement, and general cargo.

On March 18, 1898, she was chartered to the firm of Keyser & Company, being described in the charter party as "now loading in Antwerp for Cuba." to proceed to Pensacola, Florida. *or Ship Island, Mississippi, [361] "with all convenient speed." to load a cargo of lumber for Rotterdam or Antwerp. The charter party provided that "should the vessel not be in all respects ready for cargo at her loading place on or before the 18th of May, 1898, charterers or their agents have the option of canceling this charter. If required by charterers, lay days are not to commence at loading port before the 5th of May, 1898." Among the ship's papers was a bill of health issued by the consul of the United States at Antwerp, March 24, which described her as "engaged in Atlantic trade, and plies between Antwerp, Cuba, and the United States." The bill of health concluded as follows: "I certify that the vessel has complied with the rules and regulations made under the act of February 15, 1893, and that the vessel leaves this port bound for Pensacola, in the United States of America, via Havana, Santiago, and Cienfuegos." The steamer's freight list on the voyage to Cuban ports was valued at about \$7,000, stated to be barely sufficient to cover the expenses of receiving, transporting, and delivering that cargo; and the charter hire on the contemplated voyage from Pensacola or Ship Island to Rotterdam would have been about \$25,000.

The steamer arrived at Havana on April 17, and remained there for five days, discharging about 1600 tons of her cargo, and taking on some 20 tons of general merchandise for Santiago. On April 22, at about half after 3 o'clock in the afternoon, she left Havana for Santiago, and at 6 o'clock, when about 15 miles east of the Morro, at the entrance of Havana harbor, and 5 miles north of the Cuban coast, was captured by the cruiser *New York*, one of the blockading fleet, and sent to Key West in charge of a prize crew. There she was libelled on April 23.

In due course, proofs in *preparatorio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel,

and moved the court for leave to take further proofs, presenting with the motion his test affidavit. In the affidavit it was alleged that, although a majority of the stock of La [362] *Compania la Flecha* was registered in the names of Spanish subjects and only a minority in the names of British subjects (members of the firm of G. H. Fletcher & Company), one of the latter had possession of all the certificates of stock, which, under the charter of the company, established the ownership thereof, whereby he was the "sole beneficial owner of the said steamer *Pedro*." And further that the steamer was transferred from the British to the Spanish registry solely for commercial reasons, "there being discriminations in favor of vessels carrying the Spanish flag in respect of commerce with the colonies of Spain, in consideration of dues paid by such steamers to the government of Spain," but that it was the intention of the British stockholders to withdraw her from the Spanish registry and from under the Spanish flag, and restore her to the British registry and the flag of Great Britain whenever the trade might be disturbed. It was also alleged that the steamer was insured "against all perils and adventures, including the risks of war, for her full value, by underwriters of Lloyds, London, and by insurance companies organized and existing under and pursuant to the laws of Great Britain, and that if the said vessel should be condemned as prize by this court the loss will rest upon and be borne by the said English underwriters."

The motion was denied, the cause heard on the pleadings and the proofs taken in *preparatorio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to § 4624 of the Revised Statutes. By order of court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States, at New York, subject to the order of the district court. From the decree of condemnation an appeal was prosecuted to this court.

Mr. Wilhelmus Mynderse argued the cause, and *Messrs. Butler, Notman, Joline, & Mynderse* filed a brief, for the appellant.

Under ordinary rules of construction the proclamation of April 26, 1898, became effective as of the day of its date.

Lapeyre v. United States, 17 Wall. 191, 21 L. ed. 606; *United States v. Norton*, 97 U. S. 164, 24 L. ed. 907.

The ownership of a vessel determines whether or not it is neutral, and the rights of the owner are not effectually determined by the flag which he is carrying.

Lawrence, Int. Law, § 182, p. 325.

A controlling feature leading to condemnation is the time and opportunity which the owner has had to make a change of flag and register.

The Hallie Jackson, Blatchf. Prize Cas. 42, Fed. Cas. No. 5,961; *The William Bagaley*, 5 Wall. 377, *sub nom. The William Bagaley*

v. United States, 18 L. ed. 583; *The Gray Jacket*, 5 Wall. 342, *sub nom. The Grey Jacket v. United States*, 18 L. ed. 646.

The register and flag under which the *Pedro* was sailing do not constitute the vessel enemy property beyond inquiry.

Del Col v. Arnold, 3 Dall. 333, 1 L. ed. 624; *United States v. The Arcola*, Fed. Cas. No. 14,464a.

Mr. James H. Hayden argued the cause for the captors (*Mr. Joseph K. McCammon* for the captors and *Assistant Attorney General Hoyt* for the United States were with him on the brief):

The property of a house of trade established in the enemy's country is condemnable as a prize, whatever may be the domicile of the partners.

The Friendschaft, 4 Wheat. 105, 4 L. ed. 525; *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; *The Frances*, 8 Cranch, 335, 3 L. ed. 581; Story, Principles and Practice of Prize Courts, pp. 60-66; Hall, Int. Law, p. 524.

The mere act of sailing under a license granted by a belligerent state is sufficient to condemn a vessel, without regard to the object of her voyage or the port of her destination.

The Ariadne, 2 Wheat. 143, 4 L. ed. 205; *The Hiram*, 1 Wheat. 440, 4 L. ed. 131; *The Aurora*, 8 Cranch, 203, 3 L. ed. 536; *The Julia*, 8 Cranch, 181, 3 L. ed. 528.

A formal declaration is not essential to the existence of a state of war, and all enemy property found on the high seas at the actual outbreak of war is the legitimate subject of prize.

The Eliza Ann, 1 Dod. Adm. 247.

The letter of the proclamation, specifically limiting its scope, is not to be disregarded in favor of a mere supposition as to what is the tendency of civilization and what should have been the policy of the United States.

The Phoenix, 1 Spinks, Prize Cas. 306; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. Rep. 874; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168.

**Mr. Chief Justice Fuller* delivered the [363] opinion of the court:

When, on the 22d day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war. Congress had adopted a resolution April 20, demanding "that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters," and directing and empowering the President "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect." Time was given by the Executive until April 23 for Spain to signify compliance with the demand, but the Spanish government at once, on April 21, recognized the resolution as "an evident declara-

tion of war," and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of Congress of April 25 it was declared that war had existed since the 21st day of April.

Being an enemy's vessel, the Pedro was liable to capture as lawful prize, unless exempted therefrom by the terms of the proclamation of April 26. If that document in its bearing on this case could be regarded as ambiguous, a liberal construction might be indulged in; and it is urged that such liberality should in any event be accorded in view of the traditional policy of this government in respect of the exemption of private property at sea during war.

[364] In *The Phœnix*, 1 Spinks, Eccl. & Adm. Rep. 306, 310, Spinks Prize Cases, 1, Dr. Lushington said in reference to the relaxation of belligerent rights by official action: "If the words of the document are capable of two constructions, then *I am clearly of opinion that the one most favorable to the belligerent party in whose favor the document is issued ought to be adopted; but the court must bear in mind that its province is not *jus dare*, but *jus dicere*; and I must again refer to the principle which I have often enunciated in this court, *Verbis plane expressis omnino standum est*."

As applicable here, the meaning of the language used appears to us plain, and the proclamation not open to interpretation, since none is needed; nor are we justified in expanding executive action by construction because of the diplomatic attitude of this government in respect of the exemption of all property, not contraband, of citizens and subjects of nations at war with each other—an exemption which has not as yet been adopted into the law of nations.

It may be that the hardships incident to the contrary view will finally be found so destitute of corresponding advantage as to lead to the general acceptance of the doctrine so long unsuccessfully advocated by our statesmen and publicists, in diminution of the evils of war; but we must apply the law as it is, and not the law as they have contended it should be.

The Pedro did not come within the fourth article of the proclamation, for she was in Havana, a port of the enemy, on April 21, and not "in any port or place within the United States." She sailed from Havana for Santiago, another port of the enemy, on April 22, was captured that day, and reached Key West on April 23 as a prize of war. The suggestion that she was thus brought within the exemption requires no remark.

Nor did the fifth article of the proclamation exempt the Pedro. That article provided that "any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port or place, and to

discharge her cargo, and afterwards forthwith to depart without molestation."

The Pedro remained in the harbor of Havana from the 17th until the 22d of April. We think it must be assumed that she was advised of the strained relations between the United States and Spain, and the imminency of hostilities. At all events, *she did not leave Havana until the day after that designated by Congress and the President as the day on which war actually began, and which was also so regarded by the government of Spain. She had no cargo to be discharged at any port or place in the United States, but had cargo for Santiago and Cienfuegos, Cuban ports held by the Spanish forces; and she cleared, not for Pensacola, but for Santiago. She was not within the letter of the proclamation, nor within the reasons usually assigned for the exemption as pointed out in the opinion of the district judge, *The Buena Ventura*, 87 Fed. Rep. 927. She had not left a foreign port in ignorance of the perilous condition of affairs, and innocently taken a course which would subject her to our power by entering one of our ports. Neither was she bringing cargo to this country for the increase of our resources or the convenience of our citizens. On the contrary, she was sailing from one port to another port of the enemy, and all the cargo she had on board was destined for the enemy's ports. Not only this, but she took on cargo at Havana for Santiago, and was captured while thus actually trading from one enemy port to another enemy port, being herself an enemy vessel. In these circumstances the fact that the Pedro was under contract to ultimately proceed, after concluding her visits to the Spanish ports, to a port of the United States, to there load for Europe, did not bring her within the exemption of the proclamation.

The doctrine as to continuity of voyage, as laid down by this court in the cases cited by appellant, has no application.

In *The Circassian*, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796, it was ruled that the intent to violate a blockade, found as a fact, was not disproved by evidence of a purpose to call at a neutral port, not reached at time of capture, with ulterior destination to the blockaded port. In *The Bermuda*, 3 Wall. 514, *sub nom. Haigh v. United States*, 18 L. ed. 200, the actual destination to a belligerent port, whether ulterior or direct, was held to determine the character of the transaction as a whole; that transshipment could not change the effect of the pursuit of a common object by a common plan; and that, if the cargo was contraband, its condemnation was justified, whether the voyage was to ports blockaded or to ports not blockaded; and so *as to the vessel in the former case. And in *The Springbok*, 5 Wall. 1, *sub nom. The Springbok v. United States*, 18 L. ed. 480, it was held that an intention to tranship cargo at a neutral port did not save it when destined for a blockaded port; that as to cargo, both in law and intent, the voyage from London to the blockaded port was one voyage, and

that the liability attached from the time of sailing, if captured during any part of that voyage. The solution of the question under consideration is not particularly aided by these and like decisions relating to blockade running and the transportation of contraband.

In *The Joseph*, 8 Cranch, 451, 3 L. ed. 621, the American brig *Joseph* sailed from Boston with a cargo on freight April 6, 1812, on a voyage to Liverpool and the north of Europe, and thence directly or indirectly to the United States. She discharged her cargo at Liverpool; then, under British license, she took a cargo from Hull to St. Petersburg, and there received news of the war between the United States and Great Britain. She afterwards sailed from St. Petersburg to London with a cargo consigned to merchants at that port, having delivered which, she sailed for the United States in ballast, and was captured not far from Boston Light, and sent into port for adjudication. Her trading with the enemy rendered her liable to condemnation as prize; but it was contended that the offensive voyage terminated at London, and that she was not taken *in delicto*. The court held, however, that whether her voyage were considered an entire one from the United States to England, thence to St. Petersburg, and thence to the United States, or as two distinct voyages, the homeward voyage being from St. Petersburg to the United States, with a deviation to London, she was captured during the same voyage in which the offense was committed, though after it was committed, and was still *in delicto*.

The Argo, 1 Spinks, Eccl. & Adm. Rep. 375, Spinks Prize Cases, 52, so much relied on by counsel, was an entirely different case from that presented by this record. The *Argo* was a vessel belonging to a Russian owner, sailing under Russian colors, and bound on a voyage from Havana to Cork. Her charter party bore date February 7 at Havana, [367] but it was therein stipulated that *she should load at Havana or Matanzas, demurrage not to be paid for forty-two running days. She took on sufficient ballast at Havana to keep her safe, and left there in February for Matanzas, where her cargo was begun to be put on board February 28, and was completed on March 30, and she cleared from that port April 2. March 29, 1854, the British order in council, printed in the margin † was

† "Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, that nothing herein contained shall extend

issued. Dr. Lushington, adhering to the views he had expressed in *The Phoenix*, 1 Spinks, Eccl. & Adm. Rep. 306, 310, Spinks Prize Cases, 1, held that the order did not contemplate that the vessel should be *laden* at the date of sailing, and that the voyage was commenced at Havana to end in Great Britain, notwithstanding she took cargo at Matanzas.

It was argued that the *Pedro* was not liable to capture and condemnation because British subjects were the legal owners of some and the equitable owners of the rest of the stock of *La Compania la Flecha*, and because the vessel was insured against risks of war by British underwriters. But the *Pedro* was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish *flag [368] and a Spanish license; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship, and to be dealt with accordingly. Story, Prize Courts (Pratt's ed.) 60, 66, and cases cited: *The Friendschaft*, 4 Wheat. 105, 4 L. ed. 525; *The Ariadne*, 2 Wheat. 143, 4 L. ed. 205; *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; Hall, Int. Law, § 169.

These stockholders were in no position to deny that, when they elected to take the benefit of Spanish navigation laws and the commercial profits to be derived through discriminations thereunder against ships of other nations, they also elected to rely on the protection furnished by the Spanish flag. Nor can the alleged intention to restore the *Pedro* to British registry, if war rendered the change desirable, be regarded. That had not been done when the *Pedro* was captured.

In conclusion, we are of opinion that the court below did not err in refusing to allow further proofs to be taken. The Spanish ownership was made out, and the facts that the stock of the corporation belonged legally or equitably to British subjects, or that the loss of the vessel would be eventually borne by British underwriters, were immaterial. Nor was there any doubt as to the movements of the *Pedro* and the trading in which she was actually engaged. The conclusion reached by the district court could not have

or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian government.

"And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

been affected by the further proofs desired to be taken.

Decree affirmed.

Mr. Justice **White**, with whom concur Mr. Justice **Brewer**, Mr. Justice **Shiras**, and Mr. Justice **Peckham**, dissenting:

[369] The Pedro was a British-built ship, formerly owned and registered in Great Britain. About nine years prior to the 22d day of April, 1898, on which day the ship was captured, she was transferred to a Spanish corporation, took a license from the Spanish government, and thereafter sailed under the Spanish flag. From the time when she thus became *a Spanish merchant vessel she followed a course of regular trade by sailing from some port or ports in Europe to some port or ports in the southern part of the United States, touching in so doing at several places in the island of Cuba. Voyages of this kind were made for about nine years prior to the capture, the vessel usually consuming about three months in both the outward and return voyage, being thus able to make four trips each year between a European port and a port in the United States. On these voyages, as illustrated by the one on which she was engaged when captured, the business secured for the Cuban ports was accessory to the main object of the voyage, which was the procuring of a remunerative cargo in the United States. Prior to the journey to the United States upon which she was captured, the Pedro had been last at the port of New Orleans in January, 1898, at which time she there paid the tonnage tax imposed by the act of Congress, the payment then made being the fourth for the year beginning March 2, 1897, showing that for the year prior to her capture she had been four times in a port of the United States and paid tonnage at such ports.

The Pedro, being in the port of Antwerp in March, 1898, took cargo for Havana, Santiago, and Cienfuegos, in the island of Cuba. While the vessel was thus at Antwerp taking cargo for the Cuban ports in question, she was, on the 18th of March, 1898, through brokers at Liverpool, chartered by W. S. Keyser & Co., a firm of merchants established in Mobile and Pensacola, to proceed to Pensacola or Ship Island in the United States, "*with all convenient speed*," then to take a cargo of lumber to be carried on the return voyage to Rotterdam. The opening clause of the charter described the vessel as now loading in Antwerp for Cuba, and the contract contained the stipulations usual to such agreements. It was provided that the charterers should not be obliged to commence loading the ship at Pensacola or Ship Island before the 5th of May, but that the loading should be completed in sixteen working days; and that if the vessel did not arrive at her point of destination in the United States on or before the 18th day of May, [370] 1898, the charterers should have the *option of canceling the contract. Although the vessel had a capacity of about 5,000 tons measurement, the cargo which was taken at Antwerp for the Cuban ports was only about 175 U. S.

2,000 tons, less than half her capacity; and the entire freight on such cargo did not exceed \$7,000, which was barely sufficient to meet the expense of receiving, transporting, and delivering. On the other hand, the freight on the lumber to be taken at either the port of Pensacola or Ship Island, at the rates fixed in the charter party, would have amounted to about \$25,000. The ship sailed on her voyage on the 25th of March, 1898. Before doing so, she took from the American consul at the port of Antwerp a bill of health, as required by the laws of the United States. In this bill of health the vessel was described as one "engaged in Atlantic trade, and plies between Antwerp, Cuba, and the United States;" and the consul besides certified that the "vessel has complied with the rules and regulations made under the act of February the 15th, 1893, and that the vessel leaves this port bound for Pensacola in the United States of America, *via* Havana, Santiago, and Cienfuegos." She arrived at Havana on the 17th of April, 1898, and there discharged about 1,600 tons of her cargo. On the 20th of April she received from the steamer Alava, in the port of Havana, about 20 tons of general cargo destined for Santiago, which the latter vessel had brought from European ports and desired to tranship, the same never having been landed in Cuba. In the afternoon of April the 22d the steamer left Havana in continuance of her voyage. On that morning, in execution of an order received from the President, the American fleet left Key West for the island of Cuba, to establish and enforce a blockade of certain ports in the island of Cuba which had been proclaimed by the President. The Pedro, some distance outside of the harbor of Havana, met the American fleet, and was captured.

There is no just foundation, however, for the contention that in leaving the port of Havana the vessel was violating the blockade; for at the time of her sailing the blockade had *not been established. Indeed, when [371] the capture took place, the fleet was on its way to Havana for the very purpose of initiating the blockade ordered by the proclamation of the President. While it is true that, subsequently to the 22d of April, Congress passed a resolution declaring that war should be considered as having been flagrant as of the date of the 21st of April, that it was not conceived or known, when the vessel sailed from Havana on the 22d, that a state of war existed, is also demonstrated by the proof, which shows that just prior to the sailing of the Pedro from the harbor of Havana an American ship was allowed to depart from that port, and that shortly after the Pedro left, an American steamer, which was likewise in the port of Havana, was also permitted to leave.

Under this state of fact it seems to me that the Pedro was within the exact requirements of the fifth article of the proclamation of the President of the United States, and hence

was not subject to capture and condemnation. The article in question is as follows:

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

The theory from which it is deduced that the *Pedro* was not a Spanish merchant vessel "which prior to April 21, 1898," had "sailed from any foreign port, bound for any port or place in the United States," is not by me understood. She assuredly sailed from Antwerp prior to the 21st of April, 1898; she certainly was bound for a port in the United States, since she was under a charter to American citizens, by the terms of which she was obliged "to proceed with all convenient speed," so as to arrive at Pensacola or Ship Island by May 5, 1898, where she was to take on an American cargo to be carried to the port of Rotterdam. The vessel beyond question took a bill of health from the American consul at Antwerp, describing her as one engaged in Atlantic trade, and plying between [372] *Europe and the United States; and the American consul certified that she was leaving the port of Antwerp bound for Pensacola in the United States, *via* Havana, Santiago, and Cienfuegos. Under these conditions she came, in my conception, not only within the letter of the fifth article of the proclamation, but also within its plain intent. The object of the proclamation was to relieve Spanish merchant vessels coming in the regular course of a commercial voyage to our ports from, without warning and without opportunity of returning to a port of safety, being captured and condemned as prize of war, in consequence of the breaking out of hostilities subsequent to the inception of the voyage which the vessel was engaged in prosecuting. In this respect the proclamation was but a practical execution of the enlightened policy by which civilized countries, on the breaking out of hostilities, have relieved merchant vessels, coming to one or the other of the belligerent countries, from being subject to capture when, before the happening of war, they had undertaken a lawful voyage in the prosecution of purely commercial duties and relations. The scope of the proclamation is shown by a consideration of the fourth and the fifth clauses together, the one providing for the right of an enemy's vessel found in a port of the United States at a time covered by the clause to load cargo and depart without molestation, even although bound to a port of the enemy, and the provision of the fifth article which protects from seizure and condemnation the merchant vessels of the enemy which had sailed bound for any port of the United States prior to the period mentioned in the proclamation.

But, it is said, when the *Pedro* left Havana on the afternoon of the 22d she was not bound for Ship Island or Pensacola in the

United States, but was bound for Santiago; therefore she was on a voyage between two ports of the enemy, and was not within the fifth article of the proclamation. This, however, treats the voyage from Havana to Santiago as a new and wholly independent one from that which commenced at Antwerp. It disregards the fact that the vessel had sailed from Antwerp for Pensacola or Ship Island *via* Havana and the other ports named; it overlooks that the ship was under *express [373] charter to American citizens when she left Antwerp to proceed to Pensacola or Ship Island; and it further ignores the certification by the consul already referred to. To treat the voyage from Havana to Santiago as a new and independent one, moreover, fails to give weight to the proof showing that the touching at the Spanish ports in the island of Cuba was merely incidental to the main voyage from Antwerp to the United States. It also does not apply the cumulative proof arising from the long and regular course of business in which the ship had been engaged for nine years prior to her capture in making regular trips from ports in Europe to ports in the United States *via* designated ports in the island of Cuba. The decisions of this court, also, I think, refute the contention that the ultimate termination of an outward voyage may be disregarded, in order to create a new voyage, because of the touching of a vessel at an intermediate port. The rule, consecrated by the previous decisions of this court, according to my understanding, is that the real intention of a vessel as to her outward-bound port is the determining factor in concluding whether, in consequence of her voyage, she is or is not subject to capture as lawful prize. In *The Joseph*, 8 Cranch, 451, 455, 3 L. ed. 621, 622, the vessel being a merchant vessel of the United States, with full knowledge of the war (1812) between the United States and England, carried a cargo from St. Petersburg to London. After discharging the cargo at the latter point she started in ballast for New York, her home port, and was captured and proceeded against for the offense of trading with the enemy. The defense was that the voyage had terminated on the arrival of the vessel in London, and that from London to the United States she was on a new voyage, and therefore not subject to capture and condemnation for an offense committed on a previous voyage. The court, through Mr. Justice Washington, said (p. 455, L. ed. 622):

"It is not denied that if she be taken during the same voyage in which the offense was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation; but it is contended that her voyage ended at London, and that she was, on her return, embarked *on a new [374] voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from the United States to England, thence to the north of Europe, and thence directly or indirectly to the United States. Even admit that the outward and the homeward voyages could be separated, so as to render them two distinct voyages, which is

not conceded, still it cannot be denied that the termini of the homeward voyage were St. Petersburg and the United States. . . . It was, in short, a voyage from St. Petersburg to the United States by way of London."

In *The Circassian*, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796, a vessel sailing from one neutral port directly to another port of the same character was condemned, because it was found that the real and ultimate destination of the ship was a blockaded port in the United States. In *The Bermuda*, 3 Wall. 551, *sub nom. Haigh v. United States*, 18 L. ed. 205, a vessel with cargo from one neutral port to another neutral port was condemned, as it was held that the real object of the voyage was to transport contraband of war by the vessel from one neutral port to the other, with the object and purpose of continuing the transportation from the neutral port, to which the vessel was consigned, into the United States through the lines of a lawfully established blockade, the court deciding that the real purpose and intent as to the ultimate destination of the ship and its contraband cargo should control in determining the legality of the capture. In speaking on the subject, through Mr. Chief Justice Chase, the court said (p. 553, L. ed. 206):

"It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene."

[375] *Applications of this doctrine are contained in the following cases: *The Stephen Hart*, 3 Wall. 559, *sub nom. The Stephen Hart v. United States*, 18 L. ed. 220; *The Springbok*, 5 Wall. 1, *sub nom. The Springbok v. United States*, 18 L. ed. 480; *The Peterhoff*, 5 Wall. 28, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564. I do not understand that in the opinion of the court now announced the cases just cited have been overruled. They stand, therefore, and must be reconciled with the decision made in this case. This being so, the doctrine, from my point of view, may now be thus summed up. Where there is a question as to the condemnation of a vessel as lawful prize, the fact that between her point of departure and her point of ultimate destination she has touched or unladen her cargo or a portion thereof at an intermediary port, will not be considered as breaking the continuity of the voyage or as destroying the ulterior destination; and therefore, if that destination be unlawful, the voyage will be continuous from the point of departure to such ul-

terior destination; and the vessel will consequently be condemned. These rules are subject to the following exceptions: Where it becomes necessary to disregard the foregoing principles as to ulterior destination they will be given no weight and the voyage will be treated as having terminated at an intermediary point, and consequently the vessel will be condemned because the voyage was not continuous; the result being, in any event, to subject the vessel to condemnation.

It is, however, urged, conceding that the ultimate destination controls, and therefore that the stoppage at the intermediary port was of no consequence, as under the charter party the *Pedro* was bound to proceed to Pensacola, there to take on a cargo, to be delivered at Rotterdam, even under the doctrine of continuous voyage, her voyage must be treated as continuous from Antwerp *via* Havana, etc., to Pensacola, thence to Rotterdam; that is to say, the continuous voyage, as manifested by the charter party, was from Antwerp to Rotterdam *via* Pensacola, hence the ship was never bound for the United States. But this obliterates the manifest distinction between the outward and return voyage, which is apparent in the text of the fifth article of the proclamation.

Even conceding that from some points of view the round voyage, that is, both the outward and return trip, should be *considered[376] as being continuous, such concession cannot in reason be the test for determining whether under the proclamation the vessel was bound for the United States. If it be held that both the inward and the outward voyage are to be taken under the proclamation as the criterion for determining whether a vessel was bound for the United States, it would follow that the proclamation had no relation whatever to any foreign ship, other than such a ship bound to a port of the United States without the intention of departing; that is, with the intention of remaining in the port of the United States. The proclamation, however, provides that the vessels bound for the United States to which it refers "shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded." This plainly distinguishes between the voyage on which the vessel is bound for the port of the United States and the voyage to be undertaken by the vessel from the port of the United States to which she is bound back to her homeward or some other neutral port. To construe the proclamation so as to cause it to embrace only vessels bound for the United States, without any purpose of thereafter departing, would exclude from its operation the entire class of vessels it was its purpose to protect from condemnation. The error of such a consideration becomes to my mind plain, especially when it is borne in mind that it is conceded on all sides that the proclamation should receive a liberal construction in favor of the public purpose which it embodies, and

against the liability of innocent and unwarmed private property to capture and condemnation.

It was strenuously argued at bar, and, as I understand the opinion of the court, it is now held, that the *Pedro* was not embraced within the fifth article of the proclamation because she did not have cargo for the United States. The object of the fifth clause of the proclamation, it was said, was to allow vessels with cargo bound for the United States to be free from capture, because it was the public policy of the United States, on the outbreak of war, to encourage the bringing in of cargo. The text of the proclamation does not, however, support this contention. It declares that all vessels which "have sailed from any foreign port bound for any port or place in the United States shall be permitted to enter such port or place. . . ." It does not say all vessels which have sailed with cargo, but that all vessels shall be so permitted. True it is that the proclamation also authorizes the vessel thus permitted to enter to discharge her cargo. But the mere adding to the permission to enter, the right to discharge cargo, cannot be taken as denying permission to enter if there be no cargo to discharge. It cannot in any event be said that the proclamation in plain terms confers the privilege of safe entry only on vessels having cargo; and if it does not, then construction is required, and the rule is that a liberal construction must be applied in order to protect the innocent private vessel from capture and condemnation. This supposed theory of the desire to encourage the bringing in of cargo, upon which it is assumed that the fifth article of the proclamation rests, entirely discards, or at least ignores, the enlightened moral sense which the proclamation embodies; that is, the duty not to capture without warning merchant vessels bound to our shores previous to the outbreak of war, and substitutes for it what to me seems the sordid motive of a supposed gain to result from incoming cargo. In other words, in its last analysis, the contention that the proclamation contemplates only exempting a vessel from seizure which has cargo for the United States really asserts that fair dealing and justice are embodied in the proclamation only so far as it was deemed that profit might be derived from being just, and no further. Such an interpretation of the proclamation, however, is refuted by its very terms, since its preamble declares that its object was to mitigate the wrongs of war in accordance with the practice pursued by enlightened and civilized nations. Aside from these considerations, the supposed advantage to be derived from allowing cargo to come in, when considered intrinsically, is without force. Under this theory, two vessels would depart on the same day from a foreign port; one bound to a port [378] in the United States, with cargo, under a charter to foreign citizens to convey their goods into this country; the second ship proceeding in ballast, under charter to American citizens to proceed to the United States

and there take cargo. The argument is that the vessel chartered to the foreigner and containing his goods in the execution of his contract would be exempt from capture, while the vessel sailing in order to carry out the contract made with and in favor of an American citizen would be subject to capture. But this contention as to cargo is not only in conflict with the text of the fifth article, but is also at war with another provision of the proclamation—that is, the fourth article. By that article a Spanish vessel found in a port of the United States, as therein stated, is not only allowed to depart, but is also accorded the privilege of taking on cargo and carrying it either to a neutral port or to a port of the enemy, if not blockaded, up to a stated date, without molestation. But the language conferring the privilege of loading cargo contained in the fourth article, while really only permissive, must be construed as imperative, if the permissive privilege to discharge cargo in the fifth article be held an imperative one, for no distinction can be drawn between the two. The argument then comes to this, that the public policy of the proclamation deemed the coming in of cargo so important that it provided for the capture of all vessels sailing for ports of the United States prior to the commencement of war, if they did not have cargo, and that the same public policy considered the taking away of cargo from the United States so important that the privilege given in the fourth article to Spanish merchant vessels in our ports to depart could be availed of, provided only they took cargo away from the United States. An interpretation which gives rise to so unreasonable a contradiction seems to me to demonstrate its own unsoundness.

But all the considerations which are relied on as justifying the condemnation in this case seem to me to be fully answered by authority. Both the fourth and fifth articles of the proclamation of the President were almost word for word a reproduction of the British order in council of March 29, 1854, *issued at the outbreak of the Crimean [379] war. In order that the identity of the two may be at once apparent they are both reproduced, in juxtaposition, in the margin.†

†President's Proclamation of April 26, 1898 (30 U. S. Statutes at Large, 1770).	Order in Council, March 29, 1854 (Spinks, Prize Cases, Appendix, iii.).
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4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear	Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if
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Under the order in council just alluded to, the Argo, a Russian vessel, and therefore a vessel of the enemy, sailed from Havana for Matanzas, Cuba, there to take on cargo [380] for *Great Britain. The departure of the vessel from Havana in ballast was prior to the date fixed by the order in council. After arriving at Matanzas she there took on cargo, and sailed from that port for Great Britain, subsequent to the date fixed in the order in council. She was captured, and the question of her condemnation was considered and decided by Dr. Lushington. It was held that the vessel was protected by the order in council, and she was released. Necessarily, under the facts stated, the ultimate end of the outward voyage to Great Britain, and not the intermediary port at which the Argo stopped, controlled; otherwise she would have been subject to condemnation. This follows, as the order in terms only protected Russian merchant vessels which had sailed prior to the date of the order. As the sailing for Great Britain from Matanzas was subsequent to the order, it necessarily results that the date of sailing relied upon as protecting was the date of the sailing from Havana, and not the subsequent departure from the intermediate port. So, also, the case necessarily decided that the presence of cargo was not essential to entitle the vessel to protection under the order in council, since the vessel sailed in ballast from Havana, and only departed from Matanzas, where the cargo was taken on, after the date of the order, and therefore at a time and under conditions which would not have protected her unless the antecedent conditions existing at the time of the sailing had been considered as determinative.

The language of Dr. Lushington, in passing upon the case, is to my mind so persuasive of the issues which arise upon this record that I quote from it. He said (Spinks Prize Cases, p. 53, 1 Spinks, Eccl. & Adm. Rep. 377):

"This vessel did sail from the Havannah prior to the date of the order; she sailed from Mantanzas subsequently to the date of the order. When she left the Havannah she was in ballast, bound for Cork, according to the charter party.

"It has been contended that this order in council contemplated that the Russian vessel should have been laden at the date of the order; but I find no words in the order that would justify my putting so strict a construction upon it; *neither do I think that [381] there are any words which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

"The real meaning of the order in council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain; and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from the Havannah prior to March the 29th is a substantial compliance with the terms of the order."

Some stress was laid in argument, and seems to be given weight in the opinion of the court, to the language of Dr. Lushington referring to the taking on of the cargo. But, clearly, from the text of his opinion, this language was used in relation to the argument presented to him, which was that although a vessel sailing in ballast, without cargo, prior to the date of the order in council, was admittedly within its purview, the Argo was not covered by it, because subsequent to the proclamation she took on her cargo at an intermediate port. In meeting this argument the question of cargo was referred to, and the whole purport of the order was summed up in language which I again quote. It was as follows:

"The real meaning of the order of council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from the Havannah prior to March the 29th is a substantial compliance with the terms of the order."

that their cargoes on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

5. Any Spanish merchant vessel which

on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian government.

Any Russian mer-

prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

chant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

The sailing from Havana, thus decided to have been sufficient, I again remark, was in ballast and without cargo.

[382] This construction of the order in council, I have said, should be persuasive, indeed, if it should not be held to have been adopted and ratified by the reproduction in the proclamation of the President of the very language of the order in council, so many years after that order had been thus construed by the British admiralty tribunal.

Thinking that the condemnation of this ship under the circumstances disclosed by the record will subject innocent private property to condemnation without just cause, will deprive it of the protection afforded by the proclamation of the President, which, according to its terms, but carried out those commendable principles of honesty and humanity enforced by all civilized nations on the outbreak of war, I am constrained to dissent.

THE GUIDO.

(See S. C. Reporter's ed. 382-383.)

Seizure of vessel as prize—vessel going to Cuban port—intention to proceed to United States.

A vessel owned by a Spanish corporation, officered and manned by Spanish subjects, sailing under Spanish registry and the Spanish flag, having a royal patent from the Crown of Spain, and proceeding to a Cuban port, was subject to capture on April 27, 1893, notwithstanding her intention, according to custom, to proceed from Cuba to the United States for a cargo to be taken to Europe.

[No. 122.]

Argued November 3, 1899. Decided December 11, 1899.

A PPEAL from a decree of the District Court of the United States for the Southern District of Florida condemning a steamer as prize of war. *Affirmed.*

The facts are stated in the opinion.

Mr. Wilhelmus Mynderse argued the cause, and **Messrs. Butler, Notman, Joline, & Mynderse** filed a brief, for the appellant.

Mr. James H. Hayden argued the cause for the captors. **Mr. Joseph K. McCammon** for the captors and **Assistant Attorney General Hoyt** for the United States were with him on the brief.

Messrs. George A. King and **William B. King** filed a further brief for certain captors.

For contentions of counsel, see briefs as reported in *The Pedro*, ante, p. 195.

[383] ***Mr. Chief Justice Fuller** delivered the opinion of the court:

This is an appeal from a decree of the district court of the United States for the southern district of Florida condemning the steamer Guido as prize of war.

The Guido belonged to La Compania la Flecha, a Spanish corporation of Bilbao, Spain, and sailed under Spanish registry and

the Spanish flag, having a royal patent from the Crown of Spain, and being officered and manned by Spanish subjects. Her voyage began at Liverpool, whence she proceeded to Santander, Corunna, and La Puebla, Spain. At Liverpool and at each of the Spanish ports she took on cargo consisting principally of food supplies, all shipped to Havana and Cuban ports. It had been her custom to carry cargo from Spanish and other European ports to Cuba, and then proceed to some port of the United States for a return cargo of lumber, and it was her intention on this occasion to do this, but she had no charter or specific engagement, so far as appeared, for the continuation of her voyage after discharging in Cuba. It was certified in her bill of health issued at Liverpool "that the vessel has complied with the rules and regulations made under the act of February 15, 1893, and that the vessel leaves this port bound for a port (unknown) in the United States of America, via Spain and Cuba ports (unknown)."

The steamer cleared from La Puebla for Havana April 10, and was captured April 27, about 70 miles to the eastward of Havana, and sent to Key West in charge of a prize crew. She was there libeled and proofs in preparatorio were taken. The master appeared on behalf of the owner and asserted claim to the vessel, and moved for leave to take further proofs in respect of matters set forth in his test affidavit therewith filed, which motion was denied. The averments of the affidavit corresponded with those in the case of *The Pedro*.

We are of opinion that the case was properly disposed of, and the decree of the District Court is affirmed.

Mr. Justice Shiras, **Mr. Justice White**, and **Mr. Justice Peckham** dissented.

STEAMSHIP BUENA VENTURA, Juan de Luzarraga, Claimant, Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 384-395.)

Capture of vessel as a prize—effect of President's proclamation—vessel leaving United States port before declaration of war—restitution without costs.

1. Merchant vessels of the enemy, carrying on innocent commercial enterprises at the time, or just prior to the time, when hostilities break out, are entitled to a liberal interpretation of a proclamation which lays down rules for the treatment of merchant vessels of the enemy.

2. Merchant vessels which had loaded in a port of the United States, and sailed therefrom before the commencement of the war with Spain, and were still on their original voyage, not having reached any foreign port, were within the exemption from capture given by the President's proclamation, allowing such vessels in ports of the United States until May 21, 1898, for loading their cargoes and departing from ports or places within the United States.

8. A Spanish vessel seized as a prize on April 22, 1898, when there was probable cause for the seizure, but which was exempted from seizure and condemnation by the subsequent proclamation of April 26, is not entitled to damages or costs on restitution.

[No. 106.]

Argued November 1, 2, 1899. Decided December 11, 1899.

A PPEAL from a decree of the District Court of the United States for the Southern District of Florida condemning a vessel as a prize. *Reversed.*

See same case below, 87 Fed. Rep. 927.

Statement by Mr. Justice **Peckham**:

[385] *During the late war between the United States and Spain, and on May 27, 1898, the district court of the United States for the southern district of Florida condemned the steamship Buena Ventura as lawful prize of war, on the ground "that the said steamship Buena Ventura was enemy's property, and was upon the high seas and not in any port or place of the United States upon the outbreak of the war, and was liable to condemnation and seizure." It was thereupon ordered that the vessel "be condemned and forfeited to the United States as lawful prize of war; but, it appearing that the cargo of said steamer was the property of neutrals and not contraband and subject to condemnation and forfeiture, it is ordered that said cargo be released and restored to the claimant or the true and lawful owners thereof."

The vessel was captured on April 22, 1898, 8 or 9 miles from Sand Key light, on the Florida coast, by the United States ship of war Nashville, under the command of a line officer of the United States Navy, was brought into the port of Key West for adjudication, and was condemned upon the answers, given by the master and mate of the steamship, to standing interrogatories *in preparatorio*, and upon the documents seized on board the ship by the captors. This evidence showed that the steamship was a Spanish vessel engaged exclusively in the carrying of cargoes, and that at the time of her capture she was making a voyage under a charter party which had been concluded in Liverpool on March 23, 1898, between the agents of the owners and the agents of the charterers. By this charter party the steamship was described as "now ready to leave Cuba;" and it was agreed upon therein that the vessel should with all convenient speed proceed to Ship Island, Mississippi, and there take on a cargo of lumber, and proceed therewith, as customary, to Rotterdam. The vessel was to be at her loading place and ready for cargo on or before the 10th of April, and if she were not, the charterers had the option of canceling the charter. Pursuant to this charter party the ship left Cuba and arrived at Ship Island about the 31st of March, and between that time and the 19th of April she had taken on her cargo, and on the *latter day had sailed from Ship Island bound for Norfolk, Virginia, to take in bunk-

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er coal, the charter party giving the vessel the liberty to stop at any port on the voyage for coal, then to proceed to Rotterdam. After leaving port at Ship Island she proceeded on her voyage to Norfolk, and about half-past seven o'clock on the morning of April 22, while proceeding close to the Florida reefs, was captured as stated. She made no resistance at the time of her capture, there were no military or naval officers on board of her, and she carried no arms or munitions of war. The evidence is undisputed that the vessel, when captured, was proceeding on her voyage to Norfolk.

Previous to sailing from Ship Island she was furnished with a bill of health, in which it was stated that she was now "ready to depart from the port of Pascagoula, Mississippi [which is the customs port of Ship Island], for Norfolk, Virginia, and other places beyond the sea." Her manifest showed that she was bound for Norfolk. It is headed "Coast Manifest," and after a description of the cargo it continues: "Permission is hereby granted to said vessel to proceed from this port to Norfolk, in the district of Norfolk and state of Virginia, to lade bunker coal;" and it was signed and sealed by the deputy collector of Pascagoula, district of Pearl river, Mississippi, on April 14, 1898, and the fees therefor paid.

The ship's clearance was for Norfolk, and contained the same permission to proceed there to lade bunker coal.

There was no evidence which tended to throw any suspicion as to the destination of the vessel.

After obtaining all of her papers in the regular way, and having cleared at the custom house on April 14, 1898, she was detained at Ship Island by low water until between 8 and 9 o'clock, A. M. of April 19, 1898, when she sailed over the bar and proceeded on her voyage.

In the test affidavit of the master he swore that at all times before the ship's seizure he and all of his officers were ignorant that war existed between Spain and the United States, and the vessel at the time of her capture was following the ordinary course of her voyage.

*The various proceedings of Congress, proclamations of the President, letters of the Secretary of State, and other public documents connected with occurrences leading up to the breaking out of hostilities between this country and Spain are contained in this record, but are also set forth at sufficient length in the statement of facts contained in the report of the case of *The Pedro*, ante, p. 195, and it is unnecessary, therefore, to repeat them.

After a hearing the district court, on the 27th of May, 1898, condemned the vessel (87 Fed. Rep. 927), which was sold under the final decree of the court, and her proceeds deposited to abide the event of an appeal, which was then taken on the part of the claimant.

Mr. J. Parker Kirlin argued the cause, and *Messrs. Convers & Kirlin* filed a brief, for appellant:

The proclamation should be construed with

due regard to our traditional policy towards the question of the exemption of private property at sea from capture during war.

Every marine capture is at the peril of the captors, who must show just grounds for the detention or condemnation of the ship or be liable for damages.

The Resolution, 2 Dall. 1, sub nom. *Miller v. The Resolution*, 1 L. ed. 263; *The Grand Sachem*, 3 Dall. 333, sub nom. *Del Col v. Arnold*, 1 L. ed. 625; *The Charming Betsy*, 2 Cranch, 64, sub nom. *Murray v. The Charming Betsy*, 2 L. ed. 208; *Maley v. Shattuck*, 3 Cranch, 458, 2 L. ed. 498; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *British Consul v. Thompson*, Bee, 142, Fed. Cas. No. 1,899.

Without a declaration it seems that war does not begin until some blow is struck or some shot fired.

1 Halleck, Int. Law, Baker's ed. p. 525; Owen, Declaration of War, pp. 12, 36, 37; Hall, Int. Law, 4th ed. pp. 63, 392; Takahashi, International Law during Chino-Japanese War, pp. 9, 39; *The Teutonia*, L. R. 4 P. C. 171.

In order to prevent a forfeiture, the court will regard parts of a day.

Combe v. Pitt, 3 Burr. 1423; *Burgess v. Salmon*, 97 U. S. 381, 24 L. ed. 1104.

It was not in accordance with international usage to attempt to make the Buena Ventura hostile by firing upon her.

Takahashi, International Law during the Chino-Japanese War, pp. 9, 39.

The subsequent declaration of war by Congress, on April 25th, which recites that war had existed from and including April 21st, should not be given retroactive effect so as to justify the capture of private property which, otherwise, would not have been subject to seizure.

1 Halleck, Int. Law, Baker's ed. p. 542.

Assistant Attorney General Hoyt argued the cause and, with Messrs. Joseph K. McCammon and James H. Hayden, filed a brief for the United States and the captors:

Exemptions founded upon the proclamation should be express or deducible by clear and necessary inference, and where in a natural signification of the words the meaning is plain and there is nothing to interpret, an "interpretation" is not allowable; and the introduction of a different and enlarged meaning and the extension of the exemptions to cases not covered nor intended to be covered, may not be permitted under the doctrines of prize law and well-settled principles of all law relating to statutory construction.

2 Vattel, chap. 17, § 262; *Doggett v. Florida R. Co.* 99 U. S. 72, 25 L. ed. 301; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *The Phoenix*, 1 Spinks, Prize Cas. 306; *The Argo*, 1 Spinks, Prize Cas. 375.

Messrs George A. King and William B. King filed a further brief for certain captors.

[387] *Mr. Justice Peckham, after stating the facts, delivered the opinion of the court:

The Buena Ventura was a Spanish mer-

chant vessel in the peaceful prosecution of her voyage to Norfolk, Virginia, from Ship Island, in the state of Mississippi, when, on the morning of April 22, 1898, she was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any despatch of or to the Spanish government, and attempted no resistance when captured.

The facts regarding this vessel place her within that class *which this government has[388] always desired to treat with great liberality. It is, as we think, historically accurate to say that this government has always been, in its views, among the most advanced of the governments of the world in favor of mitigating, as to all noncombatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas. 3 Wharton, Int. Law Dig. § 342. The refusal of this government to agree to the Declaration of Paris was founded in part upon the refusal of the other governments to agree to the proposition exempting private property, not contraband, from capture upon the sea.

It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.

This is the doctrine of the English courts, as exemplified in *The Phoenix*, Spinks Prize Cases, 1, 5 Spinks, Eccl. & Adm. Rep. 306, and *The Argo*, Spinks Prize Cases, p. 52, 1 Spinks, Eccl. & Adm. Rep. 375. It is the doctrine which this court believes to be proper and correct.

To ascertain the intention of the Executive we must look to the words which he uses. If the language is plain and clear, and the meaning not open to discussion, there is an end of the matter. If, however, such is not the case, and interpretation or construction must be resorted to for the purpose of ascertaining the precise meaning of the text, it is our duty with reference to this public instrument to make it as broad in its exemptions as is reasonably possible.

*If inferences must be drawn therefrom in[389] order to render certain the limitations intended, those inferences should be, so far as is possible, in favor of the claimant in behalf of the owners of the vessel.

The language to justify an exemption of the vessel must, it is true, be found in the proclamation; yet if such language fail to state with entire clearness the full extent and scope of such exemption, thereby making it necessary that some interpretation thereof should be given, it is proper to refer to the prior views of the Executive Department of the government as evidence of its policy regarding the subject. This is not for the purpose of enlarging the natural and ordinary meaning of the words used in the proclamation, but for the purpose of thereby throwing some light upon the intention of the Executive in issuing the instrument, and also to aid in the interpretation of the language employed therein, where the extent or scope of that language is not otherwise entirely plain and clear. A reference to the views that have heretofore been announced by the Executive Department is made in 3 Wharton, *supra*, and it will be found that they are in entire accord with the most liberal spirit for the treatment of noncombatant vessels of the enemy.

We come now to the construction of the instrument. It will be seen that Congress on the 25th of April, 1898, declared war against Spain, and in the declaration it is stated that war had existed since the 21st of April preceding. The President on the 26th of April issued his proclamation regarding the principles to be followed in the prosecution of the war. It is dated the day it was issued. The fourth clause thereof may for convenience be here reproduced, as follows:

"4. Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, that nothing here-

[390] in *contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

What is included by the words "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places?" At what time must these Spanish vessels be "in any ports or places within the United States," in order to be exempt from capture? The time is not stated in the proclamation, and therefore the intention of the Executive as to the time must be inferred. It is a case for construction or interpretation of the language employed.

That language is open to several possible constructions. It might be said that in describing Spanish merchant vessels in any ports, etc., it was meant to include only those

which were in such ports on the day when the proclamation was issued, April 26. Or it might be held (in accordance with the decision of the district court) to include those that were in such ports on the 21st of April, the day that war commenced, as Congress declared. Or it might be construed so as to include, not alone those vessels that were in port on that day, but also those that had sailed therefrom on any day up to and including the 21st of May, the last day of exemption, and were, when captured, continuing their voyage, without regard to the particular date of their departure from port, whether immediately before or subsequently to the commencement of the war or the issuing of the proclamation.

The district judge, before whom several cases were tried together, held that the date of the commencement of the war (April 21) was the date intended by the Executive; that as the proclamation of the 22d of April gave thirty days to neutral vessels found in blockaded ports, it was but reasonable to consider that the same number of days, commencing at the outbreak of the war, should be allowed so as to bring it to the 21st of May, the day named; that although a retrospective *effect is not usually given to statutes, yet [391] the question always is, What was the intention of the legislature?

He also said that "the intention of the Executive was to fully recognize the recent practice of civilized nations, and not to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of the war, or to permit them to escape from ports to be seized immediately upon entering upon the high seas." (See preamble to proclamation.)

In *The Buena Ventura*, the case at bar, the district judge held that her case "clearly does not come within the language of the proclamation."

It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage, but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

An intention to include vessels of this class in the exemption from capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this government on the subject and which it is to be presumed were the views of the Executive. The vessel when captured had violated no law. She had sailed from Ship Island after having obtained written permission, in accordance with the laws of the United States, to proceed to Norfolk in Virginia, and the permission had been signed by the deputy collector of the port and the fees therefor paid by the ship. She had a cargo of lumber, loaded but a short time before the commencement of the war, and she left the port but forty-eight hours prior to that event. The

language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case.

[392] The omission of any date in this clause, upon which the vessel must be in a port of the United States, and prior to *which the exemption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified. Whether it was before or after the commencement of the war, would be entirely immaterial. This seems to us to be the intention of the Executive, derived from reading the fourth clause with reference to the general rules of interpretation already spoken of, and we think there is no language in the proclamation which precludes the giving effect to such intention. Its purpose was to protect innocent merchantmen of the enemy who had been trading in our ports from capture, provided they sailed from such ports before a certain named time in the future, and that purpose would be wholly unaffected by the fact of a sailing prior to the war. That fact was immaterial to the scheme of the proclamation, gathered from all its language.

We do not assert that the clause would apply to a vessel which had left a port of the United States prior to the commencement of the war, and had arrived at a foreign port and there discharged her cargo, and had then left for another foreign port prior to May 21. The instructions to United States ships, contained in the fourth clause, to permit the vessels "to continue their voyage," would limit the operation of the clause to those vessels that were still on their original voyage from the United States, and had taken on board their cargo (if any they had) at a port of the United States before the expiration of the term mentioned. The exemption would probably not apply to such a case as *The Phoenix*, Spinks Prize Cases, 1, 1 Spinks, Eccl. & Adm. Rep. 306. That case arose out of the English order in council, made at the commencement of the Crimean war. The vessel had sailed from an English [393] port in the middle of *February, 1854, with a cargo, bound for Copenhagen, and having reached that port and discharged her cargo by the middle of March, she had sailed therefrom on the 10th of April, bound to a foreign port, and was captured on the 12th of April, while proceeding on such voyage. The order in council was dated the 29th of March, 1854, and provided that "Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the 10th day of May next, six

weeks from the date hercof, for loading their cargoes and departing from such ports or places," etc. The claim of exemption was made on the ground that the vessel had been in an English port, and although she sailed therefrom in the middle of February to Copenhagen and had there discharged her cargo, before the order in council was promulgated, yet it was still urged that she was entitled to exemption from capture. The court held the claim was not well founded, and that it could not by any latitude of construction hold a vessel to have been in an English port on the 29th of March, which on that day was lying in the port of Copenhagen, having at that time discharged the cargo which she had taken from the English port. It is true the court took the view that the vessel must at all events have been in an English port on the 29th of March in order to obtain exemption, and if not there on that day, the vessel did not come within the terms of the order and was not exempt from capture. From the language of the opinion in that case it would seem, not only that a vessel departing the day before the 29th of March would not come within the exemption, but that a vessel arriving the day after the 29th, and departing before the 10th of May following, would also fail to do so; that the vessel must have been in an English port on the very day named, and if it departed the day before or arrived the day after, it was not covered by the order.

The French government also, on the outbreak of the Crimean war, decreed a delay of six weeks, beginning on the date of the decree, to Russian merchant vessels in which to leave French ports. Russia issued the same kind of a decree, and other nations have at times made the same provisions. It is [394] *claimed that they confine the exemption to vessels that are actually within the ports of the nation at the date of issuing the decree or order.

We are not inclined to put so narrow a construction upon the language used in this proclamation. The interpretation which we have given to it, while it may be more liberal than the other, is still one which may properly be indulged in.

If this vessel, instead of sailing on the 19th, had not sailed until the 21st of April, the court below says she would have been exempt from capture. In truth, she was from her character and her actual employment just as much the subject of liberal treatment, and was as equitably entitled to an exemption when sailing on the 19th, as she would have been had she waited until the 21st. No fact had occurred since her sailing which altered her case in principle from the case of a vessel which had been in port on, though sailing after, the 21st. To attribute an intention on the part of the Executive to exempt a vessel if she sailed on or after the 21st of April, and before the 21st of May, and to refuse such exemption to a vessel in precisely the same situation, only sailing before the 21st, would, as we think, be without reasonable justification. It may safely be affirmed that he never had any such distinc-

tion in mind and never intended it to exist. There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule, and if there be language in the clause or proclamation from which an inference can be drawn favorable to the exemption, and none which precludes it, we are bound to hold that the exemption is given. We think the language of the proclamation does permit the inference, and that there is none which precludes it.

[395] We are aware of no adjudications of our own court as to the meaning to be given to words similar to those contained in the proclamation, and it may be that a step in advance is now taken upon this subject. Where, however, the words are reasonably capable of an interpretation which shall include a vessel of this description in the exemption from capture, we are not adverse to adopting it, even though this court may be the first to do so. If the Executive should hereafter be inclined *to take the other view, the language of his proclamation could be so altered as to leave no doubt of that intention, and it would be the duty of this court to be guided and controlled by it.

Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar.

The question of costs then arises. We had occasion in *The Olinde Rodrigues*, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. 851, to examine that question in relation to the existence of probable cause for making the capture. In that case it was held that such probable cause did exist, and although the facts therein proved did not commend the vessel to the favorable consideration of the court, yet upon a careful review of the entire evidence we held that we were not compelled to proceed to the extremity of condemning the vessel. Restitution was therefore awarded, but without damages. Payment of the costs and expenses incident to her custody and preservation, and of all costs in the case except the fees of counsel, were imposed upon the ship.

In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy property. At the time of seizure, however (April 22), that proclamation had not been issued, and hence there was probable cause for her seizure, although the vessel was herself entirely without fault. The subsequent issuing of the proclamation covering the case of a vessel situated as was this one took away the right to condemn which otherwise would have existed. Thus, at the time of seizure, both parties, the capturing and the captured ship, were without fault, and while we reverse the judgment of condemnation and award restitution, we think it should be without damages or costs in favor of the vessel captured. The ship having been sold, the moneys arising from the sale must be paid to the claimant, without the deduction of any costs arising in the proceeding, but after deducting the expenses properly incident to her

custody and preservation up to the time of her sale, and it is so ordered.

The CHIEF JUSTICE and Mr. Justice Gray and Mr. Justice McKenna dissented.

*THEOPHILUS KING, Adverse Claimant, [396]
and the Lippitt Woolen Company, Al-
leged Trustee, *Plffs. in Err.*,

v.

JOHN A. CROSS *et al.*

(See S. C. Reporter's ed. 396-408.)

Garnishment of debt due to nonresident creditor—due process of law—effect of insolvency proceedings in other state—when insolvent divested of title.

1. A garnishment of a resident debtor to reach a debt due to a nonresident defendant who has no property subject to the jurisdiction of the court does not deprive him of property without due process of law.
2. An insolvent is not divested of all control over his assets, under the Massachusetts law, from the mere fact of the filing of the petition in insolvency; but this, in a voluntary proceeding, takes place only from the time of the first publication of the notice of issuing the warrant.
3. The provision of the Massachusetts statute retroactively vacating attachments does not control attachments levied in other states at a time when, under the Massachusetts insolvent law, the insolvent had not, by operation of law, been deprived of the dominion and control over his credits.

[No. 28.]

Argued October 12, 1899. Decided December 11, 1899.

IN ERROR to the Supreme Court of the State of Rhode Island to review a decision sustaining the lien of trustee process in that state to reach a debt due to a resident of Massachusetts against proceedings under the Massachusetts insolvent law. *Affirmed.*
See same case below, 19 R. I. 220, 33 Atl. 147.

Statement by Mr. Justice White:

The firm of Brown, Steese, & Clarke, established in Boston, on the 12th day of August,

NOTE.—The effect of the decision in this case and in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, on the authority of which the principal case depends, is virtually to settle a long standing conflict between the state courts as to the situs of a debt for the purpose of garnishment. The majority of the cases are in harmony with the doctrine announced by the United States Supreme Court, that a debt is subject to garnishment at the residence of the debtor. See *Burkington & M. River R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622; *Morgan v. Neville*, 74 Pa. 52; *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21; *Campbell v. Home Ins. Co.* 1 S. C. N. S. 158; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Glover v. Wells*, 40 Ill. App. 350;

1889, filed in the proper court in and for the county of Norfolk, Massachusetts, a petition praying to be allowed to take the benefit of the insolvent laws of the state of Massachusetts. On the day after—that is, on the 13th of August, 1889—John A. Cross, a citizen of Rhode Island, residing at Providence in that state, commenced suit in Rhode Island against the members of the firm of Brown, Steese, & Clarke on two negotiable notes drawn by the firm. The Lippitt Woolen Company and two other Rhode Island corporations carrying on business in that state were served, on the day the suit was filed, with trustee process on the averment that these corporations were indebted to the above-named firm. The Lippitt Woolen Company answered under the trustee process, disclosing the sum of its indebtedness. In the insolvency proceedings an assignee was appointed, and he commenced suit in Massachusetts against the Lippitt Woolen Company to recover the debt due by that corporation to the insolvent firm, and against which debt the trustee process had been issued in Rhode Island, and Hiram Leonard, a resident of Massachusetts, and who was indebted to the Lippitt Woolen Company, was made a garnishee. Pending

[397] *these proceedings the assignee sold the claim against the Lippitt Woolen Company and one against another corporation to Theophilus King, a resident of Massachusetts, and he was substituted as plaintiff in the action in Massachusetts above referred to. The Lippitt Woolen Company pleaded the pendency of the trustee process against it in the Rhode Island court. The Massachusetts court entered judgment in favor of the plaintiff King and against the Lippitt Woolen Company and the garnishee Leonard. The court, however, directed that execution on the judgment be stayed and the parties enter into a stipulation that no execution should issue until the proceedings in the Rhode Island action had been fully determined. Thereupon King was allowed, by the Rhode Island court, to become a party to the action there pending so far as necessary to enable him to assert his title to the in-

debtedness due by the Lippitt Woolen Company and other corporations to the firm of Brown, Steese, & Clarke, which debts were covered by the trustee process previously issued in Rhode Island under the circumstances already stated.

In the Rhode Island court both King and the Lippitt Woolen Company pleaded the proceedings under the insolvent laws of Massachusetts, the sale by the assignee to King, and the judgment of the court in Massachusetts, heretofore referred to, and asserted that thereby the title to the indebtedness due by the Lippitt Woolen Company to Brown, Steese, & Clarke passed to King, and that such title was superior to any lien supposed to have arisen from the trustee process which had been issued in the Rhode Island action. The court gave judgment in favor of the plaintiff Cross, charging the Lippitt Woolen Company for the amount of the debt due by that corporation to the firm of Brown, Steese, & Clarke, as stated in the answer of the Lippitt Woolen Company to the trustee proceedings. The court therefore rejected the claim of title preferred by King and acquired by him in the insolvency proceedings in Massachusetts, and in effect decided that the trustee process in Rhode Island operated to create a paramount lien on the debt due by the Lippitt Woolen Company, and was *unaffected by the insolvency[398] proceedings in Massachusetts and the action taken on the subject in the courts of that state. Motions for a new trial upon numerous grounds were filed on behalf of the Lippitt Woolen Company and the claimant King. These motions were heard before the appellate division of the supreme court of Rhode Island, and that court overruled them. (19 R. I. 220.) The case was then brought to this court by writ of error. In substance, the grounds relied on in this court for a reversal are, that at the time of the service of the trustee process the Rhode Island court was wholly wanting in jurisdiction over the defendants in the action, residents of Massachusetts, and over their property, and that by charging the Lippitt Woolen Company as trustee for the benefit

Roche v. Rhode Island Ins. Asso. 2 Ill. App. 360; *Moore v. Chicago*, R. I. & P. R. Co. 43 Iowa. 385; *Mooney v. Union P. R. Co.* 60 Iowa. 346. 14 N. W. 343; *Berry Bros. v. Davis*, 77 Tex. 191, 13 S. W. 978; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134; *Cochran v. Fitch*, 1 Sandf. Ch. 142; *Todd v. Missouri P. R. Co.* 33 Mo. App. 110; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919; *Neufelder v. German American Ins. Co.* 6 Wash. 336, 22 L. R. A. 287, 33 Pac. 870; *Wyeth Hardware & Mfg. Co. v. Lang*, 127 Mo. 242, 27 L. R. A. 651, 29 S. W. 1010; *Balk v. Harris*, 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 46 N. E. 631; and the principle is recognized in *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 33 N. E. 938.

But this doctrine has not been universally accepted, and many cases declare that the situs

of the debt is at the domicile of the creditor. See *Wright v. Chicago*, B. & Q. R. Co. 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Williams v. Ingersoll*, 89 N. Y. 508; *Osgood v. Magulre*, 61 N. Y. 524; *Bates v. New Orleans*, J. & G. N. R. Co. 4 Abb. Pr. 72; *Willet v. Equitable Ins. Co.* 10 Abb. Pr. 193; *Green v. Farmers & Citizens Bank*, 25 Conn. 452; *Illinois C. R. Co. v. Smith*, 70 Miss. 344, 19 L. R. A. 577, and note, 12 So. 461; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L. R. A. 210, 5 Inters. Com. Rep. 46, 58 N. W. 226; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 41 L. R. A. 331, 23 So. 825.

These decisions are, in effect, overruled by the United States Supreme Court cases first cited, as the state courts must refuse to follow their own prior decisions where the result will be to deny full faith and credit to a judgment of another state in garnishment of a debt due to a nonresident creditor which the United States Supreme Court has declared to be valid.

of the plaintiff Cross, the tribunal last mentioned failed to give full faith and credit to the judicial proceedings in the insolvency court in Massachusetts.

Mr. Charles H. Hanson argued the cause and, with Messrs. John C. Coombs and Robert W. Burbank, filed a brief for plaintiffs in error.

Mr. William R. Tillinghast argued the cause and, with Mr. James Tillinghast, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[398] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is first asserted that the judgment of the supreme court of the state of Rhode Island was not due process of law, and was in conflict with the 14th Amendment to the Constitution of the United States, because it recognized the right, in a suit brought in Rhode Island against a nonresident defendant, to garnishee the resident debtor of such defendant. It is contended that a judgment rendered by a court against a defendant who is neither within its jurisdiction by his person or his property is wholly void, and any attempt to enforce such judgment amounts to a denial of due process of law. The Rhode Island court, it is claimed, had no jurisdiction over the defendant firm because it

[399] was a resident of Massachusetts, and *it is asserted that such court had no property of the firm within its control upon which to exercise its jurisdiction. True it is the Lippitt Woolen Company, which alone was charged by the judgment, was made a trustee under the Rhode Island process, and was indebted to the Massachusetts firm; but this fact, it is asserted, did not establish that there was any right in Rhode Island to be subjected to the jurisdiction of the courts of that state, for the following reasons: The situs of movable property is at the domicile of the owner of such property, and therefore the situs of the claim or credit held by the Massachusetts firm against the Lippitt Woolen Company was not in Rhode Island, where the Lippitt Woolen Company was resident, but was in Massachusetts, where the creditor firm was established. The contention in substance is that any process of foreign attachment predicated upon the assumed right to levy on debts due to nonresidents by persons within the state wherein the process issues is absolutely void, hence a denial of due process of law.

We need not enter into a review of the contentions thus presented, since they were all considered by this court at its last term and held to be untenable. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

Conceding, however, as a general rule, that jurisdiction as to a nonresident can be acquired by trustee or garnishment process against a resident debtor of a nonresident defendant, it is urged that the facts in this case cause it to be an exception to this general rule. 175 U. S.

eral principle. The proceedings in involuntary insolvency were begun in Massachusetts before the commencement of the suit in Rhode Island. The legal effect of the insolvency proceedings, it is asserted, was to vest all the credits of the insolvent in the court of insolvency of Massachusetts, and therefore there could legally be no debt due to the nonresident insolvent in Rhode Island, because that debt by operation of the Massachusetts insolvent proceedings had ceased to be a debt due the firm, and had become a debt controlled by the Massachusetts insolvent court. The debt in Rhode Island originally due to the firm in Massachusetts cannot, it is claimed, be treated as continuing after the insolvency *proceedings to be due [400] to the firm without refusing to give effect to the proceedings in Massachusetts, and such refusal is therefore asserted to be the necessary result of the judgment of the court of Rhode Island which is before us for review.

The contention thus relied upon, it is argued, is not contrary to the settled rule that insolvency proceedings of the several states do not have extraterritorial operation; and it is also asserted that the claim here relied upon is not contrary to the decision of this court in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545. In that case it was held that a general assignment for the benefit of creditors, made by an insolvent under the insolvent laws of a state, did not operate to exempt tangible property situated at the time of the insolvent assignment in another state from seizure in the state where the tangible property was actually situated. This decision, it is claimed, was but an exemplification of the general rule limiting insolvency proceedings of one state to the jurisdiction of that state and depriving them of extraterritorial operation. A mere credit, however, it is asserted, conceding it to be subject to attachment or trustee process at the residence of the debtor, is governed by a different rule from that which controls tangible property. Such credit, the claim is, being at the situs of the domicile of the creditor, passes to the custody of the insolvent court when the insolvent law so provides, and therefore comes under the dominion and control of the insolvent court having jurisdiction of the person of the creditor. As by operation of law the credit from the date of insolvency proceedings at the residence of the creditor ceases to be under his dominion, but, on the contrary, is *in gremio legis*, the power to levy by garnishee or trustee process on the same at the residence of the debtor is destroyed. But the predicate upon which this contention rests is that the Massachusetts insolvent proceedings operated to deprive the insolvent of all control over his assets prior to or at the time when the suit in Rhode Island was commenced and the trustee process there issued. If this premise is unsound the whole contention is without merit, and therefore the legal proposition deduced from it need not be examined.

*The statutes of the state of Massachusetts [401]

on the subject of insolvency provide: First, for the adjudication by the judge of the court of insolvency upon a voluntary petition; second, for the issue of a warrant for the sequestration of the effects of a petitioning debtor; third, for publication of a notice of the issue of this warrant; fourth, for a meeting of creditors and the election of an assignee; and, fifth, for an assignment by the judge of the court of insolvency to the assignee so elected. Mass. Pub. Stat. 1882, chap. 157, §§ 16, 17, 24, 40, 44. The forty-sixth section of the act which provides when proceedings under it shall operate to divest the debtor of control over his property is reproduced in the margin.†

[402] Now the petition in insolvency on behalf of the firm of Brown, Steese, & Clarke was filed in the court of insolvency on August 12, 1889, a day prior to the commencement by Cross of his action in Rhode Island and the service of the trustee process. The warrant, however, addressed by the Massachusetts insolvent court to the sheriff, directing him, as messenger, to take possession of the estate of the insolvent, was not issued until August 21, 1889, the first publication of notice of the issue of such warrant was made on August 23, 1889, and *the assignment to the assignees elected by the creditors was made by the judge of the insolvency court on September 4, 1889. The first question presented then is: At what date was the firm of Brown, Steese, & Clarke, by force of the insolvent laws of Massachusetts, divested of the title and control of their personal property, tangible and intangible? If the Massachusetts insolvent law did not, from the mere fact of filing the petition of insolvency, operate to divest the insolvent of all control of his credits, it is obvious that such control existed in the creditor when the suit was begun in Rhode Island, for the only step

taken in the Massachusetts proceedings prior to the commencement of the suit in Rhode Island was the filing of the petition in insolvency. Every other step in the insolvency was taken after the Rhode Island suit was begun, and the trustee process there levied. Now the text of the Massachusetts statute clearly provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the first publication of the notice of the issuing of the warrant in case of voluntary proceedings." The decisions of the supreme judicial court of Massachusetts leave no doubt that up to the first publication of notice of the issuing of the warrant the insolvency proceedings do not divest the insolvent of all control of his assets and credit. We premise, however, before reviewing these decisions, that the portions of the present insolvent statutes of Massachusetts, as contained in chapter 157 of the Public Statutes of 1882, so far as they bear upon the question now under consideration, substantially reproduce the provisions of chapter 163 of the statutes of 1838. We place in the margin a portion of § 5 of the latter act, which, it will be seen, declares the effect of a formal assignment by the judge of the court of insolvency in practically similar language to that contained in § 46 of chapter 157 of the Public Statutes of 1882, already referred to.†

*Under the statute of 1838, it was early [403] settled in Massachusetts that the property of an insolvent debtor was not to be regarded as in the custody of the law until the publication of the first notice of the issuance of the warrant, and that until such time the insolvent might bona fide transfer his property, and that it was subject to seizure under ju-

†"Sec. 46. The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the first publication of the notice of issuing the warrant in case of voluntary proceedings, and at the time of the first publication of notice of the filing of the petition in cases of involuntary proceedings, and shall be effectual, subject to the provisions of the following section, to dissolve any attachment on mesne process made not more than four months prior to the time of the first publication aforesaid. The assignment shall vest in the assignee all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate. The assignee may redeem all mortgages, conditional contracts, pledges, and liens of or upon any goods or estate of the debtor, or sell the same subject to such mortgage or other encumbrance, and if a mortgage is foreclosed, pending proceedings in insolvency, and before the appointment of an assignee, or within sixty days thereafter, the assignee, when appointed, may redeem the same at any time within sixty days after the appointment, with remedies similar to those provided by law for the redemption of mortgages before foreclosure."

†"Sec. 5. The said judge shall, by an instrument under his hand and seal, assign and convey to the person or persons chosen or appointed assignees as aforesaid, all the estate, real and personal, of the debtor, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto; which assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken in execution on any judgment against him, at the time of the first publication of the notice of issuing the above-mentioned warrant, although the same may then be attached on mesne process as the property of the said debtor; and such assignment shall be effectual to pass all the said estate, and dissolve any such attachment; and the said assignment shall also vest in the said assignees all debts due to the debtor, or to any person for his use, and all liens and securities therefor, and all his rights of action for any goods or estate, real or personal, and all his rights of redeeming any such goods or estate; and the assignees shall have power to redeem all mortgages, conditional contracts, pledges, and liens, of or upon any goods or estate of the debtor, or to sell the same, subject to such mortgage or other encumbrance."

dicial process. Thus, in *Briggs v. Parkman* (1841) 2 Met. 258, 37 Am. Dec. 89, it was held that an assignment, under the statute of 1838, vested in the assignee only the property which the debtor had at the time of the first publication of the notice of the issuing of the warrant against him. In 1842, in *Judd v. Ives*, 4 Met. 401, on a petition of Judd, an insolvent debtor, asking that proceedings be set aside which had been instituted before a master in chancery under Stat. 1838, chap. 163, in considering the question whether the United States bankrupt act which went into operation on the 1st of February, 1842, superseded or suspended the insolvency proceedings referred to, the court, at page 402, said (*italics ours*) :

"But we are nevertheless of opinion that this consequence of the act is limited to cases instituted under the insolvent law subsequent to the period when the bankrupt law went into operation, and that it cannot supersede or suspend proceedings rightfully commenced under the insolvent act, prior to the time of its going into operation. The [404] counsel for the *petitioner admits that it could not, if the property of the insolvent had been actually assigned prior to the first of February, when the bankrupt law went into operation; but he contends that, as the assignment in this case was not actually made until the 7th of February, the whole proceedings were suspended or superseded. Upon consideration, we are of opinion that the proceedings under the commission are not to be thus separated, but that they are to be treated as the parts of one whole; that the assignment not only relates back to the first publication of the notice, and vests all the property of the debtor, both real and personal, in the assignee, but that the debtor is divested of his property, before such assignment, by virtue of the warrant to the messenger and the taking of the property of the debtor into custody, by force of which a qualified property in the estate vests in the messenger, inasmuch that no act of the debtor, after the due service and publication of the warrant, can be lawfully done to make any transfer of his property, or to affect the rights of any of his creditors; that the property is, by the act of publication, placed in the custody of the law, in the person of the messenger; and that the judge or master alone can dispose of the same, by the appointment of an assignee to receive it, or by dissolving the process."

In *Clarke v. Minot* (1842) 4 Met. 346, in the course of the opinion, the court, in speaking, through Chief Justice Shaw, of the time when under the insolvency laws the insolvent debtor was divested of control over his assets, said:

"The question then recurs, To what time does this assignment relate back? The statute, § 5, thus states it: 'Which assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken on execution on any judgment against him, at the time

of the first publication of the notice of issuing the above-mentioned warrant.' This leads directly to the inquiry, what is the time of the first publication thus referred to, and for this we go to the second section. The first section having provided for the issuing of a warrant to a messenger *to take [405] possession, etc., the second section provides as follows: 'The said messenger shall forthwith give public notice, by advertisement, in such newspapers as shall be designated by the judge, and also such personal or other notice to any persons concerned as the judge shall prescribe.'

"It seems to have been the obvious policy of the statute to fix some precise point of time at which the whole property and effects of the debtor shall be deemed to have passed from him and vested in the assignees. The legislature appears to have intended that a time should be fixed, before which all transfers and conveyances of property by the debtor, made in good faith and not intended to give preferences, shall be valid; so, of all payments in the ordinary course of business and transfers of property made without the concurrence of the owner, as by seizure or levy on execution.

"We are now seeking to ascertain and fix the point of time intended by the statute as the time at which all the property of the debtor is changed and his power over it suspended; that point, in other words, prior to which all payments, made by him or to him, all conveyances (not fraudulent) made by him, all seizures, levies, and extents of execution upon his property, shall be held valid, and all those made after void. It was competent for the legislature to have fixed any other time, as, for instance, the application to the judge, or the act of the judge in issuing the warrant, or the delivery of the warrant to the messenger. Either of these would have afforded security to the creditors, but might have unjustly interfered with the rights of those who had been dealing with the debtor, in good faith and without notice. The time of first publication was fixed, obviously, because that act would, in most cases, afford actual notice to those immediately interested; and it was intended as constructive notice to all. But no such effect can be attributed to personal notice to one individual."

In *Butler v. Mullen* (1868) 100 Mass. 453, the rulings above referred to were reiterated. The syllabus of the case is as follows:

*"One who has been charged as the trustee [406] of H, by a judgment in the trustee process, and has paid to the judgment creditor, on execution, the sum with which he has been so charged, will not be protected against H's assignee in insolvency, if the first publication of the warrant in insolvency against H was before the rendition of the judgment in the trustee process, though he had no actual notice of H's insolvency until after payment."

In delivering the opinion of the court, Hoar, J., at page 454, said (*italics ours*):

"The payment by the defendants upon the judgment against them as trustees was a valid payment as against Holbrook, his executors and administrators. Gen. Stat. chap. 142, § 37. But it had no validity against a party whose title intervened before the judgment against them was rendered, and whose title was superior to the attachment by which the fund had been held. Not only does the assignment, when made, relate back to the first publication of the notice in insolvency, and vest all the property of the debtor in the assignee, but before the assignment the debtor is so far divested of his property, by virtue of the issuing of the warrant, that *from the first publication* no transfer or conveyance of it can be made which will have any validity against the assignee. Gen. Stat. chap. 118, § 44; *Clarke v. Minot*, 4 Met. 346; *Judd v. Ives*, 4 Met. 401; *Edwards v. Sumner*, 4 Cush. 393; *Gallup v. Robinson*, 11 Gray, 20."

It being thus made patent that there is no merit in the contention that the operation of the Massachusetts insolvent law was to divest the insolvent of all control over his assets from the mere date of the filing of the petition in insolvency, but, on the contrary, that the Massachusetts law only produced such effect from the time of the first publication of the notice of issuing the warrant, it follows, as the levy of the trustee process in Rhode Island was prior to the first publication of the warrant, that the whole theory upon which the argument in this case proceeds is fallacious. It is therefore unnecessary to express any opinion on the legal proposition urged upon our attention on an erroneous conception of the Massachusetts *law. This becomes evident when it is considered that the case as presented does not involve the power of a Massachusetts court to assert control over a citizen of that state in order to prevent him from prosecuting in Rhode Island an attachment levied by him upon property in Rhode Island, in supposed violation of the laws of Massachusetts. On the contrary, the question here is simply whether a citizen of Rhode Island was prevented in the courts of his own state from levying an attachment upon a debt due by a citizen and resident of Rhode Island to a citizen and resident of Massachusetts because such levy was in conflict with the Massachusetts insolvent statutes. And this, although by the statutes of Massachusetts the debt levied on in Rhode Island by the citizen of the latter state, if such debt had been situate in Massachusetts, would have been subject to the disposition and control of the insolvent.

The foregoing considerations would suffice to dispose of the case but for the fact that it is claimed that as by the Massachusetts statute an assignment by the judge of the insolvent court dissolved attachments made within four months from the first publication aforesaid, therefore, although the trustee process in Rhode Island was issued at

a time when the debtor was not divested of control of the claim, nevertheless, by the operation of the Massachusetts law upon the Rhode Island levy, the latter should be dissolved. This contention, however, but asserts that the Massachusetts insolvent statute had, in this particular, an extraterritorial operation, and thereby controlled proceedings validly instituted in Rhode Island. This, however, is in conflict with the elementary doctrine that the insolvent statutes of the respective states do not, to the extent claimed, operate extraterritorially. *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, and authorities there cited. Indeed, the fact that the provision of the Massachusetts statutes retroactively vacating attachments does not control attachments levied in other states at a time when, under the Massachusetts insolvent law, the insolvent had not by operation of law been deprived of the dominion and control over his credits, is recognized in the courts of Massachusetts. Thus, in **Law- [408] rence v. Batcheller* (1881) 131 Mass. 504, assignees in Massachusetts of an insolvent debtor were held not entitled to recover from a creditor of such insolvent, though the creditor was a resident and citizen of Massachusetts, the amount of sums realized through garnishment proceedings in New York, Alabama, and Arkansas against persons who were indebted to the Massachusetts insolvent. The garnishment proceedings were instituted before the publication of the warrant, but it was not until after the adjudication in insolvency, and after the assignment by the judge of the court of insolvency to the assignees in insolvency, that the attachment proceedings were prosecuted to final judgment, and the collections were made under the trustee process. In the course of the opinion, delivered by Field, J., at pages 506, 508, he said (*italics ours*):

"As the attachments were made prior to the time when the assignment in insolvency took effect, and, *having been made in other states, were not dissolved by the proceedings in insolvency in this commonwealth*, and were valid by the laws of the states respectively in which they were made, they must prevail over the assignment, unless the statutes of the commonwealth make a title so acquired *by a citizen of the commonwealth* void or voidable at the election of the assignees in insolvency.

"In the case at bar, the title to the credits attached, which passed to the assignees by virtue of the proceedings in insolvency, whether it be regarded as a legal or an equitable title, was a title *subject to the attachments*. As neither the common law nor our statutes give any right of action on the facts agreed in this case, the assignees cannot maintain their suit if the attachments were properly made."

See also *Proctor v. National Bank of the Republic*, 152 Mass. 223, 9 L. R. A. 122, 23 N. E. 81.

Affirmed.

[409] *T. O. ABBOTT, *Plff. in Err.*,
v.

NATIONAL BANK OF COMMERCE of Tacoma, Washington, A Corporation, Chester Thorne, J. W. Wallace, Edward Huggins, and W. H. Bogle and Charles Richardson as Copartners under the Firm Name and Style of Bogle & Richardson.

(See S. C. Reporter's ed. 409-414.)

Writ of error to state court—Federal question—decision in favor of Federal jurisdiction—denying remedy for defamatory pleading.

1. The decision of a state court in favor of the jurisdiction of a Federal court in another action cannot be reviewed under U. S. Rev. Stat. § 709, as a decision on an authority exercised under the United States, since it is in favor of such authority.
2. A state court does not render a decision in favor of the authority exercised under any state, within the meaning of U. S. Rev. Stat. § 709, where it merely decides a question as to the jurisdiction of a Federal court, and where the authority of the state court to decide this matter is not drawn in question.
3. A contention in a state court, that reputation is property of which the owner is deprived without due process of law by a decision against his right of action for libelous matter contained in a pleading raises a Federal question under U. S. Rev. Stat. § 709, providing for writ of error from the Supreme Court in case of a decision against any constitutional right, privilege, or immunity.
4. A decision that words used in a pleading in another suit cannot be made the foundation of an action for damages does not involve any question of a Federal nature for review on writ of error to a state court by the Supreme Court of the United States.
5. A person is not deprived of his reputation (even if that constitutes property) without due process of law by denying his right to an action for defamatory words in a pleading.

[No. 376.]

Submitted November 6, 1899. Decided December 11, 1899.

IN ERROR to the Supreme Court of the State of Washington to review a decision against plaintiff in an action for defamatory words contained in a pleading. On motion to dismiss or affirm. *Affirmed.*

See same case below, 20 Wash. 552, 56 Pac. 376.

The facts are stated in the opinion.

Mr. John H. Mitchell submitted the cause for plaintiff in error. Mr. W. C. Sharpstein was with him on the brief.

Mr. Thomas R. Shepard submitted the cause for defendants in error. Messrs. W. H. Bogle and Charles Richardson were with him on the brief.

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.
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Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Harlan delivered the opinion of the court: [409]

The plaintiff in error, Abbott, brought this action in the superior court of the state of Washington to recover damages sustained by the plaintiff on account of an alleged libel published against him by the National Bank of Commerce of Tacoma, Washington, and the individual defendants above named.

It appears that in 1895 the defendant bank, at the instance of the other defendants as its directors and attorneys, instituted a suit in the United States circuit court for the district of Washington against three of its former directors to recover certain alleged losses on account of loans made by them. The complaint in that suit alleged that Abbott was one of the persons *to whom the loans were made, and among other things charged substantially that he was insolvent when they were made. [410]

In the present action Abbott alleged in his complaint that the statements in reference to him and his financial condition in the other suit were defamatory and untrue: that the defendants not only had no reason to believe them to be true, but knew them to be untrue, and that those statements were not pertinent, relevant, or material to the bank's cause of action.

The defendants in their answer averred that the language referred to was contained in the complaint filed by the bank, and not otherwise; that the court in which that complaint was filed had jurisdiction of the parties and of the subject-matter of the action; and that the language used was pertinent, relevant, and material to the issues, and was in good faith believed by defendants to be true, and was true.

In his reply the plaintiff, besides denying the averments of the answer, alleged that he was not a party to the action in which that complaint was filed, was not bound by any proceedings therein, that his rights cannot be determined in any manner thereby, and that "any attempt to deprive him of his rights or his property by any process therein or thereunder is contrary to and in violation of the Constitution and laws of the state of Washington, and of § 1 of article 14 of the Amendments to the Constitution of the United States."

The trial court, on motion for judgment on the pleadings, dismissed the suit upon the ground that the facts stated did not constitute a cause of action, and because the matters alleged to be libelous were privileged.

This judgment was affirmed by the supreme court of Washington. Among other things that court said: "Whether the Federal court had jurisdiction of the cause in which the pleading was filed, and of the parties thereto, is purely a legal question, to be determined from an inspection of the pleading itself. The Federal court overruled a demurrer to the bill which contained the objectionable matter, and we are constrained

[411] to hold, as did that court, that it had jurisdiction. See *National Bank of Commerce v. Wade*, 84 Fed. Rep. 10. We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, Were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith? The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.' *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518. It cannot be doubted that it is a privilege liable to be abused, and its abuse may lead to great hardships; but to give legal sanction to such suits as the present would, we think, give rise to far greater hardships." *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376.

Among the errors assigned in this court are that the supreme court of Washington erred in affirming the judgment of the superior court of Pierce county because the effect of such judgment was to deprive plaintiff in error of his property without due process of law, contrary to the 14th Amendment to the Constitution of the United States; in holding that the United States circuit court for the district of Washington, western division, had jurisdiction of the suit brought by the National Bank of Commerce of Tacoma; in holding that the libelous matter contained in the bill of complaint filed in that suit was privileged; and in holding that such matter was pertinent and material to the issue in that suit.

This case is now before us upon motion to dismiss the present writ of error for want of jurisdiction in this court, and, that motion failing, to affirm the judgment below on the ground that the question upon which jurisdiction depends is such as not to need further argument.

The question whether the circuit court of the United States had jurisdiction to entertain the suit brought by the National Bank of Commerce was raised in the action brought by the bank and was decided in its favor—the court holding that the case was one arising under the laws of the United States, in that it involved the [412] question whether or not the action could be maintained under § 5239 of the Revised Statutes before the violation of its provisions had been determined by a proper court in a suit brought for that purpose by the comptroller of the currency. *National Bank of Commerce v. Wade*, above cited. That section is as follows: § 5239. "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the 218

United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in case of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The supreme court of the state held that the circuit court of the United States had authority to entertain the action brought by the bank. But that decision did not bring the case within the clause of the statute giving this court jurisdiction to re-examine a final judgment or decree in the highest court of the state "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." Rev. Stat. § 709. The circuit court of the United States had authority to judicially determine in the case and for the parties before it whether the action brought by the bank was one arising under the laws of the United States. Its authority in that regard was not and could not have been disputed. But to deny that the bank could bring its action in the Federal court—the bank being located in Washington and the persons sued by it being citizens of that state—was not, within the meaning of § 709, to draw in question "an authority exercised under the United States." Besides, the decision of the same question by the state court was in support of the jurisdiction of the circuit court [413] of the United States. Where the issue is as to the validity of "an authority exercised under the United States," we cannot review its determination by the state court, unless the decision was against the validity of the authority so exercised. As said in *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 223, 32 L. ed. 908, 913, 9 Sup. Ct. Rep. 503, "the distinction is palpable between a denial of the authority and a denial of a title, right, privilege, or immunity claimed under it." *Clough v. Curtis*, 134 U. S. 361, 369, 33 L. ed. 945, 10 Sup. Ct. Rep. 573; *United States v. Lynch*, 137 U. S. 280, 286, 34 L. ed. 700, 702, 11 Sup. Ct. Rep. 114; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 636, 653, 34 L. ed. 1110, 1116, 11 Sup. Ct. Rep. 435.

Nor can we sustain the contention that our jurisdiction may rest on the clause of § 709, "or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." The authority of the state court to consider and pass upon the question, directly raised in the case before it, as to the jurisdiction of the circuit court of the United States on the bank's suit, was not drawn in question. The contention is only that its decision was erroneous.

But this court has jurisdiction under the clause of § 709, "or where any title, right, 175 U. S.

privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, . . . or authority." The plaintiff did specially set up and claim that reputation was "property," and that the ground on which the state court proceeded, namely, that the alleged libelous matter appeared in a pleading and could not be made the basis of an action for damages, deprived him of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

It is true, as suggested by plaintiff in error, that a state may not by any of its agencies, legislative, judicial, or executive, disregard the prohibitions of that amendment. **[414]** But even *if reputation could be deemed property within the meaning of the 14th Amendment, the state court did nothing that could be regarded, within the meaning of the Constitution, as depriving the plaintiff of his reputation. It only adjudged that the words used in a pleading in another suit could not be made the foundation of an action for damages. If it erred in so declaring, it was an error as to a matter of general law and involved no question of a Federal nature; still less an error which in any legal sense deprived the plaintiff of his reputation. It left his reputation as it was, and only adjudged that he could not proceed against the defendants and by judgment and execution take their property in violation of what the court deemed to be the principles of law governing the case.

There was, in our opinion, color for the motion to dismiss, and therefore the motion to affirm may be considered; and *as the judgment below did not deprive plaintiff of any right, privilege, or immunity secured by the Constitution or laws of the United States, it is affirmed.*

FRANCES REBECCA HAMILTON, *Plff. in Err.,*
v.

GRACE ABBIE B. RATHBONE.

(See S. C. Reporter's ed. 414-423.)

Devise of land by married woman—property acquired from her husband—construction of statute by reference to prior act.

1. A wife acquired property by gift or conveyance from her husband, within the meaning of a statute restricting her disposition of such property, although it was transferred to her through a third party as a mere medium of transfer of title, when there was no real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character.
2. Prior acts may be resorted to in construing a statute, to solve, but not to create, an ambiguity.
3. The right of a married woman to convey, devise, and bequeath "her property" under D. C. Rev. Stat. (1874), § 728, is not limited by the provisions of the act of April 10, 1869,
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which governed the subject before the revision was made, in which the right was limited to property acquired otherwise than by gift or conveyance from her husband.

[No. 6.]

Argued April 15, 1898. Ordered for reargument January 30, 1899. Reargued November 15, 1899. Decided December 18, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming a judgment entered upon a verdict for plaintiff in an action of ejectment. *Reversed.*

See same case below, 9 App. D. C. 48.

Statement by Mr. Justice **Brown:**

This was an action of ejectment brought in the supreme court of the District of Columbia by Grace Abbie B. Rathbone as plaintiff, against Frances Rebecca Hamilton, defendant, to recover an undivided one-third interest in a parcel of land of which the defendant Hamilton was then in possession.

*The common source of title was one **[415]** Abram Elkin, who received his deed on July 31, 1867. He was married to Lucy V. Elkin, April 15, 1863.

The plaintiff's chain of title was as follows: Deed from Abram Elkin and wife to Fred. G. Calvert, April 29, 1872; deed of same date by Fred. G. Calvert and wife to Lucy V. Elkin. These deeds were evidently given to avoid a direct conveyance from husband and wife. Both deeds ran to the grantee, "his (or her) heirs and assigns, to and for his (or her) and their sole use, benefit, and behoof forever."

Lucy V. Elkin died May 3, 1876, leaving her husband, Abram Elkin, and four children: (1) Grace, the plaintiff, subsequently married to Rathbone; (2) Lucy Caroline; (3) Charles Calvert; (4) Harry Lowry, who died in 1885 at the age of nine or ten years.

Abram Elkin disappeared in June, 1876, and has not been heard of since.

Plaintiff sues for an undivided one-third interest as one of the heirs at law of her mother.

Defendant's chain of title was as follows: Lucy V. Elkin, who died May 3, 1876, leaving a will by which she appointed Fred. G. Calvert, her brother, her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband \$1,000 out of the proceeds of the sale, directing that the residue of such proceeds, after the payment of funeral and other necessary expenses, should be divided equally between her four children. Calvert duly qualified as executor.

In February, 1879, as such executor, Calvert sold the land in controversy to the defendant Frances Rebecca Hamilton, and conveyed it to her by a deed (February 20) which recited that the sale had been made under the power conferred upon him by the will.

A plea of not guilty having been inter-

posed, the case was tried in the supreme court of the District by a jury, and a verdict directed for the defendant. On appeal to the court of appeals from the judgment entered upon the verdict so rendered, that court set aside the verdict and remanded [416] the *case for a new trial. *Rathbone v. Hamilton*, 4 App. D. C. 475.

A second trial was had, and the jury instructed to return a verdict for the plaintiff. From the judgment entered upon this verdict, the defendant appealed to the court of appeals, which affirmed the judgment. *Hamilton v. Rathbone*, 9 App. D. C. 48. Whereupon defendant Hamilton sued out a writ of error from this court.

Mr. A. S. Worthington argued the cause and, with Mr. A. A. Lipscomb, filed a brief for plaintiff in error:

Where the legislature makes a plain provision without making any exception, the courts can make none.

United States v. Goldenberg, 168 U. S. 102, 42 L. ed. 398, 18 Sup. Ct. Rep. 3; *Postmaster-General v. Early*, 12 Wheat. 148, 6 L. ed. 582; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *French v. Spencer*, 21 How. 238, 16 L. ed. 99; *Yturbi v. United States*, 22 How. 290, 16 L. ed. 342.

No reference can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision.

United States v. Bowen, 100 U. S. 508, 25 L. ed. 631; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 30 L. ed. 60, 6 Sup. Ct. Rep. 929; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

Mr. M. J. Colbert argued the cause, and Messrs. Hamilton & Colbert and Mr. H. G. Mylans filed a brief for defendant in error.

[416] *Mr. Justice Brown delivered the opinion of the court:

Plaintiff brings ejectment as one of the heirs at law, namely, the eldest of three children, of her mother Lucy V. Elkin, who died May 3, 1876. Defendant relies upon a purchase made by her from the executor of Mrs. Elkin's will. To establish her title, then, plaintiff is bound to show that the property did not pass under the will of her mother, but descended to her heirs at law. The question whether it did so pass depends upon the construction given to certain acts of Congress then in force, relative to estates of married women.

By the act of April 10, 1869 (16 Stat. at L. 45, chap. 23), it was enacted:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as abso-

lute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Sec. 2. And be it further enacted. That any married *woman may contract, and sue [417] and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were *sole*."

Under the first section, the right of a married woman to dispose of her property as if she were a *feme sole* does not apply to property acquired by gift or conveyance from her husband. Did the case rest here, there could be no doubt that Mrs. Elkin took this property from her husband subject to such disabilities as were imposed upon married women by the common law, except so far as the same may have been modified by the statutes of Maryland then in force (*Sykes v. Chadwick*, 18 Wall. 141, 21 L. ed. 824), and the fact that she took title through her brother, Fred. G. Calvert, as an intermediary grantee, did not affect the question. *Cammack v. Carpenter*, 3 App. D. C. 219. The deeds from Abram Elkin to Calvert, and from Calvert to Lucy V. Elkin, were made upon the same day, recorded at the same hour of the same day, and both were for the same nominal consideration of \$5. Add to this the fact that Calvert was the brother of Mrs. Elkin, and the inference is irresistible that it was intended as a transfer from husband to wife. We concur in the opinion of the court of appeals [4 App. D. C. 484] that "assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was *employed, it [418] was no less, in legal effect and contemplation, a gift or conveyance from the husband to the wife."

Whether under the common law she held this property as her separate estate, with power to devise or otherwise dispose of it, as if she were a *feme sole*, is a question which does not arise in view of the statutes then existing, which we think control the case.

In the revision of the statutes applicable to the District of Columbia (passed in 1874), the above act of 1869 was rearranged, and became §§ 728 to 730, as follows:

"Sec. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"Sec. 728. Any married woman may convey, devise, and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Sec. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"Sec. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

The difference between these sections and the former act is noticeable. By the first section of the act of 1869, the absolute right of a married woman over her property is not given with respect to such property as she has acquired by gift or conveyance from her husband. The final clause of this section reads as follows: "But such married woman may convey, devise, and bequeath *the same*" (that is, her separate property, except as above stated), "or any interest therein, in the same manner and with like effect as if she were unmarried." The first clause of this section is repeated in Rev. Stat. § [419] 727, but *the second clause is thrown into a separate section (728), which declares that "any married woman may convey, devise, and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried." Literally, this section extends to all her property, and is not limited to the "same" property described in § 727, and thus excluding that which she acquired by gift or conveyance from her husband. Under the act of 1869, therefore, the power of a married woman to convey, devise, and bequeath her property does not extend to such as she acquired by gift or conveyance from her husband, while under § 728 it extends to *all* her property, however derived.

The second section of the act of 1869 likewise reappears without change as §§ 729 and 730, and no question is likely to arise with respect to any differences in construction.

The decisive question then is whether § 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in 175 U. S.

such prior act. The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Heydon's Case*, 3 Coke, 76; *United States v. Freeman*, 3 How. 556, 11 L. ed. 724; *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47; *Platt v. Union P. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; *Viterbo v. Friedlander*, 120 U. S. 707, 724, 30 L. ed. 776, 781, 7 Sup. Ct. Rep. 962; *Lake County v. Rollins*, 130 U. S. 662, 22 L. ed. 1060, 9 Sup. Ct. Rep. 651; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

This rule has been repeatedly applied in the construction of the Revised Statutes. The earliest case is that of *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539, in which a section (5440), defining *and punishing [420] conspiracies to defraud generally, was held not to be restricted by the prior act of March 2, 1867, from which the section was taken, which was limited to conspiracies arising under the revenue laws.

The question was again elaborately considered in the case of *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631, in which it is broadly stated that "when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." Rev. Stat. § 4820, enacted that "the fact that one to whom a pension has been granted for wounds or disabilities received in the military service has *not* contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all *such* pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits." Bowen was the recipient of an invalid pension, but he *had* contributed to the funds of the Soldiers' Home, and the question was whether that fact withdrew him from the clause which requires pensioners to surrender their pensions to the home while inmates of it. The section was held to be limited to those ("such") who had *not* contributed to the funds of the home, although by the act from which the section was taken *all* invalid pensioners who accepted the benefit of the home were bound to surrender their pensions to its use while there.

The language above quoted was repeated in *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 30 L. ed. 60, 6 Sup. Ct. Rep. 929, the court again holding that, where the meaning of the Revised Statutes is plain, it can-

not recur to the original statutes to see if errors were committed in revising them. To the same effect are *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *United States v. Averill*, 130 U. S. 335, 32 L. ed. 977, 9 Sup. Ct. Rep. 546; *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625, in which the court said that if there were an ambiguity in a section of the Revised Statutes, resort might be had to the original act from which the section was taken, to ascertain what, if any, change of phraseology there is, and whether such change should be construed as

[421] *changing the law. See also *Balc Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create*, an ambiguity. If § 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word "property," used in § 728, includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject.

As bearing upon the proper construction of this section we are also referred to an act approved June 1, 1896 (29 Stat. at L. 193, chap. 303), entitled "An Act to Amend the Laws of the District of Columbia as to Married Women, to Make Parents the Natural Guardians of Their Minor Children, and for Other Purposes." The sections of the act which are pertinent here are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of any person, shall be and remain her sole and separate property, notwithstanding *her marriage, and shall not be subject to the disposal of her husband or liable for his debts, ex-

cept that such property as shall come to her by gift of her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"Sec. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessities purchased by her or furnished at her request for the family.

"Sec. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia be and the same are hereby repealed."

It will be observed that, by the first section, all the property of a married woman owned at the time of marriage, or which shall afterwards come to her in any manner or from any person, shall remain her sole and separate property, notwithstanding her marriage, thus enlarging the operation of § 727, which limited it to such as she had not acquired by gift or conveyance from her husband. By the second section power is given to her to bargain, sell, and convey her property as if she were a married man, but nothing is said about her power to bequeath it. It will be noticed, however, that while §§ 727, 729, and 730 of the Revised Statutes are repealed, no repeal of § 728 is made. Evidently Congress understood § 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand. If full effect be not given in this case to § 728, as including all the property of a married woman, one of two results must follow: Either that the law of 1896 changed the construction to be given to § 728, although it did not repeal or modify it, or the construction of that section, contended for by the plaintiff, must prevail, *and married women are still under [423] the disabilities of the act of 1869, though that act and §§ 727, 729, and 730, which reproduced it, are expressly repealed. The more reasonable construction is that Congress understood § 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand.

Our conclusion is that the property in question passed under the will of Mrs. Elkin. The view we have taken of this subject renders it unnecessary to consider the other questions in the case.

The judgment of the Court of Appeals must be *reversed*, and the case remanded to that court with instructions to reverse the judgment of the Supreme Court of the District of Columbia, and to remand the case to that court with directions to grant a new trial.

LA ABRA SILVER MINING COMPANY,
Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 423-500.)

Bill signed by President during recess of Congress—suit by United States to determine question of fraud in claim against Mexico—judicial power to decide case—case in law or equity—interference with executive power—inconsistency with principles of international arbitration—equitable nature of suit—fraudulent character of claim—letters and reports to corporation as res gestæ.

1. A bill passed by Congress and duly presented to the President during its session may be signed by him, so as to make it a law, during a recess which Congress has taken for a fixed period.
2. A suit by the United States to determine the question of fraud in obtaining an award against Mexico, brought under authority of the act of Congress of December 28, 1892, is a "case," within the meaning of U. S. Const. art. 3, § 2, extending the judicial power of the United States to cases in law and equity arising under that instrument, the laws of the United States, or treaties, since the proceeding involves a right which in its nature is susceptible of judicial determination; and the statute makes the decision of the court of claims a final and indisputable basis of action by the parties, and not simply an ancillary or advisory decision.
3. No interference with the constitutional functions of the President in connection with matters involved in the relations between this country and the Republic of Mexico is made by the act of Congress of December 28, 1892, providing for a suit in the court of claims to determine as to the matter of fraud in obtaining an award against Mexico, the amount of which had been paid by Mexico to the United States for the claimants.
4. There is no inconsistency with the principles underlying international arbitration, in providing for a judicial investigation of fraud in obtaining an award from an international commission, the amount of which has been paid to the United States in accordance with the award, for distribution, as the purpose of the suit is to enforce good faith on the part of citizens who seek the intervention of the government to obtain redress of alleged wrongs from another country.
5. A suit by the United States to bar and foreclose all claims in law and equity on the part of one who has fraudulently obtained an award against another country, under a statute authorizing the court to render such interlocutory and final decrees as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction,—is a suit in equity, which on appeal is to be re-examined on both law and facts.
6. Letters and reports to a corporation by its

NOTE.—As to right of the Executive to sign a bill after the adjournment of the legislative bodies,—see *Detroit v. Chapin* (Mich.) 37 L. R. A. 391, and note.

As to declarations of an agent as evidence against the principal,—see note to *Leeds v. Marine Ins. Co.* 4 L. ed. U. S. 266.

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agents in charge of mines, made in respect to their management, are admissible against the corporation as *res gestæ*.

[No. 29.]

Argued on question of jurisdiction November 30 and December 1, 1898. Argued on merits February 20, 21, and 23, 1899. Decided December 11, 1899.

APPEAL from a judgment of the Court of Claims deciding that an award in favor of the La Abra Silver Mining Company against the Republic of Mexico, made by an international commission, was obtained by fraud. *Affirmed.*

See same case below, 32 Ct. Cl. 462.

The facts are stated in the opinion.

Messrs. Crammond Kennedy and J. M. Wilson argued the cause and, with *Messrs. John C. Fay and E. I. Renick*, filed a brief for appellant:

To become "a case" within the meaning of the Constitution, the subject must be submitted to the court by a party who asserts his rights.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; *Osborn v. Bank of United States*, 9 Wheat. 739, 6 L. ed. 204; *Paschal*, Anno. Const. 194 *et seq.*, and cases cited; *Story*, Const. § 1648.

There must be parties to come into court who can be reached by its process and bound by its power.

Curtis, Com. §§ 85 *et seq.*

Congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Gordon v. United States*, 117 U. S. 697, Appx.; *Interstate Commerce Commission v. Brimson*, 155 U. S. 3, 39 L. ed. 49, 15 Sup. Ct. Rep. 19.

The original claim of the company was of international and not of municipal jurisdiction, and belongs to the executive branch of the government, which is charged with our foreign relations.

Williams v. Suffolk Ins. Co. 13 Pet. 420, 10 L. ed. 228; *United States v. Dickelman*, 92 U. S. 520, 23 L. ed. 742; *DeBode v. Queen*, 3 H. L. Cas. 465.

The La Abra Company stands invested and shielded with the Secretary of State's report and the President's decision that it had a valid claim against Mexico, and that "the proper limits of the further consideration which the honor of the government should promptly give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim."

Marbury v. Madison, 1 Cranch, 165, 2 L. ed. 60; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Williams v. Suffolk Ins. Co.* 13 Pet. 420, 10 L. ed. 226.

Equity will not relieve against an award for mere excess of damages. The allowance must be so grossly unreasonable and so evidently unjust as to raise a presumption of corruption or partiality on the part of the arbitrator.

Kerr, Fraud and Mistake, Bump's ed. 291, note; *Van Cortlandt v. Underhill*, 2 Johns. Ch. 339; *Burchell v. Marsh*, 17 How. 351, 15 L. ed. 100.

Such also in principle is the law of nations.

2 Vattel, chap. 18, § 329; 3 Phillimore, Int. Law, pp. 3, 4; 2 Rivier, Principes du Droit des Gens, p. 186.

Neither the court of claims nor this court has jurisdiction, because it requires a collateral inquiry to be made into the merits of an international award rendered by a tribunal of exclusive and final jurisdiction.

Meade Case, 2 Ct. Cl. 224; *Comegys v. Vasse*, 1 Pet. 193, 7 L. ed. 108; *Meade v. United States*, 9 Wall. 725, 19 L. ed. 694.

There is nothing in the decision in *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607, to justify or support a grant of "full jurisdiction" by Congress, to the court of claims to "finally adjudge" the particular question submitted to it by the act, or to pass judgment upon the fairness and integrity of the award collaterally.

The act referred to in the rules of practice prescribed by this court relating to "cases decided in the court of claims in which, by the act of Congress, such appeals are allowable" is the act of March 3, 1863, and not an act of Congress in a special case.

McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321.

In a suit in equity this court must review the facts as well as the law.

Harvey v. United States, 105 U. S. 671, 26 L. ed. 1206; *United States v. Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650.

Congress clearly intended that the suit which it directed the Attorney General to bring should be a suit in equity.

1 Story, Eq. §§ 25 *et seq.*; 2 Story, Eq. §§ 960 *et seq.*; 4 Minor, Inst. 333.

If it has any resemblance, as claimed by the complainant, to an interpleader, this, too, forms one of the ordinary subjects of equity jurisdiction.

Mitford, Eq. Pl. 104, 125.

Mr. John C. Fay filed a further brief for appellant on the question of the validity of the approval of the act approved December 28, 1892.

Mr. William A. Maury argued the cause and filed a brief for the United States:

When the government assumed to prosecute the Abra claim before the commission, the claim passed under its absolute control as though it had been a public claim from the beginning.

Frelinghuysen v. Key, 110 U. S. 63, 28 L. ed. 71, 3 Sup. Ct. Rep. 462; *United States ex rel. Angarica v. Bayard*, 127 U. S. 251, 32 L. ed. 159, 8 Sup. Ct. Rep. 1156; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; *Great Western Ins. Co. v. United States*, 19 Ct. Cl. 217, 112 U. S. 193, 28 L. ed. 687, 5 Sup. Ct. Rep. 99; *Rustomjee v. Reg. L. R. 1 Q. B. Div. 487, L. R. 2 Q. B. Div. 69*; *Burnand v. Rodocanachi*, L. R. 5 C. P. Div. 424, L. R. 6 Q. B. 224

Div. 633, L. R. 7 App. Cas. 333; 2 Wharton, Int. Law Dig. 2d ed. § 220.

There was nothing in the provision of the treaty between the United States and Mexico making the decision on each claim submitted to the commission "absolutely final and conclusive," to prevent either government from refusing to pay over to one of its citizens the proceeds of an award shown to have been the result of false and fraudulent practices on the part of such citizen.

Frelinghuysen v. Key, 110 U. S. 63, 28 L. ed. 71, 3 Sup. Ct. Rep. 462.

The act of December 28, 1892, was approved in a constitutional way.

Opinion Declaring the Soldiers' Voting Bill, 45 N. H. 610; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432.

The inference drawn in the cases of *Harvey v. United States*, 105 U. S. 671, 26 L. ed. 1206, and *United States v. Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650, as to the scope of this court's appellate jurisdiction, is made impossible in the case at bar by the statutory command that the appeal allowed to either party shall be under the rules of practice which govern appeals from a court of claims.

Mr. Justice **Harlan** delivered the opinion of the court:

*The questions involved in this case arise[425] from a claim made by the La Abra Silver Mining Company, a New York corporation, for damages alleged to have been sustained in consequence of certain acts and omissions of duty upon the part of official representatives of the Republic of Mexico.

The claim was originally the subject of investigation by a commission organized pursuant to a convention between the United States of America and the Republic of Mexico concluded July 4, 1868, and proclaimed February 1, 1869. 15 Stat. at L. 679.

An award was made by the commission in relation to this claim, but it has been executed only in part—its full execution having been suspended by legislation in conformity with which the present suit was instituted to ascertain whether the award had been obtained by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the La Abra Company, its agents, attorneys, or assigns. 27 Stat. at L. 409, chap. 14.

It will conduce to a clear understanding of the questions to be determined if we state fully the circumstances that led to the organization of the commission, and show how it came about that a court established by this government took cognizance of a money demand made by an American corporation against a foreign government.

By the above convention of July 4, 1868, it was provided that all claims on the part of corporations, companies, or private individuals, citizens of the United States or of the Republic of Mexico, arising from injuries to their persons or property committed by the authorities of the respective governments, *and presented to either govern[426]ment for its interposition with the other

since the treaty of Guadalupe Hidalgo of February 2, 1848, and which remained unsettled or did not arise out of any transaction prior to that date, as well as any other claims presented within the time prescribed in the convention, should be referred to two commissioners—one to be appointed by the President of the United States by and with the advice and consent of the Senate and the other by the president of the Mexican Republic.

The commissioners were conjointly to investigate and decide the claims presented to their notice in such order and manner as they thought proper, but "upon such evidence or information only" as should "be furnished by or on behalf of their respective governments." Where they failed to agree in opinion upon any individual claim, they were to call to their assistance an umpire, who was to decide upon it finally and without appeal. It was competent for each government to name one person to attend the commissioners as its agent, to present and support claims on its behalf, and to represent it generally in all matters connected with the investigation.

When every case presented had been decided by the commissioners or the umpire, the total amount awarded in favor of the citizens of one government was to be deducted from that awarded to the citizens of the other government, and the balance to the amount of \$300,000 was to be paid to the government in favor of whose citizens the greater sum had been awarded, without interest or any other deduction than that specified in the convention. The residue was to be paid in annual instalments not to exceed \$300,000 in any one year, until the whole amount had been paid.

The contracting parties agreed to consider the result of the proceedings of the commission as a full, perfect, and final settlement of every claim upon either government, arising out of any transaction of a date prior to ratification of the convention, and to give full effect to the decision of the commission or the umpire without objection, evasion, or delay; and they further engaged that every such claim, whether or [427] not *presented to the notice of, made, preferred, or laid before the commission, should from and after the conclusion of its proceedings be considered and treated as finally settled, barred, and thereafter inadmissible.

The commission was organized in the city of Washington, and held its first meeting on the 31st day of July, 1869, Mr. William H. Wadsworth and Senor Don Miguel Maria de Zamacona being the commissioners respectively, and Mr. J. Hubley Ashton and Mr. Caleb Cushing, the agents respectively, on behalf of the United States and Mexico. Dr. Francis Lieber, the first umpire, having died, he was succeeded by Sir Edward Thornton, who at that time was the British minister accredited to the government of the United States at Washington.

On the 23d day of February, 1870, Secretary Fish issued a circular referring to the 175 U. S. U. S., Book 44.

convention of 1868 and stating that the Department of State deemed it advisable to refer to the joint commission all claims of corporations and citizens of this country without special examination of their merits. He took care to say that the government thereby expressed no opinion either as to the merits of the claims presented or as to the principles of law to be invoked in their support. The responsibility of deciding questions of fact and law, he observed, rested with the commissioners.

On the 17th day of March, 1870, the La Abra Company gave written notice to the Secretary of State that it claimed from Mexico \$1,930,000 "for damages and losses suffered by it in consequence of the violence and outrages committed by the authorities of Mexico against the rights of said company in 1867 and 1868." It asked for the interposition of the government of the United States with Mexico for the payment of that demand, and requested that its claim and proofs thereafter to be produced be referred to the commission for settlement. This notice was transmitted by the Secretary to the commission.

Subsequently, June 14, 1870, the company filed with the commission a memorial of its claim, stating the amount thereof to be \$3,000,030. Before the case was finally heard the claim was increased to \$3,962,000.

*The period within which the commission [428] was to conclude its labors was from time to time extended by the two governments. Of the claims presented by the United States there was allowed the sum of \$4,125,622.30, while of the claims presented by Mexico the sum of \$150,498.41 was allowed.

In respect of the claim of the La Abra Company the commissioners differed in opinion, and the case went to the umpire for consideration.

The award of the umpire, which was made December 27, 1875, embraced the following items as representing the damages sustained by the La Abra Company and to be paid by the Republic of Mexico: (1) On account of subscriptions and sales of stock, \$235,000; (2) money lent and advanced, \$64,291.06; (3) rent, expenses, salaries, law expenses, \$42,500; (4) amount derived from reduced ores, \$17,000; (5) ore extracted from the mines and deposited at the mills, \$100,000; in all, \$458,791.06. On \$358,791.06, the aggregate of the first four items, the umpire allowed interest from March 20, 1868, at 6 per cent, and upon \$100,000, the fifth item, interest was allowed from March 20, 1869. The total amount of principal and interest allowed was \$683,041.32.

An application was made to the umpire by the government of Mexico for a rehearing of the case, but a rehearing was denied.

Subsequently, the Mexican government, without at all disputing its obligation under the convention of 1868 to comply with the award, placed in the possession of the Secretary of State of the United States certain books, papers, and documents which it alleged had been then recently discovered

and would show that the claim of the La Abra Company was not only fictitious and fraudulent, but had been supported by false and perjured testimony. At that time a large part of the sum awarded to the company had been paid by Mexico and was in the hands of the Secretary of State. The distribution of the amount received had been delayed by the Secretary acting under the orders of the President to await legislation deemed necessary in order to make good to the fund the amount with which it was [429] chargeable, and *also because, as stated by the Secretary, it was desirable that the form and manner of the reservation from the instalment in hand of the expenses of the government should first be settled.

These difficulties were met by the passage of the act of June 18, 1878. 20 Stat. at L. 144, chap. 262.

By the first section of that act the Secretary of State was authorized and required to receive all moneys paid by the Mexican Republic under and in pursuance of the conventions of July 4, 1868, and April 29, 1876, and whenever and as often as any instalments should be paid by the Mexican Republic to distribute the moneys received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards were made, or to their legal representatives or assigns, except as in that act otherwise limited or provided, according to the proportion which the respective awards should bear "to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto."

By the second section it was provided that "out of any moneys in the Treasury not otherwise appropriated a sufficient sum is hereby appropriated to enable the Secretary of the Treasury to pay to the Secretary of State of the United States, in gold or its equivalent, the equivalent of fifty thousand five hundred and twenty-eight dollars and fifty-seven cents in Mexican gold dollars, and ten thousand five hundred and fifty-nine dollars and sixty-seven cents in American gold coin, and eighty-nine thousand four hundred and ten dollars and seventeen cents in United States currency, said sums being the aggregate in said currencies respectively of the awards made under the said convention of July 4, 1868, in favor of citizens of the Mexican Republic against the United States, and having been deducted from the amount awarded in favor of the citizens of the United States, and payable by Mexico, in accordance with article four of the said treaty; and that said sums, when paid to the Secretary of State as aforesaid, shall be regarded as part of the awards made under the said treaty, to be paid or distributed as herein provided."

[430] *The third section made provision for meeting out of the moneys received by the Secretary the expenses of the commission, including contingent expenses paid by the United

States as ascertained and determined in pursuance of the provisions of the treaty.

The fourth section provided that in the payment of money in virtue of the act to any corporation, company, or private individual, the Secretary of State should first deduct and retain or make reservation of such sums, if any, as might be due to the United States from any corporation, company, or private individual in whose favor awards were made under the convention.

The fifth section of the act was in these words: "And whereas the government of Mexico has called the attention of the government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted, that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them." 20 Stat. at L. 144, chap. 262.

Pursuant to the direction of President Hayes the investigation *required by the [431] fifth section of the act of June 18, 1878, was made by the Secretary of State.

Having reviewed all the proceedings of the commission, including the testimony originally submitted to it, the supplemental evidence furnished in support of the allegations of fraud as to the Weil and La Abra claims, and the action theretofore taken by the Department of State, Secretary Evarts referred to the contention that in deciding against opening those awards diplomatically and re-examining them by a new international commission, the whole discretion vested in the Executive as a part of the treaty-making power and under the special provisions of the act of Congress was exhausted, and that the payments in the cases referred to should be no longer suspended. He said that a solicitous attention to the rights of the claimants and the duty of the Executive in the premises had confirmed him in the opinion that Congress should determine whether "the honor of the United States" required any further investigation in these cases or

either of them, and provide the efficient means of such investigation, if thought necessary.

After stating the considerations which led him to that conclusion, the Secretary proceeded: "While these considerations led to the conclusion that these cases ought not to be made the subject of a new international commission, I was yet of opinion that 'the honor of the United States' was concerned to inquire whether in these cases, submitted by this government to the commission, its confidence had been seriously abused, and the government of Mexico, acting in good faith in accepting a friendly arbitration, had been subjected to heavy pecuniary imposition by fraud and perjury in the maintenance of these claims, or either of them, before the commission. In furtherance, however, of this opinion, it seemed to me apparent that the Executive discretion under the act of Congress could extend no further than to withhold further payments on the awards until Congress should, by its plenary authority, decide whether such an investigation should be made, and should provide an adequate procedure for its conduct, and prescribe the consequences which should follow from its results. Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same *pro rata* with all other awards under the convention." Senate Ex. Doc. No. 150, 49th Cong. 2d Sess.

The suggestions of the Secretary having been approved by the President, the first, second, and third instalments of the award received from Mexico on account of the claim of the La Abra Company, amounting to \$138,565.52, were paid to the representatives of that company. Payments were subsequently made out of moneys received from Mexico, amounting to \$103,117.54, leaving in the possession of the United States on account of the award \$403,030.08.

After Mr. Arthur became President further distribution of the money received was suspended because of the negotiation of a treaty between the United States and Mexico for a re-examination of the Weil and La Abra cases. This treaty was signed on the 13th day of July, 1882, and was submitted to the Senate for its approval, but after some delay it was rejected by that body.

While that treaty was before the Senate, Key, as assignee of part of the Weil claim, and the La Abra Company, filed separate petitions in the supreme court of the District of Columbia for a mandamus upon the Secretary of State, compelling him to pay to the petitioners their distributive shares of the sums paid by Mexico in accordance with the terms of the convention of July 4, 1868. In *Key's Case* the writ asked for was awarded, while in the *La Abra Case* the petition was

dismissed. The cases having been brought to this court, the judgment in the *Key Case* was reversed with direction to dismiss the petition and the judgment in the *La Abra Case* was affirmed. *Frelinghuysen v. Key*, 110 U. S. 63, 28 L. ed. 71, 3 Sup. Ct. Rep. 462.

Chief Justice Waite, delivering the judgment of this court, *said: "No nation treats [433] with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claimed to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexico against the United States as well. By the terms of the compact the individual claimants could not themselves submit their claims and proofs to the commission to be passed upon. Only such claims as were presented to the governments respectively could be 'referred' to the commission, and the commissioners were not allowed to investigate or decide on any evidence or information except such as was furnished by or on behalf of the governments. After all the decisions were made and the business of the commission concluded, the total amount awarded to the citizens of one country was to be deducted from the amount awarded to the citizens of the other, and the balance only paid in money by the government in favor of whose citizens the smaller amount was awarded, and this payment was to be made, not to the citizens, but to their government. Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens. As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do. Her payments have all been made promptly as they fell due, as far as these records show.

*"As to the right of the United States to [434] treat with Mexico for a retrial, we entertain no doubt. Each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection as far as possible against frauds and impositions by the individual claimants. It was for this reason that all claims were excluded from the consideration of the commission except

such as should be referred by the several governments, and no evidence in support of or against a claim was to be submitted except through or by the governments. The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own government, and if that government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be, not only its right, but its duty, to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. None of the cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the governments and into the hands of private parties. The language of the opinions must be construed in connection with this fact." *Frelinghuysen v. Key*, 110 U. S. 63, 71-73, 28 L. ed. 71-74, 3 Sup. Ct. Rep. 462.

[435] Referring to the act of 1878, and observing that it did not *undertake to set any new limits on the powers of the Executive, the court further said: "From the beginning to the end it is, in form even, only a request from Congress to the Executive. This is far from making the President for the time being a quasi-judicial tribunal to hear Mexico and the implicated claimants and determine once for all, as between them, whether the charges which Mexico makes have been judicially established. In our opinion it would have been just as competent for President Hayes to have instituted the same inquiry without this request as with it, and his action with the statute in force is no more binding on his successor than it would have been without. But his action as reported by him to Congress is not at all inconsistent with what has since been done by President Arthur. He was of opinion that the disputed 'cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud,' and, by implication at least, he asked Congress to provide him the means 'of instituting and furnishing methods of investigation which can coerce the production of evidence or compel

the examination of parties or witnesses.' He did report officially that he had 'grave doubt as to the substantial integrity of the Weil claim' and the 'sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra Company.' The report of Mr. Evarts cannot be read without leaving the conviction that if the means had been afforded, the inquiries which Congress asked for would have been further prosecuted. The concluding paragraph of the report is nothing more than a notification by the President that unless the means are provided, he will consider that the wishes of Congress have been met, and that he will act on such evidence as he has been able to obtain without the help he wants. From the statements in the answer of Secretary Frelinghuysen in the *Key Case*, it appears that further evidence has been found, and that President Arthur, upon this and what was before President Hayes, has become satisfied that the contested decisions should be opened and the claims retried. Consequently, the President, *believing that [436] the honor of the United States demands it, has negotiated a new treaty providing for such a re-examination of the claims, and submitted it to the Senate for ratification. Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject are finally concluded. That discretion of the Executive Department of the government cannot be controlled by the Judiciary. The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the commission. As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purpose of fair dealing with the government against which, through the United States, a claim has been made." *Frelinghuysen v. Key*, 110 U. S. 63, 74, 76, 28 L. ed. 71, 75, 3 Sup. Ct. Rep. 462.

After the rejection of the treaty negotiated in 1882, President Cleveland in 1886 sent a message to the Senate calling attention to the act of 1878, and asking consideration of the status of the Weil and La Abra claims. By that message Congress was in substance notified that if it did not take some action in the matter the President would proceed to distribute the funds received from Mexico under the award and remaining in the hands of the United States. The matter having been referred to the Senate committee on foreign relations, it recommended the passage of a bill providing for a reinvestigation of those claims. The committee's report on the subject thus concluded: "This brief *résumé* of the correspondence between the two governments shows that Mexico, while observing, in good faith, all her obligations under the

convention, has earnestly and constantly urged upon the United States that these claims were fraudulent. This appeal to the spirit of justice cannot be ignored, but should be met by a frank and open examination by our own courts of the facts presented by Mexico. These claimants have no vested [437] rights *growing out of these claims which entitle them to come between Mexico and the United States, and to demand the payment of any part of these awards that are the outgrowth of fraud and perjury." Senate Doc. Report No. 2705, p. v., 50th Cong. 2d Sess.

No action having been taken by Congress, the subject was again mentioned in a message sent by the President to the Senate on the 5th of March, 1888, in response to resolutions of that body. The message was accompanied by a report from Mr. Bayard, Secretary of State, in which reference was made to the action of his predecessor. He said: "It is fair to assume that the rejection by the Senate of the treaty signed by Mr. Frelinghuysen, for an international rehearing of the awards, was in no sense an expression of opinion adverse to their investigation, which Mr. Evarts had recommended. It is rather to be regarded as an approval of the opinion which he also expressed, that the investigation should, under the circumstances, be made by this government for itself, as a matter affecting solely its own honor. It is a remarkable fact that whenever, since the distribution of the Mexican fund was commenced, the deliberate judgment of the official authorized by Congress to make such distribution has been recorded upon the two awards in question, it has uniformly been to the effect that the evidences that the United States, in presenting the claims, had been made the victim of fraudulent imposition were of such a character as to require investigation by a competent tribunal, possessing appropriate powers for that purpose.

The sole question now presented for the decision of this government is whether the United States will enforce an award upon which the gravest doubts have been cast by its own officers in opinions rendered under express legislative direction, until some competent investigation shall have shown such doubts to be unfounded, or until that branch of the government competent to provide for such investigation shall have decided that there is no ground therefor." Senate Doc. Report No. 2705, p. v., 50th Cong. 2d Sess. The Secretary recommended that Congress take action providing expressly for the reference of the Weil and La Abra claims to the [438] court of *claims or such other court as was deemed proper, in order that a competent investigation of the charges of fraud might be made.

Pending the consideration of this matter in the Senate the committee on foreign relations examined the evidence alleged to have been discovered by Mexico after the award in question,—especially certain letters and copies of letters of the officers and agents of the La Abra Company contained in a letter-impression book that was not before the com-

mission. The committee in their report to the Senate on March 1, 1889, among other things said: "The main allegation in the petition of the La Abra Company presented to the mixed commission, to wit, that the company was dispossessed of its property by the forcible interference of the Mexican authorities, is disproved and shown to have been wholly false, and this mainly by the correspondence of the company's own officers and agents; and it appears by the testimony taken by the committee that the abandonment of the property and the failure of the company were wholly due to the poverty of the mines and the consequent financial embarrassment of the company." After reviewing, in the light of precedent and upon principle, the question of the power of Congress to order a re-examination of the La Abra claim, the committee concluded its report to the Senate: "It thus appears that the power of Congress to reopen the La Abra award, and to direct a suit to be brought to judicially determine whether or not it was procured by fraud, has been affirmed by successive Secretaries of State, assumed by Congress in the passage of the act of June 18, 1878, expressly declared by committees of both Houses of Congress, and substantially held to exist by the highest judicial tribunal of this government." Senate Doc. Report No. 2705, pp. ix., xviii., 50th Cong. 2d Sess.

Reference should here be made to *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 323-326, 35 L. ed. 183, 189, 190, 11 Sup. Ct. Rep. 607, as announcing principles that affect certain questions arising in the present litigation. That case was commenced on the 23d day of November, 1889, in the supreme court of the District of Columbia. Boynton, the relator, as assignee of Weil, sought to *compel the Secretary of State to [439] pay certain moneys received under the award made pursuant to the convention of 1868. The mandamus asked for was refused and the petition of Boynton was dismissed. That judgment was affirmed by this court. The present Chief Justice, delivering the unanimous judgment of the court, declared its adherence to the principles announced in *Frelinghuysen v. Key*, above cited, and among other things said: "As between nations, the proprietary right in respect to those things belonging to private individuals or bodies corporate within a nation's territorial limits is absolute, and the rights of Weil cannot be regarded as distinct from those of his government. The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it. Under this convention it was the balance that was to be paid, after deducting from what was found in favor of one government that which was found in favor of the other. So that the moneys paid in liquidation of that balance belonged to the United States, to be increased by appropriation to the extent of the amounts allowed Mexico, and the aggregate to be distributed to the claimants as might be provided." Again: "Congress, in furnishing the auxiliary legislation needed to carry the results of the con-

vention under consideration into effect, requested the President to so far investigate certain charges of fraud as to determine whether a retrial ought to be had. This inquiry might have resulted in reopening the awards as between the two nations, or in such re-examination in a domestic forum as would demonstrate whether the honor of the United States required a different disposition of the particular amounts in question. The validity and conclusiveness of the awards remained unimpugned so long as they were permitted to stand, and the principle of *res judicata* could not be invoked against the United States by individual claimants while the controversy raised as to them remained *in fieri*. In *Frelinghuysen v. Key*, while conceding the essential value of international arbitration to be dependent upon the certainty and finality of the decision, the court adjudged that this government need not therefore close its doors against an investigation into the question whether its *influence has been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award, and the receipt of money thereon, were necessarily subject to such modification as circumstances might require. So long as the political branch of the government had not lost its control over the subject-matter by final action, the claimant was not in a position, as between himself and his government, to insist on the conclusiveness of the award as to him. And while it is true that for the disposition of the case of *Frelinghuysen v. Key* it was sufficient that it appeared that diplomatic negotiations were pending, which, as the court demonstrated, the act of 1878 in no manner circumscribed, it does not follow that the political department of the government lost its control because those negotiations failed. On the contrary, that control was expressly reserved, for it was made the duty of the President, if of opinion that the cases named should be retried, to withhold payment until such retrial could be had in an international tribunal, if the two governments so agreed, or in a domestic tribunal if Congress so directed, and, at all events, until Congress should otherwise direct. The fact that a difference of view as to whether the retrial should be international or domestic may have arisen and led to delay, or that such difference may have existed on the merits, does not affect the conclusion. The inaction by Congress is not equivalent to a direction by Congress. The political department has not parted with its power over the matter, and the intervention of the judicial department cannot now be invoked."

This brings us in the orderly statement of the history of this dispute to the act of December 28, 1892, amending and enlarging the above act of June 18, 1878. 27 Stat. at L. 409, chap. 14.

That statute recited that the Secretary of State, after investigating the charge of

fraud presented by the Mexican government as to the case of the La Abra Silver Mining Company, had reported that the honor of the United States required that case to be further investigated by the United States to ascertain *whether this government had enforced against a friendly power claims of its citizens based upon or exaggerated by fraud, but that the executive branch of the government "was not furnished with the means of instituting and pursuing methods of investigation which could coerce the production of evidence or compel the examination of parties and witnesses;" that "the authority for such an investigation must proceed from Congress;" and that the President of the United States had transmitted to Congress the recommendation of the Secretary of State that the case be referred to the court of claims, or such other court as might be deemed proper, in order that the charge of fraud made in relation to this claim might be fully investigated. It was therefore enacted:

"That in further execution of the purpose of said act, the Attorney General of the United States be, and he is hereby, authorized and directed to bring a suit or suits in the name of the United States in the court of claims against La Abra Silver Mining Company, its successors and assigns, and all persons making any claim to the award or any part thereof in this act mentioned, to determine whether the award made by the United States and Mexican mixed commission in respect to the claim of the said La Abra Silver Mining Company was obtained, as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Silver Mining Company, or its agents, attorneys, or assigns; and, in case it be so determined, to bar and foreclose all claim in law or equity on the part of said La Abra Silver Mining Company, its legal representatives or assigns, to the money, or any such part thereof, received from the Republic of Mexico for or on account of such award; and any defendant to such suit who cannot be found in the District of Columbia shall be notified and required to appear in such suit by publication as the court may direct, in accordance with law, as applicable to cases in equity.

"Sec. 2. That full jurisdiction is hereby conferred on the court of claims to hear and determine such suit and to make all interlocutory and final decrees therein, as the evidence may *warrant, according to the principles of equity and justice, and to enforce the same by injunction or any proper final process, and in all respects to proceed in said cause according to law and the rules of said court, so far as the same are applicable. And the Secretary of State shall certify to the said court copies of all proofs admitted by the said mixed commission on the original trial of said claim, and the said court shall receive and consider the same in connection with such competent evidence as may be offered by either party to said suit.

"Sec. 3. That an appeal from any final decision in such cause to the Supreme Court of the United States may be taken by either party within ninety days from the rendition of such final decree, under the rules of practice which govern appeals from said court; and the Supreme Court of the United States is hereby authorized to take jurisdiction thereof and decide the same.

"Sec. 4. That in case it shall be finally adjudged in said cause that the award made by said mixed commission, so far as it relates to the claim of La Abra Silver Mining Company, was obtained through fraud effectuated by means of false swearing, or other false and fraudulent practices of said company or its assigns, or by their procurement, and that the said La Abra Silver Mining Company, its legal representatives or assigns, be barred and foreclosed of all claim to the money or any part thereof so paid by the Republic of Mexico for or on account of such award, the President of the United States is hereby authorized to return to said government any money paid by the government of Mexico, on account of said award, remaining in the custody of the United States, that has not been heretofore distributed to said La Abra Mining Company or its successors and assigns, which such court shall decide that such persons are not entitled, in justice and equity, to receive out of said fund.

[443] "Sec. 5. That, during the pendency of said suit and until the same is decided, it shall not be lawful for the Secretary of State to make any further payments out of said fund, on account of said award, to La Abra Silver Mining Company, *or its legal representatives, attorneys, or assigns; and in case it shall be finally adjudged in said cause in either the court of claims or in the Supreme Court of the United States that the award made by said mixed commission, so far as it relates to the claim of La Abra Silver Mining Company, or any definable and severable part thereof, was not obtained through fraud as aforesaid, then the Secretary of State shall proceed to distribute so much of the said award as shall be found not so obtained through fraud, or the proceeds thereof remaining for distribution, if any, to the persons entitled thereto." 27 Stat. at L. 409, chap. 14.

Pursuant to the provisions of that act the Attorney General brought the present suit in the court of claims. The defendants are the La Abra Company and numerous individuals who assert some interest in the award made in respect of its claim against Mexico. The relief asked by the United States is indicated by the following paragraph in the bill:

"Your orator further shows, that by reason of the premises a controversy has arisen between your orator and the defendants hereinbefore named, the said defendants claiming that it is the duty of your orator to pay over to them the sums by them, the said defendants, claimed respectively from the proceeds of said award now in the possession of your orator, and your orator

claiming that it is the right and duty of your orator to have the facts relating to said claim and award inquired of by your honorable court, and if it shall be adjudged by your honorable court that the said award was obtained through fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said defendant La Abra Silver Mining Company, or its agents, attorneys, or assigns, to return the proceeds of said award to the said Republic of Mexico; that the said defendants have made persistent demands upon the Department of State and upon the Congress of your orator for the payment to them of said moneys, and that some of the said defendants have brought suits in the courts of your orator to compel such payment, and that, unless restrained by the judgment and decree of this honorable court, the said defendants will continue to *harass and annoy your orator with such demands and suits. . . . And that the said defendants and each and every of them may, by the decree of this honorable court, be forever restrained and enjoined from setting up any claim to any part of said award or of the moneys now, as aforesaid, in possession of your orator. And that the said award on the claim of the said defendant La Abra Silver Mining Company may, by the decree of this honorable court, be declared to have been wholly obtained by means of false swearing and other false and fraudulent practices on the part of said defendant company, its agents, attorneys, and assigns. And that your orator may have such other and further relief as the nature of your orator's case may require and as may be agreeable to equity and good conscience."

The La Abra Company and other defendants demurred to the bill on the following grounds:

That by the Constitution and laws of the United States the subject-matter of this suit was within the final and exclusive control of the Executive Department of the government of the United States, and not within the jurisdiction of any judicial tribunal;

That the questions whether the award of the Commission was obtained by fraud and whether the money received under it and remaining undistributed by the Secretary of State should be returned by the President of the United States could not properly be determined by any municipal court of either of the sovereign parties to the treaty of 1868, but were questions of a diplomatic or political nature determinable only by the Executive Department of the government;

That the United States had not such an interest in the matters and things alleged in the bill as entitled it to maintain this suit or to have the relief asked;

That the government of Mexico was the party pecuniarily interested in this suit, and that, by failing to institute and prosecute suit against the alleged wrongdoers in the courts of the United States for the annulment of the award and the recovery of the moneys paid on account thereof, it had been guilty of laches and had forfeited all right to relief in equity; *consequently, the United [445]

States was not entitled to demand such relief for the benefit of or in the interest of Mexico;

That a mixed commission created and acting under and by virtue of such a treaty as that of July 4, 1868, between the United States and Mexico, was recognized by the law of nations and by the Constitution and laws of the United States and was in fact and law a court of exclusive and final jurisdiction, and its award could not be set aside, reopened, or vacated by a municipal court of the United States, either in virtue of an act of Congress or otherwise, and that Congress could not grant a new trial in respect of matters so finally determined and concluded by international arbitration under such a treaty; but, on the contrary, such an award could, on the part of the United States, be set aside, vacated, or reopened only through its treaty-making power; and that the question presented by the bill, whether the award should be reopened or not on the grounds alleged, having been submitted to the treaty-making power and by it decided in the negative, was *res judicata*;

That it appeared on the face of the bill that the question whether the award in favor of the La Abra Company was obtained in whole or part by fraud effectuated by means of false swearing or other corrupt and fraudulent practices was substantially the same question that was tried by the commissioners, such fraud and fraudulent practices having been charged by the Mexican agent and commissioner at the trial; and that that question, on the disagreement of the two commissioners in respect of the integrity of the witnesses and the credibility and weight of the evidence for and against the claim of the company, was referred to the umpire for decision, and, having been decided by him, was *res judicata* and could not be re-examined or redetermined by this court;

[446] That the act of Congress under which the suit was prosecuted was unconstitutional and inoperative on the further ground that it assumed to direct, control, and bind the courts in determining the questions submitted for final adjudication to receive evidence and apply legal principles that were erroneous and wholly inadmissible according to law as administered *in the courts of the United States in like cases, and to prescribe to the court what weight and effect should be given to the evidence and how the court should reach the conclusion that the award was obtained in whole or in part through fraud;

That inasmuch and because the questions presented by the bill were of a political and diplomatic nature and not justiciable or fit and proper to be considered and finally determined by a municipal court, Congress could not impose upon the court of claims, or upon the Supreme Court of the United States, or upon the judges thereof, the trial and determination of those questions;

That the act of Congress in question was inoperative and void on the further ground that it was never approved by the President of the United States as required by law, the

only alleged approval it ever received being on the 28th of December, A. D. 1892, when Congress was not in session, both Houses of Congress having adjourned on the 22d of December, A. D. 1892, to the 4th of January, A. D. 1893; and,

That the bill did not state facts sufficient to constitute a cause of action or to authorize the granting of any relief.

The demurrer to the bill, so far as it involved the jurisdiction of the court of claims and the charges of fraud, was overruled, the opinion of the court being delivered by Judge Weldon. 29 Ct. Cl. 432, 484. The question whether the act of December 28th, 1892, was so approved by the President as to become a law was determined in favor of the United States, upon the grounds stated in the opinion of the court previously delivered by Judge Nott, now chief justice of that court, in *United States v. Weil*, 29 Ct. Cl. 523.

The case having been prepared on the merits, the court of claims upon final hearing found that the award made by the commission on the claim of the La Abra Company "was obtained as to the whole sum included therein by fraud effectuated by means of false swearing and other false and fraudulent practices on the part of said company and its agents;" and it was adjudged that all claims in law and equity on the part of the company, its legal representatives *and as-[447] signs, be forever barred and foreclosed in respect of the money received from the Republic of Mexico for or on account of such award. 32 Ct. Cl. 462, 520, 521.

An elaborate opinion of the court of claims, delivered by Judge Weldon, states fully the grounds on which the decree was based. That opinion concludes: "The court, upon an examination of all the testimony, excluding such portions of it as in the opinion of the court are not competent, determines as a conclusion of fact that the La Abra Silver Mining Company did not abandon its mines in Mexico because of the interference of the people of Mexico and the public authorities of the Mexican government, or either, but on the contrary that it abandoned its mines because they were unproductive and for the want of money to operate and work the same, and that the award made by the United States and the Mexican mixed commission in respect to the claim of the said La Abra Silver Mining Company was obtained as to the whole sum included therein by fraud effectuated by means of false swearing and other fraudulent practices upon the part of said company and its agents, and a decree will be entered barring and foreclosing all claim in law and equity on the part of said company, or its agents, attorneys, and assigns, to the money received from the Republic of Mexico for or on account of such award. Having decided that the company was not compelled to abandon its mines because of the acts of the people of Mexico, unrestrained by the Mexican government, and that it was not compelled to abandon the mines because of the unlawful interference of the Mexican authorities with the property and business

of the company, it is not necessary to consider the question of the value of the property of the company at the time of the abandonment."

Chief Justice Nott dissented in part from the judgment. He was of opinion that the first three items in the award of the umpire, above set forth, should stand, but that the fourth item was fraudulently exaggerated and should be reduced to \$420.09, and the fifth, \$100,000, rejected altogether as having been utterly overthrown by the evidence. 32 Ct. Cl. 521, 533.

[448] *From the judgment of the court of claims the present appeal was prosecuted.

In the light of this history of the claim of [451]the La Abra *Company we proceed to the consideration of such of the principal questions presented in argument as are essential to the disposition of the case.

I. If, as insisted by the appellants, the above act of December 28, 1892, was not so approved by the President as to become under the Constitution a law, it would be unnecessary to consider any other question raised by the pleadings; for that act is the only basis of jurisdiction in the court of claims to render a judgment that would be conclusive between the parties and which could be reviewed by this court. We must therefore first consider whether that act is liable to the constitutional objection just stated.

The ground of this contention is that having met in regular session at the time appointed by law, the first Monday of December, 1892, and having on the 22d day of that month (two days after the presentation of the bill to the President) by the joint action of the two Houses taken a recess to a named day, January 4, 1893, Congress was not actually sitting when the President, on the 28th day of December, 1892, by signing it, formally approved the act in question. The proposition, plainly stated, is that a bill passed by Congress and duly presented to the President does not become a law if his approval be given on a day when Congress is in recess. This implies that the constitutional power of the President to approve a bill so as to make it a law is absolutely suspended while Congress is in recess for a fixed time. It would follow from this that if both Houses of Congress by their joint or separate action were in recess from some Friday until the succeeding Monday, the President could not exercise that power on the intervening Saturday. Indeed, according to the argument of counsel the President could not effectively approve a bill on any day when one of the Houses, by its own separate action, was legally in recess for that day in order that necessary repairs be made in the room in which its sessions were being held. Yet many public acts and joint resolutions of great importance, together with many private acts, have been treated as valid and enforceable, which were approved by the President during the recesses of Congress cover-

[452]ing the *Christmas holidays. In the margin 175 U. S.

will be found a reference to some of the more recent of those statutes.†

Do the words of the Constitution, reasonably interpreted, sustain the views advanced for appellant?

That instrument provides:

"The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day." Art. I. § 4.

"Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." Art. I. § 5.

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approves, he shall sign it, but if not, he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on the journal, and proceed to consider it. If after such reconsideration two thirds of that *House [453] shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten

†I. PUBLIC ACTS: 1862, 12 Stat. at L. 632, c. 4; Id. c. 5; Id. c. 6; 1866, 14 Stat. at L. 374, c. 5; 1868, 15 Stat. at L. 266, c. 4; 1869, 16 Stat. at L. 61, c. 4; Id. c. 5; 1872, 17 Stat. at L. 400, c. 12; Id. c. 13; Id. c. 14; Id. c. 15; Id. c. 17; 1873, 18 Stat. at L. 1, c. 3; 1874, 18 Stat. at L. 293, c. 7; Id. c. 8; Id. c. 9; Id. c. 10; 1875, 18 Stat. at L. 294, c. 12; 1875, 19 Stat. at L. 1, c. 1; 1879, 21 Stat. at L. 59, c. 1; Id. c. 2; 1880, 21 Stat. at L. 311, c. 4; Id. c. 5; Id. c. 6; Id. c. 7; Id. c. 8; Id. c. 9; Id. c. 10; 1884, 23 Stat. at L. 280, chap. 7; 1886, 24 Stat. at L. 353, c. 9; 1887, 24 Stat. at L. 354, c. 11; Id. c. 12; Id. c. 13; Id. c. 14; Id. c. 15; Id. c. 16; 1888, 25 Stat. at L. 638, c. 7; Id. c. 8; 1889, 25 Stat. at L. 639, c. 18; 1892, 27 Stat. at L. 409, c. 14; Id. c. 15; Id. c. 16; 1894, 28 Stat. at L. 595, c. 8; Id. c. 9; Id. c. 10; Id. c. 11; Id. c. 12; Id. c. 14; Id. c. 15; 1897, 30 Stat. at L. 226, c. 3.

II. JOINT RESOLUTIONS: 1869, 16 Stat. at L. 368, No. 5; Id. No. 6; 1872, 17 Stat. at L. 637, No. 1; 1878, 20 Stat. at L. 487, No. 1; Id. No. 2; Id. No. 3; 1883, 23 Stat. at L. 265, No. 3; 1885, 24 Stat. at L. 339, No. 2; Id. No. 3; 1893, 28 Stat. at L. 577, No. 7; 1894, 28 Stat. at L. 967, No. 2.

III. PRIVATE ACTS: 1873, 18 Stat. at L. 529, c. 2; 1874, 18 Stat. at L. 529, c. 4; 1879, 21 Stat. at L. 531, c. 3; 1880, 21 Stat. at L. 601, c. 11; Id. c. 12; Id. c. 13; Id. c. 14; 1884, 23 Stat. at L. 615, c. 6; 1885, 24 Stat. at L. 653, c. 1; Id. c. 2; 1886, 24 Stat. at L. 881, c. 10; 1887, 24 Stat. at L. 882, c. 17; Id. c. 18; Id. c. 19; Id. c. 20; 1888, 25 Stat. at L. 1251, c. 9; Id. c. 10; Id. c. 11; Id. c. 12; Id. c. 13; Id. c. 14; Id. c. 15; Id. c. 16; Id. c. 17; 1894, 28 Stat. at L. 1022, c. 13; Id. c. 16; Id. c. 17.

days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law." Art. I. § 7.

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill." Art. I. § 8.

It is said that the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature; and this view, it is argued, conclusively shows that his approval can legally occur only on a day when both Houses are actually sitting in the performance of legislative functions. Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws which the Constitution requires him to execute. But that consideration does not determine the question before us. As the Constitution, while authorizing the President to perform certain functions of a limited number that are legislative in their general nature, does not restrict the exercise of those functions to the particular days on which the two Houses of Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the Executive. It is made his duty by the Constitution to examine and act upon every bill passed by Congress. The time within which he must ap-

454] prove or disapprove a bill is prescribed. If he approve a bill, it is made his duty to sign it. The Constitution is silent as to the time of his signing, except that his approval of a bill duly presented to him—if the bill is to become a law merely by virtue of such approval—must be manifested by his signature within ten days, Sundays excepted, after the bill has been presented to him. It necessarily results that a bill when so signed becomes from that moment a law. But in order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved and be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the approval of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time. After a bill has been presented to the President; no further action is required by Congress in respect of that bill, unless it be disapproved by him and within the time prescribed by the Constitution be returned for reconsideration. It has properly been the practice of the President to inform Congress by message of his ap-

proval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed or not by message from the President of the fact of his approval of it, the bill becomes a law, and is delivered to the Secretary of State as required by law.

Much of the argument of counsel seems to rest upon the provision in relation to the final adjournment of Congress for the session whereby the President is prevented from returning, within the period prescribed by the Constitution, a bill that he disapproves and is unwilling to sign. But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the *presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls, and does not become a law. [455]

Whether the President can sign a bill after the final adjournment of Congress for the session is a question not arising in this case, and has not been considered or decided by us. We adjudge—and touching this branch of the case adjudge nothing more—that the act of 1892, having been presented to the President while Congress was sitting, and having been signed by him when Congress was in recess for a specified time, but within ten days, Sundays excepted, after it was so presented to him, was effectively approved, and immediately became a law, unless its provisions are repugnant to the Constitution.

II. It is said that the present proceeding based on the act of 1892 is not a "case" within the meaning of that clause of the Constitution declaring that the judicial power of the United States shall extend to all cases in law and equity arising under that instrument, the laws of the United States, or treaties made or which shall be made under their authority. Art. III. § 2. This article, as has been adjudged, does not extend the judicial power to every violation of the Constitution that may possibly take place, but only "to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend." *Cohen v. Virginia*, 6 Wheat. 264, 405, 5 L. ed. 257, 291. In the same case, Chief Justice Marshall de-

clared a suit to be the prosecution by a party of some claim, demand, or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he was deprived.

[456] *Referring to the provision defining the judicial power of the United States, the court in a subsequent case said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 6 L. ed. 204, 223. In *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 284, 15 L. ed. 372, 377, this court said that Congress can neither "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." But in the same case it was observed by Mr. Justice Curtis, speaking for the court, that "there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Of like import was the judgment in *Smith v. Adams*, 130 U. S. 167, 173, 32 L. ed. 895, 897, 9 Sup. Ct. Rep. 566, in which the court said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

The principles announced in the above cases are illustrated by the opinion prepared by Chief Justice Taney for the case of *Gordon v. United States*, 2 Wall. 561, 17 L. ed. 921, and printed in 117 U. S. 697, appx. That case was brought to this court from the court of claims, and related to a demand asserted against the United States. The principal question was whether this court had jurisdiction to review the final order made in the court *below. The chief justice died before the case was decided, and the opinion prepared by him in recess was not formally accepted. But if the court approved his views, as it undoubtedly did, the appeal was dismissed upon the ground that Congress could not authorize or require this court to express an opinion on a case in which its judicial power could not be exercised, and when its judgment would not be

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final and conclusive upon the rights of the parties. "The award of execution," Chief Justice Taney said, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." In a more recent case this court dismissed an appeal from a final order made in the court of claims in virtue of a particular statute, observing: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the court of claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action, either by the department or by Congress." *Re Sanborn*, 148 U. S. 222, 226, 37 L. ed. 429, 431, 13 Sup. Ct. Rep. 577; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 483, 38 L. ed. 1047, 1059, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Under the principles established in the cases above cited, the objections urged against the jurisdiction of the court of claims and of this court cannot be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by *the court of claims and by this [458] court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties.

The money in the hands of the Secretary of State was paid to the United States by Mexico pursuant to the award of the commission. That tribunal dealt only with the two governments, had no relations with claimants, and could take cognizance only of claims presented by or through the respective governments. No claimant, individual or corporate, was entitled to present any demand or proofs directly to the commission. No evidence could be considered except such as was furnished by or on behalf of the respective governments. While the claims of individual citizens presented by their respective governments were to be considered by the commission in determining amounts, "the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." And "each government, when it entered into the compact under which the awards were made,

relied on the honor and good faith of the other for protection as far as possible against frauds and impositions by the individual claimants." *Frelinghuysen v. Key*, above cited. As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the government legally withheld it from distribution.

When the La Abra Company asked the intervention of the United States it did so on the condition imposed by the principles of comity recognized by all civilized nations, that it would act in entire good faith, and not put the government whose aid it sought in the attitude of asserting against the Mexican Republic a fraudulent or fictitious claim; consequently the United States, under its duty to that Republic, was required to withhold any sum awarded and paid on account of the company's claim, if it appeared that such claim was of that character. As between the United States and the *company, [459] the honesty or genuineness of the latter's claim was open to inquiry in some appropriate mode for the purpose of fair dealing with the government against which such claim was made through the United States. We so adjudged in the *Key Case*. The United States assumed the responsibility of presenting the La Abra claim and made it its own in seeking redress from the Mexican Republic. But from such action on its part no contract obligations arose with the La Abra Company "to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the commission." *United States ex rel. Boynton v. Blaine*, above cited.

These considerations make it clear that the act of 1892 is not liable to the objection that it subjected to judicial determination a matter committed by the Constitution to the exclusive control of the President. The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment. The question for the determination of which the present suit was directed to be instituted was whether the award made by the commission in respect to the claim of the La Abra Company was obtained as to the whole sum included therein or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the company, or its agents, attorneys, or assigns. It cannot, we think, be seriously disputed that the question whether fraud has or has not been committed in presenting or prosecuting a demand or claim before a tribunal having authority to allow or disallow it is peculiarly judicial in its nature, and that in ascertaining the facts material in such an inquiry no means are so effectual as those employed by or in a court of justice. The executive branch of the government recognized the inadequacy for such an investigation of any

means it possessed, and declared that Congress by its "plenary authority" ought not only to decide whether such an investigation should be made, but provide an adequate procedure for its conduct, and prescribe the consequences to follow therefrom. The suggestion that the question of fraud be committed to the determination of a judicial *tribunal [460] first came from the executive branch of the government. Undoubtedly Congress, having in view the honor of the government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute approved by the President, or which being disapproved by him was passed by the requisite constitutional vote, have directed the return to Mexico, the other party to the award, of such moneys as had been paid into the hands of the Secretary of State. It is also clear that in the absence of any statute suspending the distribution of such moneys, the President could have ignored the charges of fraud and ordered the distribution to proceed according to the terms of the treaty and the award. But it does not follow that Congress was without power, no distribution having been made, to control the whole matter by plenary legislation.

It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate. *Head Money Cases*, 112 U. S. 580, 599, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 804, 5 Sup. Ct. Rep. 247; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456; *Chinese Exclusion Case*, 130 U. S. 581, 600, *sub nom. Chze Chan Ping v. United States*, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623; *Fong Yue Ting v. United States*, 149 U. S. 698, 721, 37 L. ed. 905, 915, 13 Sup. Ct. Rep. 1016. It is therefore difficult to perceive any ground upon which to question its power to make the distribution of moneys in the hands of the Secretary of State—representing in that matter the United States and not simply the President—depend upon the result of a suit by which the United States would be bound and in which the claimants to the fund in question could be heard as parties, and which was to be brought in a court of the United States by its authority, for the purpose of determining whether the La Abra Company, its agents or assigns, had been guilty of fraud in the matter of the claim that it procured to be presented to the commission. The act of 1892 is to be taken as a recognition, so far as the United States is concerned, of the legal right of the company to receive the moneys in question unless it appeared upon judicial investigation that the *United States was entitled, by rea- [461] son of fraud practised in the interest of that corporation, to withhold such moneys from it. Here, then, is a matter subjected to judicial investigation in respect of which the parties assert *rights*—the United States in-

sisting upon its right under the principles of international comity to withhold moneys received by it under a treaty on account of a certain claim presented through it before the commission organized under that treaty in the belief, superinduced by the claimant, that it was an honest demand; the claimant insisting upon its absolute legal right under the treaty and the award of the commission, independently of any question of fraud, to receive the money, and disputing the right of the United States upon any ground to withhold the sum awarded. We entertain no doubt these rights are susceptible of judicial determination within the meaning of the adjudged cases relating to the judicial power of the courts of the United States as distinguished from the powers committed to the executive branch of the government.

It remains, in our consideration of the question of jurisdiction, to inquire whether the judgment authorized by the act of 1892 to be rendered would be a final, conclusive determination, as between the United States and the defendants, of the rights claimed by them respectively, or only ancillary or advisory. In our opinion the act of Congress authorized a final judgment of the former character, and therefore the judgment of the court of claims is reviewable by this court in the exercise of its appellate judicial power. If our judgment should be one of affirmance then the La Abra Company, its legal representatives or assigns, are barred of all claim, legal or equitable, to the money received by the United States from the Republic of Mexico on account of the award of the commission. Such a determination would rest upon the broad ground that the United States in its efforts to protect the alleged rights of an American corporation had been the victim of fraud upon the part of that corporation, its agents or assigns, and was in law relieved from any responsibility to that corporation touching the claim in question *or the moneys received on account of it. If, on the other hand, this court should find that the charges of fraud were not sustained or were disproved, and reverse the decree of the court of claims, then it would become the absolute legal duty of the Secretary of State to proceed in the distribution of the moneys in his hands according to the terms of the award. It was competent for Congress by statute to impose that duty upon him, and he could not refuse to obey the mandate of the law.

Much was said in argument about the interference by the act of 1892 with the discharge by the President of his constitutional functions in connection with matters involved in the relations between this country and the Republic of Mexico. For reasons already given this contention cannot be sustained. It is without support in anything done or said by the eminent jurists who have presided over the Department of State since the controversy arose as to the integrity of claim made by the La Abra Company. On the contrary, those officers have uniformly insisted that the authority of Congress was plenary to determine whether the award in

respect of those claims was procured by fraud practised on the part of that company, and whether in that event the company should be barred of any claim to the moneys received from the Republic of Mexico. Upon this question the legislative and executive branches of the government have acted in perfect harmony. The question arises under the Constitution of the United States, and a treaty made by the United States with a foreign country is judicial in its nature, and one to which the judicial power of the United States is expressly extended. Both branches of the government were concerned in the enactment subjecting that question to judicial determination, and it cannot properly be said that the President, by approving the act of 1892 or by recognizing its binding force, surrendered any function belonging to him under the supreme law of the land.

It was also said in argument that the act of Congress in some way—not clearly defined by counsel—was inconsistent with the principles underlying international arbitration, a *mode for the settlement of disputes[463] between sovereign states that is now more than ever before approved by civilized nations. We might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration. So far from the act of Congress having any result of that character, the effect of such legislation is to strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned, and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself. The act of 1892 is a recognition of the principle that "international arbitration must always proceed on the highest principles of national honor and integrity." *Frelinghuysen v. Key*, above cited. By that act the United States declares that its citizens shall not through its agency reap the fruits of a fraudulent demand which they have induced it to assert against another country. Such legislation is an assurance in the most solemn and binding form that the government of this country will exert all the power it possesses to enforce good faith upon the part of citizens who, alleging that they have been wronged by the authorities of another country, seek the intervention of their government to obtain redress.

We hold that the act of 1892 is not unconstitutional upon any of the grounds adverted to; that the court of claims had jurisdiction to render the decree in question; that such decree, unless reversed, is binding upon the parties to this cause; and that this court, in the exercise of its appellate power, has authority to re-examine that decree and make such order or give such direction as may be consistent with law.

III. The court of claims did not make a finding of facts. It is therefore contended on behalf of the United States that the appeal provided for by the act of 1892 does not

[464] authorize a re-examination of the evidence, as in equity cases generally; and that the present case comes within the rule prescribed by this court under the authority of the act of March 3, 1863 (12 Stat. at L. 766, chap. 92; Rev. Stat. § 708), providing that in connection *with any final judgment rendered in the court of claims there shall be a finding of facts.

In its opinion on the demurrer to the bill the court of claims said: "The directions of the statute [the act of 1892] as to the character of the decree seem to be without doubt, and as the court in the trial of the cause is in the exercise of equity powers, it would find no difficulty in entering such a decree as will carry out the purpose of the statute." 29 Ct. Cl. 432, 452. In its opinion on the final hearing of the case the court below said: "This being a proceeding in equity, this court is not called upon to settle the facts by the finding of ultimate facts for the consideration of the Supreme Court, but the whole record is transmitted to that court, and the case is to be determined in the Supreme Court upon the law as it shall be adjudged and upon the facts as they shall be found by the decision of the Supreme Court. That would be so in a case of this kind arising under the ordinary jurisdiction of the court of claims, but it is especially true from the provisions of the statute giving us the special jurisdiction to determine the issues of this proceeding. The statute provides for a decree, and not for a money judgment." After citing *Harvey v. United States*, 105 U. S. 671, 26 L. ed. 1206, the court continued: "All the testimony being before the Supreme Court for the purpose of settling ultimate facts from such testimony, we have confined the limits of this opinion to questions of law and the determination of the ultimate fact, which is whether the company was compelled to abandon its mines because of the acts of the people of Mexico and the Mexican authorities." 32 Ct. Cl. 462, 515, 516.

In our judgment the court of claims properly interpreted the act of 1892. While that act does not, in express words, direct the Attorney General to institute a suit "in equity" or declare that this court on appeal should re-examine the entire case on both law and facts, a suit of that character was contemplated when Congress invested the court of claims with full jurisdiction to make "all interlocutory and final decrees therein as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction *or any proper final process," and gave either party the right to appeal to this court from the final decision within ninety days "from the rendition of such final decree." This construction is not inconsistent with the direction that the court of claims should in all respects proceed in the suit brought by the Attorney General "according to law and the rules of said court, so far as the same are applicable," and that the appeal from its final decree should be taken "under the rules of practice which govern appeals from said

court." Looking at the words of the act of 1892 and the peculiar nature of the important questions involved in any suit brought under it, we cannot suppose that Congress intended to relieve this court from the responsibility of determining for itself and upon its own view of all the evidence what were the ultimate facts bearing upon the inquiry as to the alleged fraud in bringing about the award in question. The present proceeding, we think, comes within the principle announced in *Harvey v. United States*, 105 U. S. 671, 691, 26 L. ed. 1206, 1213, where it was said that the rule in regard to findings of fact in the court of claims had no reference to a case "of equity jurisdiction conferred in a special case by a special act" in which "this court must review the facts and the law as in other cases in equity, appealed from other courts." This principle was approved and applied in *United States v. Old Settlers*, 148 U. S. 427, 428, 465, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650.

We are of opinion that the appeal provided for in the act of 1892 was one under which it is our duty to determine the rights of the parties as in a case in equity. The provision in the act expressly empowering the court below in the event it was found that the award in question was fraudulently obtained as to the whole or any part of the sum included therein by the La Abra Company, to bar and foreclose all claims in law or equity on its part, together with the provision authorizing the court to render such interlocutory and final decrees as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction, imports such jurisdiction in the court of claims as may be ordinarily exercised by courts of equity as distinguished from courts of law, *and as entitled that court to send up the entire evidence for examination here. [466]

IV. We come now to consider in the light of all the evidence whether the award in question was obtained by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the La Abra Company, its agents, attorneys, or assigns.

In view of the exceptional character of the case, and that there may be no ground to misapprehend the basis upon which our decree will rest, we deem it appropriate to set forth in this opinion the principal facts bearing on the issue of fraud.

In its memorial presented to the commission through the United States, the La Abra Company referred to the mines in Mexico of which it asserted ownership as being of extraordinary richness and historical interest.

It was stated in the memorial that after becoming the proprietor of those mines the company with all possible despatch proceeded to the working of them, and to that end sent intelligent agents to Mexico, employed miners, machinists, and laborers, purchased mules, equipments, provisions, the best and most improved machinery, which were transported on the backs of mules to the mines at heavy cost, and incurred other expenses

necessary to the most extensive and successful working of the property; that they expended in the purchase of the mines and in their working the sum of \$303,000, and as the result of this large expenditure were getting out a large amount of the richest ore and were in the act of realizing the extraordinary profit of \$1,000,000 per annum when, by reason of unfriendly and illegal acts of the Mexican officials, they were compelled to abandon their mines, all their machinery and other property, and over a thousand tons of ore obtained by the company from the mines; that intense prejudice was constantly manifested by the civil and military authorities and by the Mexican populace against all Americans, and especially against those engaged in mining, this prejudice being intensified by the belief that the United States intended to annex Durango, Sinaloa, and other states to its territory, and that the La

[467] *Abra Company was assisting in that purpose; that the property of the company and the persons and the lives of employees were threatened by the authorities and the people, and its superintendent was arrested without having given cause for offense, and fined and imprisoned without trial and without being informed of any offense; that when he applied to the authorities, civil and military, in Durango and Sinaloa for protection, his request was harshly refused, and acts of violence, encouraged by the authorities, were committed against the property and employees of the company, which so alarmed the employees that it was impossible to keep them at work; that the authorities repeatedly seized its mule trains loaded with provisions and appropriated the same to their use, and large quantities of ore from the mines were taken from the company, its employees being deterred by threats from resisting such spoliation; that things finally got to such a pass that an employee of the company in charge of one of its trains was killed by the Liberal forces and the train seized, and that was made matter of boast by the Mexican officials, and the authorities at San Dimas openly avowed their purpose to drive out all American mining companies and get their property; that the one motive of this persecution was to compel the company to leave, and thus permit the Mexicans to obtain possession of their valuable property; and that from such persecution, outrages, and insecurity it became impossible for the company to work the mines and they were abandoned as stated, such enforced abandonment utterly ruining the company.

The memorial concluded by alleging that when the company acquired the La Abra mines, though they were of immense richness, it was impossible from their neglected state to extract ores except by heavy expenditures; that in connection with the principal mines were buildings of great cost and other permanent structures, but owing to the abandoned condition of the mines they were of no present value; that the large expenditures made by the company at the mines gave a very great value to them and to the

buildings and other permanent structures, and they became and were of the value of \$1,000,000; *that the company was obliged [468] to abandon 1,000 tons of silver ore already extracted, worth \$500,000, which it was impossible for them to bring away, and which, upon the abandonment of the mines, were carried off by the Mexicans and lost to the company; that when such abandonment occurred the company was extracting large quantities of ore, and the profits would have been great if it had been permitted to work them; that the company estimated its clear annual profits which it could have obtained from the mines at \$1,000,000 per annum; that in addition to the expenditures in the mines as aforesaid, the company had expended \$30,000 in conducting its business; and that the mines and the improvements and machinery therein had become wholly lost to the company, and its losses and damages because of the enforced abandonment were \$3,000,030.

The memorial also stated that the company had never received any indemnity for its claim, and its prayer was for an award against the Mexican government for its damages, with interest thereon.

It may be here observed that this memorial contained no hint or intimation that the abandonment by the company of mining operations in Mexico was due in any degree to its inability or failure to supply the money necessary for the development of its property and to meet the expenses of mining operations.

That the La Abra Company ceased to work its mines in Mexico and practically abandoned them is undoubtedly true. But is it true that they did so in consequence of violence and outrages committed against it by the public authorities of the Republic of Mexico? The United States insists upon a negative answer to this question. It contends that the company ceased to work its mines and abandoned its property for reasons wholly disconnected from anything done or omitted to be done by the authorities of Mexico, and asserts that the La Abra Company suspended operations in that country, not only because of want of funds necessary to develop its property, but because of the belief of stockholders that the mines were not of sufficient value to justify a larger expenditure of money; *and that it was a pure afterthought [469] to attempt by the agency of the United States to fasten upon Mexico responsibility for the losses incurred by the company in the abandonment of its mining property.

The connection of the La Abra Company with these mines may be briefly stated as follows: In 1865 one Hardy went to the city of New York for the purpose of selling mining property in Mexico which he claimed to own or control and which constitutes part of the property now in question. He there met a person named Garth and exhibited to him some specimens of ore which he stated were taken from that property. Among those whose attention had been called to those mines—precisely at what time or in what way does not appear—was a person named Bartholow. Garth and Bartholow were sent to

Mexico by New York capitalists to examine the mines. They were accompanied by Hardy and were joined by one who was reputed to be a California mining expert, named Griffith. The party arrived at the mines near Tayoltita, Mexico, in June, 1865. In his deposition taken June 22, 1874, Bartholow stated that after examining the property several mines with their improvements were purchased from the owners, Don Juan Castillo de Valle and Ygnacio Manjarrez, at the price of \$57,000, gold coin. Twenty-two twenty-fourths of the La Abra mine, lying immediately contiguous to the mines, purchased from de Valle and Manjarrez, were purchased from Hardy and one Luce, at the price of \$22,000, gold coin. In the same deposition Bartholow stated: "We then reported said purchases, and all the facts exactly as they existed there, to said gentlemen, capitalists, all of whom were intimate acquaintances, and some of them personal friends and relatives of said Garth and myself, and thereupon they formed said Abra Silver Mining Company, and organized the same under the general mining laws of the state of New York, to work said mines in Mexico, which organization was perfected on the eighteenth day of November, 1865, and said mines and haciendas were duly conveyed to said company by said Garth and myself, we being amongst the very largest stockholders of the same. . . . After

[470] receiving the legal titles to all of *said property, as we did, without any reserved interest to said former owners, the said Garth immediately returned to New York, and I proceeded to the city of San Francisco, California, and I there purchased, for and in the name of said company, as the same had been determined upon by said Garth and myself, a ten-stamp mill, and other machinery and modern appliances for running or working the same at said mines; and I also purchased provisions and supplies of every kind and description needed by the officers and employees, which could not be purchased to advantage in Mexico, and I shipped the same to the port of Mazatlan, Sinaloa, by steamships and sailing vessels, and from there said machinery and supplies were transported by mule trains, over the mountains of Sinaloa and Durango, to the said hacienda of La Abra Company, San Nicolas, near to Tayoltita, and I commenced, as superintendent, the work of erecting a mill house for said stamp mill, a new hacienda adjoining the old hacienda, San Nicolas, out-houses for officers and employees, and the opening of said mines, with general preparations for carrying on said mining enterprise on a large scale, as was anticipated by said stockholders. In the meantime the said Garth and myself had reported to said stockholders at New York our entire action and conduct in the matter of said purchases and preparations, which reports were accepted and fully approved by said stockholders, who, upon the organization of said company, appointed me as their first superintendent of their said mining operations, and requested me to remain as such superin-

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tendent until said works were fairly started and in successful operation. I had already requested said stockholders, and subsequently the company, after its organization, to appoint a superintendent to relieve me, as my business in St. Louis was of greater importance to me than my interest in the mining enterprise. My successor was appointed and relieved me at said mines in the month of May, 1866."

The successor of Bartholow as superintendent in charge of the mining property was Colonel Julian A. De Lagnel, formerly an officer in the army of the United States. He had had no experience in mining, but was recognized by all—*and properly, according to the evidence in this record—as a gentleman of integrity and force of character. He left New York for the mines in March, 1866, and arrived there in April of that year. He discharged the duties of superintendent for about one year and until the spring of 1867, and was succeeded by a person named Exall. The latter remained in charge of the mines until about March or April, 1868, when he abandoned the property and returned to New York, and all work at the mines ceased. When Exall left Mexico for New York, the property was placed by him in charge of one Granger. The principal witnesses before the commission on behalf of the La Abra Company were Bartholow and Exall. The company did not take the testimony of De Lagnel, giving as a reason for not doing so the impossibility of ascertaining his whereabouts. That excuse is not sustained by the record before us. [471]

During the entire period when Bartholow, De Lagnel, and Exall were respectively superintendents at the mines, Garth was the executive officer and manager of the affairs of the company at the city of New York, representing it in all correspondence with the different superintendents. Whatever omissions of duty were fairly chargeable against the Mexican authorities in respect of the company's property necessarily occurred after Bartholow took charge at the mines and before Exall returned to New York. During that period of about three years there was a regular correspondence by letter between the respective superintendents and Garth in his capacity as representative of the company at its chief office in New York. Neither the commissioners nor the umpire had those letters before them when the La Abra claim was examined by them. After the award in question, the letter-impression book in which the letters or reports of the superintendents were originally copied was discovered by Mexico and brought by its diplomatic representatives to the attention of the Department of State. Of the identity of that book, as containing the correspondence between the La Abra Silver Mining Company and its several superintendents at the mines, no doubt can exist, although it is insisted that some letters do *not now appear [472] in the book that were once in it. It was, we suppose, principally the evidence furnished by that correspondence that induced Secretary Evarts to report to the President that

the honor of the United States required that the La Abra claim should be further investigated in order to ascertain whether its government had not been induced to enforce against a friendly power claims of American citizens based upon or exaggerated by fraud and false swearing.

That there was before the commission some evidence which, uncontradicted or unexplained, tended to support the allegations of outrage, violence, and neglect of duty on the part of Mexican authorities may be admitted. That evidence came largely from Bartholow and Exall. But it is manifest that the umpire could not possibly have reached the conclusion he did in respect to the La Abra claim if the letter book, giving detailed accounts from time to time of all that occurred at the mines while in charge of Bartholow, De Lagnel, and Exall, had been in evidence when he rendered his decision. The reports made by the company's superintendents as to the management of the property and of what occurred at the mines are utterly inconsistent with the statement that the company's abandonment of mining operations and of its property was in consequence of the misconduct and violence of the Mexican authorities. Placing this letter book beside the evidence adduced before the commission and the umpire by the La Abra Company, it is clear that the material transactions and incidents which the company's witnesses before the commission detailed as establishing the charge against the Mexican authorities were misstated or grossly exaggerated. It now appears that much of the evidence upon which the commission must have rested its conclusion was wholly without foundation and had its origin in a fraudulent purpose or plan to make it appear that the public authorities of Mexico were chargeable with a responsibility that could not fairly or justly be imputed to them.

Let us see how far this general statement is justified by the evidence adduced in the present case when examined in connection with the testimony brought before the commission.

[473] *In the memorial presented by the company through the United States the principal specification of the outrages alleged to have been committed by the Mexican authorities was that "one of the personnel of the company, in charge of one of its trains, was openly killed by the Liberal forces, and the train seized, and that was made matter of boast by the Mexican officials, and the authorities at San Dimas openly avowed their purpose to drive out all American mining companies and get their property." The particular matter here referred to was that of the killing during the superintendency of Bartholow of William Grove, an employee of the company. We have already referred to the deposition of Bartholow taken June 22, 1874. It seems that prior to that date the Mexican government had taken the deposition or affidavit of Pio Quinto Nunez and Cepomuceno Manjarraz. Nunez, who resided in the district where the mines were

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situated, among other things testified "that it is not true that these Americans abandoned their enterprise on account of the acts of Mexican officials, and that it is equally false that either the civil or military authorities, or the inhabitants of the district, made any prejudicial opposition to them, as they have alleged they did; that the deponent has never seen or heard it said that any superintendent was imprisoned, and much less does he believe that such superintendent complained to the civil or military authorities in Durango and Sinaloa, and was denied the protection thus solicited; that he has never known that the authorities have countenanced acts of violence against the interests and employees of the company; that it is false that the authorities, as the company allege, took possession of their mules and provisions and appropriated the same to their own use; that the company never had any ore taken from them, as they affirm, since that which they took out of their mines still exists, as before stated; nor have their employees ever been threatened by any Mexican with intention to rob them; that the company has no reason to complain, in any way, against Mexico, because they did not abandon their operations on account of the Mexicans, but because they themselves did not understand how to carry on the working *of the mines, as is proved by the unproductive manner in which they worked; that this is the cause of their abandonment, and not, as they say, from any want of security; that the reparation which the company claims of Mexico is not founded in justice, because the allegations upon which it is based are false." Manjarrez, residing in the same district, testified to the same effect.

Now, when Bartholow's deposition was taken in 1874, he was asked whether the statements made by Nunez and Manjarrez and other witnesses for Mexico were true. He answered in the negative, saying they were wholly untrue. In response to an inquiry as to the circumstances of the murder of one of the employees of the company in charge of mule trains or supplies, he then testified: "His name was William Grove; he was one of my most valued employees; he was murdered between the town of San Ignacio and Tayoltita; I afterwards recovered his body; it was badly mutilated by gunshot wounds, evidently produced by a volley of musketry. This occurred in January or February, 1866. At the time of the murder Mr. Grove was in the employ of the Abra Company as quartermaster, and was intrusted with the charge of one of our mule trains, used for transportation of supplies. Mr. Grove was murdered by soldiers of the Republican army. The train that was the special charge of Mr. Grove was taken possession of by the military authorities, with its entire outfit and supplies, all of which were totally lost to the Abra Company. The mule trains owned and worked by the company, at that time, were three in number, aggregating about 150 mules; the train so taken was one of the three here mentioned."

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This was a very imposing statement in support of the charge in the company's memorial as to the murder of one of its employees and the seizure of its property by the Mexican authorities. But the charge had no foundation in fact, if Bartholow's account of the affair as contained in his report made to the company when all the circumstances were fresh in his mind was true. In his report to Garth as the representative of the La Abra Company, of March 7, [475] 1866,—which *report appears in the letter book above referred to,—he said: "In my last letter I informed you that one of my employees, Wm. Grove, Esq., formerly of Saline county, Missouri, was missing, and I feared had been waylaid and murdered; since then my worst fears have been realized, for after a search of two weeks his body was found buried in the sand on the bank of the Piastra river, some 10 miles above the mouth of Candalaro creek, near where he had been murdered. At the time of the discovery of the body it was in such an advanced state of decomposition that it was impossible to ascertain the manner in which he had been killed. His mule, pistol, and clothing have not yet been found; the mule is, however, likely to turn up, as it had our hacienda brand 'U. S.' on the left shoulder. These facts were promptly laid before the commander of the Liberal troops at San Ignacio, Senor D. Jesus Vega, who took great interest in the matter and promised to use all the means in his power to discover the murderers and bring them to justice, and he has had arrested and placed in confinement two men charged with the crime, and his soldiers are in pursuit of the third. These we are assured will be tried by court-martial, and if found guilty will be summarily executed. Mr. Grove, I think, lost his life by imprudence in talking; he had resided in Mexico for six or seven years, spoke the language quite fluently, and ought to have understood the character of the people. I had nominally purchased a train of pack mules in Mr. Grove's name, and sent him to San Ignacio to obtain a permit for them to pack for me, and a guarantee that they would not be taken by the army; he succeeded in getting these documents and was on his way home to take possession of the mules and start them to packing; he passed the night previous to his death at the house of one Meliton, at Techamate, the place where you will recollect we stopped for dinner on our first trip up, where we had quite a quantity of watermelons. This man Meliton had a bad reputation, was some years ago convicted of murder and robbery and sentenced to be executed, but got clear by bribery. Grove told this man of his purchase of the pack train, [476] and that he was to *pay \$4,000 for it, and was on his way to take possession of it and start it to work, thus leaving the impression that he had this sum of money with him. Now, while I do not think that Meliton committed the murder, I have no doubt of his having planned it and arranged for it to be done, and the imprudence of Mr. G. in telling this man the circumstances above men-

tioned, in my opinion, was the cause which led to his murder, which was effected between Techamate and Tenchuguilita, about midway between the two places." In a subsequent report to Garth under date of April 10, 1866, he said: "I wrote you fully in my last letter detailing the circumstances of the murder of William Grove and the finding of his body. Since then the Liberal authorities have taken the matter in hand and arrested one of the murderers at this place. The villain was actually *in our employ*, doubtless for the purpose of ascertaining when an opportunity should offer to waylay and murder another of our men if the prospect for plunder was sufficient to warrant the risk. When the officers arrested him I had him conveyed to the blacksmith shop and securely ironed. The next day he was conveyed to San Ignacio and thence to Cosala, where he was tried. We failed to convict him for the murder of Grove, but was convicted for the murder of a woman, who he killed previously, and sentenced to be shot, and before the execution of the sentence he confessed the murder of Grove, and revealed the names of his two confederates; these two would have been arrested before this but for the expulsion of the Liberals from the country. Now we will have to wait for the Imperialists to put their officers in power before we can act any further in the matter."

These letters were not before the commission. If they had been, that body could not have attached any importance whatever to the statement in Bartholow's deposition of 1874 to the effect that the murder of Grove was committed by soldiers of the Republican army, or to the charge in the company's memorial that such murder "was made matter of boast by Mexican officials."

Another of the outrages alleged to have been committed *by the Mexican authorities [477] and to have resulted in driving the La Abra Company from its property was described in the original evidence as the robbery of Scott, one of its employees. That evidence indicated that the robbery was by the military authorities then in control in the locality of the mines. Referring to "the military authorities of the Republic" under the command of General Corona, Bartholow stated in his deposition of 1874: "One of the employees of the company, who had been sent to Mazatlan on business, was robbed by said military authorities, near Camacho, in Sinaloa, while on his return from Mazatlan to the company's works, of \$1,178 of the moneys of the company, which amount never was repaid to the company, nor was the company ever indemnified for the same in any way. I recollect the exact amount taken, because I entered the same on the books of the company, charging the same to the 'robbery account,' where other 'prestamos' and robberies were entered. The name of this employee who was so robbed of the company's money was George Scott, commonly called 'Scotty.' This transaction was nothing less than highway robbery by said troops, and was in addition to the several 'prestamos' levied and enforced by the military author-

ities, which, I have said, ranged from \$300 to \$600. The amount of cash 'prestamos,' so levied and enforced during my said superintendence, amounted to a little more than \$3,000, but the value of the mule trains and supplies so taken from the company by the said military, while I was superintendent, was not less than \$25,000."

The same incident was described in an affidavit made in 1870 by a witness for the company named Clark, who was a contractor for the company while Bartholow was in charge of its property. He said that he knew "of other abuses of said company by the military authorities aforesaid; that in the early part of 1866 an employee of said company, whose name, deponent believes, was George Scott (called 'Scottie'), who was on his way from Mazatlan to the works of the company in Durango, was met in the road by [478] an armed party of *the said military, between Mazatlan and deponent's residence in Camacho, and said armed party of troops, of the Republican army of Mexico, did, by force of arms, take from said Scott, or 'Scottie,' about twelve hundred out of three thousand dollars in gold coin (\$3,000), Mexican ounces, 187½ ounces, which money belonged to said 'La Abra Silver Mining Company,' and was being transported to said company by the said 'Scottie,' who appealed to deponent to visit, with him, the headquarters of the army in that district, and to ask General Guerra to return said money, or to receipt for it, in order that he might have *something* to return to said company; that deponent did so visit General Guerra's headquarters with the said 'Scottie,' but was informed by the commanding officer that he could not give up said money. After said Scottie had wasted two or three days to obtain some kind of acknowledgment of the taking of said money, he became disgusted, and returned to report the facts to his company at Tayoltita."

How differently this affair was regarded at the time by Bartholow is shown by his report to Garth, to be found in the letter book, under date of April 10, 1866. In that report Bartholow spoke of the difficulties he had met and overcome, and stated that a demand for taxes amounting to \$3,000 or \$4,000 had been easily met after corresponding with the collector of taxes, by the payment of \$30, and that there was no necessity of troubling General Corona with the matter. He proceeded: "In consequence of the unsettled state of the country and the presence of bands of robbers on and near the roads leading from here to the port, I have had a great deal of trouble to get money from time to time transported to pay my hands and other expenses, and in consequence I was, of course, unwilling to risk any very large sum at one time; yet, when we were getting timber and doing other work which required a great many Mexican laborers, we frequently needed \$1,000 per week, and of course all that the proceeds of the sales of goods did not supply had to be brought from Mazatlan, but I so managed it that we never had more than from \$1,500 to \$2,000 at risk at one time, and all came 175 U. S.

through safe except in one case. This *oc-[479] curred some two weeks ago, when I sent Mr. Scott to San Ignacio to settle our taxes with the authorities. I gave him a check on Messrs. Echeguran, Quintana, & Co. for \$1,000 to bring up. Besides this he had some money outside of this sum which was left after paying the taxes in San Ignacio. He got the money as directed and started out of Mazatlan to overtake a train which was bringing up some supplies for us and Mr. Rice, and when about 20 miles out from the port, near the town of Comacho, six or eight armed men sprang into the road and with their guns leveled upon him forced him to dismount, and robbed him of \$1,178 in money, his pantaloons and boots (the latter, however, being No. 12, were too large for any of the villains, and were returned). He immediately informed the nearest commander of the Liberal forces of the fact, who sent for him for the purpose of identifying the robbers. He complied, but could not find them, for the reason that the officer could not find even half his men. I also at the same time opened a correspondence with General Corona through the prefect, Colonel Jesus Vega, at San Ignacio, who by the way is, I think, one of the most perfect gentlemen I have met in the country, and I am of the opinion that but for the turn in military affairs which occurred a few days since, we would in some way or other have been reimbursed for the loss, but now I have no hopes whatever, and we may as well charge up \$1,178 to profit and loss."

Can the statements in that report be reconciled with the declaration in the affidavit of Clark and in the deposition of Bartholow, that the robbery of Scott was by the military authorities of the Republic under General Corona? We think not. The affair as described in that letter could never have been made the basis of a finding that would place the responsibility for this robbery upon the public authorities then holding control in Mexico.

We now refer to a matter occurring during the superintendency of De Lagnel. It was referred to in argument as the Valdespino forced loan. Alluding to this exaction in his deposition, taken in rebuttal while the case was being prepared for the commission, and being asked whether it was paid by *him, and [480] if not, by whom, Exall said: "It is untrue that any part of it was paid by me, voluntarily or otherwise. I was not superintendent until September, 1866, and this loan was made in July, 1866, when Colonel De Lagnel was superintendent, as will be seen by the order addressed by said Valdespino to Colonel De Lagnel, and to the best of my recollection, the whole amount, \$1,200, was required of and paid by said De Lagnel." Granger, in whose charge the property was left by Exall in the spring of 1868, made an affidavit in 1870 which the company used before the commission in support of the charge that the Mexican authorities had imposed upon it forced loans or prestamos. He said: "Said company was also forced to

pay 'prestamos.' A letter was received by Colonel De Lagnel, superintendent of said company, from Colonel Valdespino, of the Republican army of Mexico, dated July 27, 1866, and signed 'Jesus Valdespino,' which came into my possession as clerk of the company, and which letter has never, since its receipt, passed out of my possession; and I now present the same to the consul, marked 'Exhibit Z.' This letter demands twelve hundred dollars (\$1,200) from said company for the support of his forces under his command. It is needless to say the demand was complied with."

Here we have a distinct assertion by the company, through its witnesses, that this demand to pay \$1,000 was met by the company. The fact was just the reverse, as must have been known to some of the representatives of the company who were accredited by it to the commission as witnesses having knowledge of the facts. On the day succeeding the receipt of Valdespino's letter Colonel De Lagnel wrote to the Gefé Politico of the San Dimas mines as follows: "In due time reached me your communication of yesterday in regard to a loan or tax which you exact from the residents of the district for the support of the forces of Colonel Valdespino, and having noticed the contents thereof I answer it forthwith. I send you part of the articles I have and which you ask me for, hoping that they be useful and acceptable to you. As regards the cash I am sorry to inform you that it is impossible for me to send you even a little, because I have not [481] here the *necessary amount to defray my many and constant expenses. I request you to consider that this hacienda has brought the county thousands and thousands of dollars, most of which have been spent among the needy people of this district, and a considerable part in duties paid into the treasury of the district, under whose flag Colonel Valdespino is serving. As it is public and well known, not a single dollar have we received of this sum up to date. I send you two pieces of blue mohair and two pieces of bleached cotton, valued at \$65.75, of which amount be pleased to send me the corresponding receipt, in order that it may serve me as a voucher to the company I have the honor to represent." At the same time De Lagnel wrote to Colonel Valdespino: "Your favor of yesterday informs me of the sad situation in which you find yourself for the lack of resources and of your intention to procure them preparatory to leaving the district. Understanding the great need that you are in and considering, as you yourself state, the many evils that we would suffer if you should bring your forces here, I do all I can to overcome the difficulties, and I have sent to the political chief of the district two pieces of mohair and two of bleached cotton, those being the only things among the necessary things mentioned which I have. It is impossible for me to contribute with money in order to provide you with what you need to-day. Be pleased to consider that our reducing works are not complete, and therefore unproductive, without reckoning

the many expenses that we yet have to make, the proximity of the rainy season, the scarcity of money, and the abnormal political situation, which cannot but cause us serious damages. I am not, therefore, in a condition to accede, as you desire, to the wishes of the political chief, but have sent him what I have, hoping that they be accepted as a token of my good will. I suppose that having contributed with what I can I may, as a matter of course, resume my work without fearing the interruption that would be caused by the arrival of armed forces." But this is not all the evidence on this point. De Lagnel, under date of July 31, 1866, wrote to Rice, the superintendent of the company at San Dimas, saying: "As to the *forced, vol- [482] untary (?) loan, it was an impossibility to meet the demand, and I so stated in my note to the prefect."

If any additional evidence were needed to disprove the statement before the commission that the company by its agent had met and paid the levy of \$1,200 by Valdespino to be used in supporting his troops, it is found in De Lagnel's deposition taken in this cause. His attention being called to the reference in the letter book to this levy or forced loan, he said: "I received from the civil officer in San Dimas, and also at the same time from Colonel Valdespino, letters, both bearing on the same subject. He had come into the vicinity with a command of cavalry—Liberal cavalry—destitute. The mules were broken down by coming over the mountains. They wanted food and clothing and money, and they wrote to me, saying that they had apportioned it on the two mining companies, the one at San Dimas and the one with which I was connected, levying one quarter upon us, and the other half was to be borne by the citizens. I was advised to comply. They wanted \$300, if I recollect right, in money. I didn't have the money to give them, and didn't intend to give it even if I had it. . . . I sent them a few goods—some stuff they wanted, blankets and hats. I sent them some goods, cotton goods, and wrote a courteous note to each one of them, expressing regret that I could not comply with their wishes, and stating that we had no money, because the mines had never turned out a dollar. They wrote me an acknowledgment and sent a receipt for the goods and courteous acknowledgments. That was the end of it."

There are many other specific matters discussed in the elaborate briefs of counsel. To consider each of them and show the grounds upon which our conclusions rest would extend this opinion far beyond all proper limits. There were undoubtedly some unpleasant occurrences, such as the affair between Exall and Perez, a local judge, growing out of a misunderstanding by the latter of Exall's order to him to keep out of a particular room at the mines. But none of those occurrences had any real connection with the abandonment by the company of its mining property in Mexico; and, as is *evident from the new [483] proof adduced in this cause, they were described by the company and its witnesses in

the testimony before the commissioners in such exaggerated terms as to justify the charge of fraud made in the bill filed by the government.

What does the letter-impression book disclose as the real cause of the company's abandonment of its mines?

In the reports made by Bartholow, the first superintendent, to Garth, of February 6, March 7, and April 10, 1866, no statement is made which even by inference showed that any difficulties were in his way that had their origin in the acts or conduct of the public, civil, or military authorities of Mexico. On the contrary, one letter shows that he obtained military protection for the mill transported from Mazatlan to the mines, and another one* that he had pleasant relations with the civil and military authorities of the locality.

Looking next at the reports of De Lagnel, the second superintendent, we find a letter of July 6, 1866, from him to Garth, showing that there was then a heavy outstanding indebtedness against the company that compelled the superintendent, not only to lessen expenditures, but to reduce the working force nearly one half, and pay the workmen for their services, one half in cash and one half in goods. Under date of October 8, 1866, De Lagnel wrote: "I am troubled exceedingly that better success has not attended my efforts, but the rainy season has proved a sore trial to my patience and been a serious drawback. I have striven to meet your wishes and expectations, and regret that my success has not been commensurate with my efforts to serve you and discharge my duties. As to sending a successor, I deem it best to tell you now that no money could tempt me to remain in this country longer than next 1st March." On the 17th of November, 1866, De Lagnel wrote from Mazatlan to Garth: "Had nothing occurred to interrupt the work, I feel sure that at this time the mill would be in operation, and the proofs at last being developed. Unfortunately, I was unable in September or October to communicate with this place; and the ready money giving out at the hacienda, [484] the workmen (not miners) *refused to continue and left, thus bringing the ditch-work to a standstill. . . . In the utter impossibility of obtaining aid here, I have, despite the tone of your letters, drawn upon you for the sum of \$7,000. I feel sure that you will experience no greater feeling of annoyance in receiving the intelligence than I do in communicating the fact; but after debating the thing long and carefully, I am satisfied that it is the best course to pursue. Longer delay in executing the work would be most injurious, perhaps fatal. . . . At present the mine is, I may say, *bare of metal*. A few days before I left metal had been struck again, but in so small a quantity as to forbid much hope."

Under date of January 5, 1867, De Lagnel wrote again to Garth from Mazatlan: "In your latest letter, the 20 Nov'r, you there informed me that you can meet no further drafts upon you; yet I had already, about

the 17 Nov'r, drawn on you as treasurer for the sum of seven thousand dollars. I wrote to you fully by the same mail, and hoped to be able to send the letter *via* Acapulco, and thus reach you before the draft. In this I was disappointed, and my letters having gone *via* S. Francisco will reach you at the same time that the d'tt comes in for payment. I trust that, despite what you say, you will find some way to satisfy the draft, for if it goes to protest it will be of incalculable injury to the best interests of the Co. To me the consequences of such a thing would be both mortifying and most embarrassing, but to the comp'y's interest they would prove far more serious. It is therefore that I urge upon your serious consideration the interest at stake, and pray that a prompt settlement be given upon presentation."

De Lagnel was again in Mazatlan on February 5, 1867, and on that day wrote to Garth, saying: "I had hoped, and fully expected, to be able by this time to send forward some return for the outlay incurred by the company in the prosecution of its enterprise; but am disappointed in not yet having succeeded in bringing on the water in sufficient quantity to drive all the machinery. . . . The supplies laid in during the past year being in great part exhausted, and a new supply *being absolutely necessary [485] to keep the mines, etc., going, and there being necessity for ready money, in order to purchase the requisite supplies, I have drawn upon you for \$7,500 in favor of the Bank of California. This I would not have done had it been possible to do otherwise; but no assistance can be had in this country. I have satisfied myself on this point, and had only the alternative to stop operations or draw on you."

We come now to the period during which Exall was superintendent. His reports to Garth, as the representative of the company, and Garth's letters to him, make it clear that its bankruptcy was all the time imminent, and the time near at hand when all work at the mines would be suspended, not because any obstacles were put in the way of the company by the Mexican authorities, but solely because it was without money to employ in developing the property.

The first letter written by Exall shows that the financial situation at the mines was such as to require the utmost economy on the part of the company's superintendent.

Under date of May 6th, 1867, after De Lagnel departed for New York, Exall wrote: "I have, as far as I think safe, reduced the number of hands at the mines, keeping only a sufficient number to show that they are still being worked. I have a light force in the Christo; no improvement in the metal; a light force in the La Luz; the metal about the same. . . . I have discharged a greater portion of the hacienda hands."

On the 10th of May, 1867, Garth wrote to Exall a letter in which, after expressing the hope that De Lagnel would soon arrive at New York, he said: "The affairs of the

company here are much embarrassed; a few of the directors have advanced all the money to carry on the operations, and have been nearly ruined by it, and are not able to afford any further aid from here, and look anxiously to be reimbursed very soon from the products of the mine, and it is hoped that your best energies will be exerted to afford relief."

Again, under date of May 20, 1867, Garth wrote to Exall, and referring to De Lagnel's [486] draft for \$7,500 said: "This draft *arrived on 2d April last, and was paid by one of the directors of the company, as it was considered that was *surely the last* that would be needed, and we expected to return the money by an early remittance of bullion from Mexico. You can judge of our surprise and chagrin, when the last steamer arrived, instead of bringing Colonel De L. with some fruits of our works, a draft for \$5,000 in gold was presented for payment by Lees & Waller, drawn by De Lagnel, favor Bank California, and dated 10th April last, and of which we had not received any notice or advice whatever, and have not yet received any. As I had so often and fully advised the superintendent of the condition of affairs here, and requested him not to draw further, I was much surprised that he did so, and that without giving any notice or reason for so doing. As it was found impossible to raise the means to pay this draft, it was protested and returned unpaid, and you must make some provisions for its payment when it gets back. I do trust that before that date you will have plenty of means to do so. I would now again repeat that I have made every effort possible to raise the money here and have failed, and I have advanced all I can possibly do, and the other directors have done the same; the stockholders will do nothing, and it is probable the company will have to be sold out and reorganized."

This was followed by a letter from Garth to Exall of date May 30, 1867, in which it was said: "We wrote to you on the 20th instant, informing you that we had nothing from you or Colonel De Lagnel, but that a draft drawn by Colonel De L. from Mazatlan, 10th April last, had been presented, and there being no funds on hand, and no means here of meeting it, that it was protested and returned not paid; it is hoped by the time it gets back you will be prepared to meet it. Since my last letter Colonel De Lagnel has arrived and made known to us something of the state of things with you. I must confess that we are amazed at the results; it seems to me incredible that everyone should have been so deceived in regard to the value of the ore, and I can but still hope that the true process of extracting the silver has not been pursued, and that before this time better results have been attained. . . . All ex-

[487]penses *must be cut down to the lowest point, and you and Mr. Cullins must try and bring this enterprise into paying condition if the thing is possible—at any rate, no further aid can be rendered from here, and what you need must come from the resources you now

have. Neither must you run into debt; cut down expenses to amount you can realize from the mines. I cannot yet say what can be done in the future; no meeting of the stockholders has been held, and nothing done to pay off the debts here, now pressing on the company. For the present, all I can say is that the whole matter is with you; take care of the interests and property of the company; don't get it involved in debt, and advise us fully of what you are doing."

Garth wrote again, June 10, 1867: "We have not heard from you since Colonel De Lagnel left Mexico, but hope that you are well and getting along as well as could be expected. The account that Colonel De L. gave us of the quality of the ores on hand was most unexpected and a fearful blow to our hopes. We trust, however, that a fuller examination will show better results. We have in previous letters to you and to De Lagnel so fully informed you of the condition of affairs here that it is hardly necessary to say anything further on that subject. There is no money in the treasury, and we have no means of raising any, and a few of us have already advanced all that we can do, and you have been advised that the draft last drawn by De L., on 10th April, was returned protested, and I hope you will be able to take it up when it gets back, promptly. Everything now depends upon you, and to your judgment, energy, prudence, and good management of the resources in your hands, and we hope you will be able to command success."

So straitened were the circumstances of the company at that time that it was sued in New York on promissory notes past due (one of the notes being held by an assignee of Garth), and it permitted judgment on them by default in July, 1867, for the sum of \$53,653.50. Manifestly that suit was instituted with the consent, if not by the direction, of the officers of the company who had charge of its affairs in New *York, who were aware [488] of its financial embarrassments and knew that it must soon suspend business and go into liquidation.

By a letter of June 11, 1867, Garth was informed by Exall that he had been compelled to draw on him for \$3,000. The latter's letter of July 13, 1867, expressed regret that the draft made by De Lagnel before he left for New York could not be paid, and stated: "All your previous letters to me were to follow out the instructions given to Colonel De L. I took charge of affairs at a time when the expenditure of money was absolutely necessary to purchase supplies for the rainy season. Colonel De L. left me with only moderate means to buy these various supplies; pay't of sundry bills which were coming due, and pay of the workmen who had accounts of three, four, and six months' standing."

On the 10th of July, 1867, Garth wrote to Exall: "I had this pleasure on 30th May and 10th June last, after the return of Colonel De Lagnel, and we had learned something of the condition of affairs in Mexico. In these, as well as in preceding letters, you were fully advised of the condition of the

company here; that there had been no funds in the treasury for a long time; that appeals had been made in vain for aid to the stockholders, and that the parties here who had made heavy advances to the company were anxious for its return, and refused to make any further payments; and that the draft for \$5,000 drawn on me as treasurer by Colonel De Lagnel, on the 10th April last, had been protested and returned to California, and, we suppose, to parties in Mazatlan who advanced the money on it, and who would have to look to you for payment of same; and we expressed the hope that by that time you would have taken out sufficient money to meet it and all other expenses, and hoped soon to have a remittance of bullion from you to aid in payment of the large indebtedness here. . . . You will see, from all my letters, that no further aid can be given you from here, and that you must rely upon the resources you now have, and which, we think, ought to be ample to pay off the debts and to sustain you in current expenses, which

[489]you should cut down to the *lowest possible point. . . . Don't run into debt or get into difficulty with the authorities, if there are any such things existing; but at the same time be firm in maintaining your rights, and don't submit to imposition except by force, and then make a legal and formal protest as a citizen of the United States and as an American company duly organized and prosecuting a legitimate business under the protection of the law, and our rights will be protected by our government."

Garth wrote again on the 20th of July, 1867: "The steamer is just starting, and I have only time to say that your letter of the 11th, by private hand, has been rec'd, advising us that you had drawn on me for \$3,000 gold. In former letters you will have learned the condition of things here, and that there is no money to pay same, and that former dr'ft of De Lagnel has been returned unpaid, and that you were urged to try and get along with what resources you had. These letters, no doubt, reached you in time to prevent your drawing, as no draft has been presented, and we hope by this time there is no necessity for doing so."

Under date of October 6, 1867, Exall wrote to Garth: "By this steamer I am in receipt of yours of 10th and 20th of July and 10th of August. I was much disappointed that my urgent demands for money were not favorably answered. I have complied with the requests in your various letters in reference to giving you exact information concerning affairs here. I now have to urge you to send me means. I have heretofore been keeping above water by using the stock which I fortunately had on hand; that is now entirely exhausted. I have neither money, stock, nor credit. This latter I would not use even if I had it, as in this country it is an individual obligation and no company affair. Now, you must either prepare to lose your property here or send me money to hold it (and that speedily) and pay off debts of the concern. I have worked as economically as possible and have cut down expenses to the lowest

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point. . . . I am working the mines with as few hands as possible. What little good metal is taken out amounts to almost nothing. The \$5,000 draft of De Lagnel's was sent to a house in this place to be collected, with instructions *to seize the prop-[490]erty in case it was not paid. It troubled me a great deal, and I had much difficulty in warding it off. The concern to whom the draft was sent showed me his instructions and also the original draft. Fortunately for the company, there was a flaw in the draft; De Lagnel failed to sign his position, as superintendent of the La Abra Silver Mining Company; simply signed his name, making it an individual affair. This was the only thing that kept them from seizing the property. I told them they could do nothing with the property here, as the company were not obligated on the draft. I have exhausted all the ore that I had on hand that was worth working. That which I worked was very poor and the yield small. The La Luz, on the patio, won't pay to throw it into the river. I have had numerous assays made from all parts of each pile; the returns won't pay. Amparas are not now granted, and mines are to be held only by working. I am compelled to keep men in mines which yield nothing, merely to hold them. This I can do no longer; as I have nothing to give the men for their labor, and must now take the chances and leave the mines unprotected."

The same letter contains a statement as to the situation which contrasts most strangely with the charge that the company was prevented from successfully working its mines by the conduct of the Mexican authorities. That statement was: "By next steamer will send you full statements of past months. The returns from Durango were small. I turned it over to E. P. & Co., as I was owing them. There is no difficulties about authorities, boundaries, or anything else concerning the mines and hacienda, provided there is money in hand, and *money must* be sent. I hope I have urged this point sufficiently so that you may see fit to send me something to hold the mines. I should be sorry to see them lost on this account. Please telegraph me if you intend sending money? I fear that before I can get a reply to this that something may have occurred. Of course, Colonel Le Lagnel informed you the conditions and terms on which I took charge of affairs here, which was the same that he was getting, and if I had known at the time what difficulties I was going to have in procuring *means to keep the concern in motion, I[491] would have refused on any terms. I am much in need of money, as I wish to use it here. I will, in a month or so, draw on you through Wells, Fargo, & Co., San Francisco, for \$1,500—please inform me by earliest opportunity that you will meet the draft. . . . I hope that before this reaches you that some steps will have been taken to procure means to operate with."

On the 10th of October, 1867, Garth wrote to Exall: "I am very sorry to say that it

is not possible to aid you from here, and that you must rely entirely upon the resources of the mines and mill to keep you going and to relieve you of debts heretofore contracted. It is not possible for us to direct any particular course for you, but only to urge you to try and work along as well as you can, cutting down expenses and avoid embarrassing yourself with debts. The Bank of California has again sent Colonel De Lagnel's draft here for collection, but it was not possible to pay same, and it will have to return to Mexico, and we do hope you will be able to make some satisfactory arrangement to pay it."

Under date of November 17, 1867, Exall wrote to Garth from Mazatlan: "Yours of the 30th September is just at hand, and, contrary to my expectations, contains nothing of an encouraging nature. I expected after having previously written so positively in reference to the critical state of affairs with me, that you would have sent me by *this mail* some means to relieve me from my embarrassing position. I have in former letters laid before you the difficulties under which I was laboring and begged that you would send me means, and was relying much on the present mail, expecting that some notice would have been taken of my urgent demands for assistance to protect the property belonging to the company. To add to my further embarrassment, Mr. Cullins, whose time expired on the 16th inst.,—since my leaving Tayoltita—(I left there on the 10th for this point), intends to commence suit in the courts here for his year's salary. I am endeavoring to get him to delay proceedings until the arrival of the next steamer (don't know as yet if I will succeed in getting him to delay), when I hope you will have seen [492] the necessity of acting*decidedly and sending means to prosecute the works and pay off the debts of the company, or abandoning the enterprise at once. Nothing can be done without a further expenditure of money. I am now doing little or nothing in the mines, and will, when I return, discharge the few men who are now at work in them. This I am compelled to do, as I have no money, and my stock is almost entirely exhausted, and I fear if money isn't very soon sent some of the mines will become open to denouncement. In my last letter I mentioned the amount required for immediate demands, \$3,000, which must be sent out. By next steamer Mr. Elder, Slone, and Cullins, if paid off, will sail for San Francisco; if not paid off, suit will be commenced, and as I have no means to defend the case, fear it will go against me. When these parties leave, the hacienda will be left almost entirely alone, there being only myself, Mr. Granger, who I am also owing, and I away most of the time. What you intend doing must be done promptly. Please send me Mr. Cullins' contract with you. The political state of the country just now is rather discouraging. I hope by the time this reaches you will have rec'd statement sent. Everything at mines as it was when I last wrote, only more gloomy in ap-

pearance on ac't of not being able to employ the people and put things in operation. *Please do something immediately*, and inform me as speedily as possible."

Still relief did not come to Exall and he again wrote to Garth from Mazatlan, under date of December 18, 1867, a most urgent letter. It is here given in full: "I arrived here a few days since. Received by steamer yours of October 10, informing me of your inability to send me the means to operate with and meet my obligations. I have in previous letters expressed the condition of affairs with me, and begged that you would do something. Thus far I have been able to protect your interests here, but affairs have gotten to such a point that I am unable to do so longer without money. Mr. Cullins, who I informed you in a former letter would leave, insisted upon doing so by this steamer. He demands a settlement, otherwise he will immediately commence suit, and had made preparations to do so. To keep the matter from the courts *I was compelled to [493] borrow money to pay him off. The balance due him, and the amount I had to borrow here, was \$1,492. He has troubled me a great deal—has been exceedingly unreasonable. On yesterday the agent of the Bank of California informed me that he received the draft by the last steamer (which arrived a few days ago), and would immediately commence legal proceedings, and sent the draft on to the courts here. I am utterly unable to oppose them; first, I have no means, and, again I am not your agent here, never having received a power of attorney from you, which will be necessary, for I cannot act in these courts without it. The Bank of California—and will do something to recover the amount of the draft before the amount is doubled by the expenses. For God's sake, telegraph to pay them. Matters of this nature once getting in these courts it takes large sums to oppose them. The first steps taken by the courts will be to send someone to the hacienda to see to and secure everything there. This will, of course, stop everything and make it impossible for me to protect your interests. For your own sake in the matter pay them before things go further. My position is extremely embarrassing, and I know not what to do, and will have to be guided entirely by circumstances. I will, of course, do everything in my power, and may have to act in a very cautious manner, and will probably act in a manner which may occasion censure. Now, all I ask of you is to judge my actions justly, and consider my circumstances, and believe I am doing the best for your interests. I am doing nothing at the mines, and have only one person left with me. Please attend to this matter promptly. I am writing very hurriedly, as there is a war steamer just leaving San Francisco, which will arrive there some days prior to the regular mail. I leave for the mines in a few hours. Attend to this at once and telegraph me."

Exall still failed to hear anything of an encouraging character from the company.

He again wrote most urgently to Garth on the 24th day of January, 1868, as follows: "I came down to meet steamer from San Francisco, in hopes of receiving letters from you; I received none, and now, being entirely
[494] *out of funds and stock, and being sued by agents from Bank of California for the payment, have to let things take their own course, as I am unable longer to protect your interests here. In previous letters I gave you a full and detailed accounts of affairs here, and such frequent repetitions I find useless, and will simply state that I am doing nothing whatever at the mines, and cannot until I receive money to operate with. I haven't means to protest now, and they are liable to be denounced at any moment. Some months since I wrote you for titles; the government demanded them; they have not been received. By steamer I sent you a telegram from San Francisco; no reply. The parties I sent the despatch to in San Francisco sent it on to New York. I am owing considerable and no means of paying. What is your intention? Is it to let your interests here go to the dogs? You have either to do this or send money out to protect them. If by next steamer I receive no assistance from you, I intend leaving for the east. I will go *via* San Francisco, will from there telegraph you what further steps I shall take. I have been doing everything in my power to keep the Bank of California from getting possession; thus far have succeeded, but can prevent them no longer, and fear they will eventually have their own way. Mr. Cullins (who is not the man he was represented to be) left by last steamer. I have only one man now; am compelled to keep someone. Please telegraph me in San Francisco, care of Weil & Co., immediately on receipt of this. You can judge by what has been done in New York and send me whether or not I may have left. Please let me know your intentions."

The situation had become financially so discouraging to Exall that he determined to leave the mines and return to New York. So under date of February 26, 1868, he wrote to James Granger, who sometimes called himself Santiago Granger, and who was at the mines, this letter: "As circumstances are of such a nature as to compel me to leave for San Francisco, and probably for New York to inquire into the intentions of this company, I place in your hands the care and charge of the affairs of the La Abra S.
[495] M. Co., together with *its property. You are invested hereby with all power confided to me, of course, acting in all your transactions with an eye to the interests of the company. This will, to you, should occasion require it, be ample evidence of the right possessed by you to act in their behalf." Notwithstanding the execution of this paper, Exall testified in his deposition taken before the commission in 1874 as follows: "I did not leave said mines, hacienda, or property in charge of said Granger, or any other person, nor did I give any charge, control, powers, or authority of or over the same, or any part of the
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same, to him, or anyone else, and if he, or any other person, has taken charge or control of said mines, hacienda, and property, or of any of it, or has sold, used, or in any way disposed of any of it, each of such acts was without any power or authority or right whatever to do so, so far as any act by me or for me, or on my part, as superintendent or otherwise, is concerned." We also find in the record a letter from Exall, written from New York to Granger under date of May 8, 1868, in which the writer says: "Of course, on the first day of my arrival here, I saw nothing of the company. The day after I went down and saw Garth. Had a long talk concerning affairs, and, contrary to our expectations, gave me no satisfaction; didn't seem to intend to do anything more. I have seen him several times, but have got nothing from him of an encouraging nature. He seems disgusted with the enterprise, and, so far as regards himself, intends to do nothing more, or have nothing more to do with it. . . . I wish I could send you some means to get along with, knowing you must be having quite a rough time, but am unable. I expected to be paid up here; its not having been done plays the devil with my arrangements." Among the letters now produced in evidence is one from Granger, written from Tayoltita under date of August 12, 1868, to Senor Don Remegio Rocha. That letter was in these words: "I have received the communication calling upon this company to pay \$52.50 each month for taxes imposed by the legislature of the state, and presume it to be correct; but as I am only acting in the absence of the superintendent, and as there is no money nor *effects to pay
 this tax, I beg you to wait until the month of November, at which time said superintendent is to come, and then the sums due by this company on account of this tax will be paid." **[496]**

From the above and other evidence in the record it is certain that before the La Abra Company ceased to work the mining property it had become utterly bankrupt, and that its abandonment of all operations at the mines was due to its inability from want of funds to carry them on, and to the belief, founded upon the experience of two years and more, that the mines, if not entirely worthless, were not of sufficient value to justify its owners in proceeding further in their development. If the proper working of the mines while Bartholow, De Lagnel, and Exall were successively in charge of them was prevented by the acts or omissions of duty on the part of the public authorities of Mexico, surely that fact would have been disclosed by the letters or reports made to the company by its several superintendents. The demand made during that time by the company's representatives in charge of the mines was not for military or civil protection, but for the money needed to develop the property and to meet the debts incurred at the mines during the progress of the work there. We do not doubt that the situation was accurately described by Exall when in the above

letter to Garth of October 6, 1867, he reported that "there are no difficulties about authorities, boundaries, or anything else concerning the mines and hacienda, provided there is money on hand, and money must be sent;" and when in his letter of November 17, 1867, he endeavored to impress Garth with "the necessity of acting decidedly and sending means to prosecute the works and pay off the debts of the company, or abandoning the enterprise at once." In that condition of affairs, it is not strange that Exall in the letter of January 24, 1868, just before he left Mexico for New York, wrote to Garth: "I am owing considerable and no means of paying. What is your intention? Is it to let your interests here go to the dogs? You have either to do this or send money out to protect them." We have seen that Garth, as the representative of the company, in *a letter to Exall, dated July 10, 1867, warned him against running into debt and getting into difficulty with the authorities, "if there are any such things existing;" "but," he continued, "at the same time be firm in maintaining your rights, and don't submit to imposition except by force, and then make a legal and formal protest as a citizen of the United States and as an American company duly organized and prosecuting a legitimate business under the protection of the law, and our rights will be protected by our government." Now, it does not appear that there was any formal protest before the United States Consul at Mazatlan by any representative of the company to the effect that the Mexican authorities had so acted or failed in duty as to compel it to abandon its property in Mexico. If the company's superintendents had any such view of the situation when they returned to the United States and gave an account of their management of the property, how natural it would have been for the company, in some formal way, to have promptly brought the whole matter to the attention of the government of the United States, and sought its aid in order to have justice done to them by the Republic of Mexico. No such course was taken, and we cannot doubt, in view of the evidence adduced after the commission made its award, in connection with the evidence before that tribunal, that the idea of attributing the losses of the company to the wrongful conduct of the Mexican authorities never occurred to the company until after the organization of the commission, long after the arrival of Exall in New York. In March, 1870, the company for the first time gave notice to the Department of State that it had any claim against the Republic of Mexico. It then claimed only \$1,930,000. A few months later it increased its claim to \$3,000,030, and before the commission concluded its labors, it amended its claim and fixed it at \$3,962,000.

One point in connection with the letter-impression book cannot be passed without notice. It is contended that what passed between Garth and the superintendents in

charge of the property, in the form of letters or reports by the latter to the former, was not admissible in evidence against the company. *This proposition cannot be sus-^[498]tained. The superintendents placed at the mines were its representatives in charge of the company's property. What they did at the locality of the property in and about its management were the acts of the company, so far as those acts were within the scope of the business intrusted to them. So what they said while engaged in managing and with reference to the management of the property, particularly what they reported to their principal in respect to the condition of the property and their acts in the course of the business, constitute part of the *res gestæ* of the controversy between the parties. The vital inquiry in this cause is whether the company's representatives at the mines were prevented by the Mexican authorities from developing and working them, whereby it was forced to abandon the property. Surely, what those representatives said and did or forbore to do at the mines, bearing upon that inquiry, would have been part of the *res gestæ* and admissible in evidence against the company. Upon like ground, their written reports or letters to the company while in charge of the property and in respect of its management are admissible in evidence so far as they bear upon the same inquiry and constitute a part of the *res gestæ*. The rule, we think, is accurately stated by Greenleaf, who, after saying that the act of declaration of each member of a partnership in furtherance of the common object of the association is the act of all, because by the very act of association each one is constituted the agent of all in respect of the common business, says: "A kindred principle governs in regard to the declarations of agents. The principal constitutes the agent his representative, in the transaction of certain business; whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents. And, 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*.' They are of the nature of original evidence, and not of hearsay; the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not an admission of *some other fact. But it must be^[499] remembered that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and, therefore, it is not nec-

essary to call the agent himself to prove it; but, wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it; and it follows, that, where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being hearsay." Vol. 1, § 113. See also Story, Agency, § 134.

Upon a careful scrutiny of all the evidence we are of opinion that so far from the Mexican government being legally responsible for the losses falling upon the company, its investment was without profitable results because the company did not have or did not furnish to its superintendents at the mines the funds required for their successful development, and did not find the property to be as valuable as they had supposed. All this is apparent from the reports made from time to time to the company by its superintendents, duplicate originals of which are to be found in the letter-impression book which was not before the commission. The identity of that book is fully established and the Mexican Republic is not fairly chargeable with negligence in not having discovered it sooner. It is certain that that government, within a reasonable time after it received the book, delivered it to the Department of State, and called attention to the important and vital facts disclosed by it, so that the United States could take such action as its sense of duty suggested.

[500] Our conclusion is that the question stated in the act of 1892—whether the award in question "was obtained as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of false swearing or other false *and fraudulent practices on the part of the said La Abra Silver Mining Company, or its agents, attorneys, or assigns"—must be answered in the affirmative as to the whole sum included in the award. That company placed before the commission a state of facts that had no existence, and which we are constrained by the evidence to say its principal representatives must have known had no existence, but which being credited by the commission under the evidence adduced before it brought about the result complained of in the bill. The whole story of losses accruing to that company by reason of wrongs done by the authorities of Mexico, is, under the evidence, improbable and unfounded. We do not wish to be understood as saying that the company did not meet with losses on account of its investments in this mining property. But we do adjudge that it had no claim which, upon any principle of law or equity, it was entitled to assert against the Republic of Mexico. The decree below is affirmed.

Mr. Justice **Gray** did not hear the argument on the facts and took no part in their consideration. Mr. Justice **McKenna** took no part in the decision.

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UNITED STATES, Appt.,
v.

ANTONIO SERAFIN PENA, L. Z. Farwell, and M. Z. Farwell, and Jose A. Garcia, et al.

(See S. C. Reporter's ed. 500-509.)

Time for appeal from court of private land claims—postponement by dereliction of United States attorney—dismissal for want of assignment of errors—appeal allowed by associate justice—Mexican grant in severalty—effect of long-continued possession—possession interrupted by war—additional grant after treaty of Guadalupe Hidalgo.

1. The right of appeal from the court of private land claims on the part of the United States continues to exist under § 9 of the act creating that court (26 Stat. at L. 858), until six months next after the receipt by the Attorney General of a statement of the case and the points decided.
2. The sufficiency of the reasons for the delay of the United States attorney in giving a notice to the Attorney General of a judgment confirming a private land claim, whereby the time for an appeal by the United States is extended, is shown by an allowance of the appeal by a justice whose attention was called to this question.
3. An appeal will not be dismissed for want of an assignment of errors, as the court, under rule 21, ¶ 4, may, at its option, notice a plain error not assigned.
4. An appeal may be allowed by an associate justice of the court of private land claims by virtue of § 9 of the act creating that court, which provides for appeals in the same manner and upon the same conditions as appeals from circuit courts of the United States, in which, by U. S. Rev. Stat. § 999, any judge of such court has the power to act.
5. A grant in severalty was made by a Mexican grant to an applicant and his associates, when it directed the alcalde to place them in possession, "setting forth a general donation, in which shall necessarily be stated the boundaries of said possession," also requiring the alcalde to "take charge of the general document of distribution, which shall be for the archives," and to "give testimonies therefrom as may be requested,"—especially when it appears that the alcalde distributed the lands to them severally, giving juridical possession accordingly.
6. Some interruption of possession under a Mexican grant during the war between the United States and Mexico is not fatal to the validity of the grant.
7. Neither a prefect nor an alcalde had power to make a grant of lands on behalf of the Mexican government.

[No. 72.]

Submitted October 27, 1899. Decided December 18, 1899.

A PPEAL by the United States from a decision of the Court of Private Land Claims. *Reversed.*

The facts are stated in the opinion.

Solicitor General **John K. Richards** and Mr. **Matthew G. Reynolds** argued the cause and filed a brief for appellant.

Messrs. Edward L. Bartlett and T. B. Catron argued the cause and filed briefs for appellees.

Contentions of counsel sufficiently appear in the opinion.

[501] *Mr. Justice **Brewer** delivered the opinion of the court:

This case comes from the court of private land claims, and the first contention of appellees, made on a motion to dismiss the appeal, is that it was not taken in time. The decree was entered December 1, 1896, and the appeal was not allowed until April 14, 1898. Section 9 of the act creating the court of private land claims (26 Stat. at L. 858), while giving to either party the right of appeal within six months from the date of the decision, also provides that on the rendition of a judgment confirming any claim it shall be the duty of the attorney of the United States to notify the Attorney General in writing of the judgment, giving a clear statement of the case and the points decided,—a statement to be verified by the certificate of the presiding judge of the court; and also that if the Attorney General shall not receive such statement within sixty days next after the rendition of a judgment the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of the statement. It appears in the record, from the certificate of the judge allowing the appeal, that no such statement was sent to the Attorney General until March 9, 1898, or received by him until March 25, 1898. So, within the letter of the statute, the time for an appeal on the part of the United States had not expired.

[502] *It is also insisted that it is the duty of the United States attorney to give this notice, and that, therefore, his dereliction cannot enlarge the time within which the government must act if it wishes to appeal. Can he, it is asked, continue indefinitely the right of appeal? In the brief filed by the government is a statement of the reasons for the delay in giving the notice, but it is unnecessary for us to enter into any examination of the matter. It is enough that it was called to the attention of one of the justices of the trial court, who has, by allowing the appeal, approved the action of the attorney. It is for the party challenging such action to show that it was wrong.

A third proposition is that no assignment of errors is annexed to the transcript, as required by §§ 997 and 1012 of the Revised Statutes. But this is not sufficient to compel a dismissal of the appeal. Paragraph 4 of rule 21 of this court provides that the court may at its option notice a plain error not assigned. *School District v. Hall*, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417.

A final contention is that the allowance of appeal was not made by the presiding judge but by one of the associate justices of that court. But the provision of § 9 is that appeals shall be taken in the same manner and upon the same conditions as appeals from

the judgments of a circuit court of the United States, and by § 999 of the Revised Statutes any judge of such court has the power to act. The rule is different in cases coming from a state court. *Havner v. New York*, 170 U. S. 408, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631.

There is no sufficient reason for sustaining the motion to dismiss, and it is denied.

Coming now to the merits of the case, it is unnecessary, in view of the contentions of the government, to which alone we direct our attention, to consider other than two matters, to the understanding of which a brief statement of facts is necessary. In 1836 Jose Julian Martinez and others made application to the ayuntamiento of Ojo Caliente for a tract of public land, called "the Petaca." That body declared its opinion that the grant should be made, and thereupon the governor signed this order:

Santa Fé, February 25, 1836.

*Having seen the action of the ayuntamiento [503] to of Ojo Caliente of date 22d instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right herein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession, and without prejudice to any third party; also binding the grantees to the obligations prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonios therefrom, as may be requested of him, on payment of his corresponding fees. Perez.

In pursuance of this order the alcalde proceeded to give juridical possession, and this is the report of his action:

For the years one thousand eight hundred and thirty-six and eight hundred and thirty-seven.

At Santa Cruz del Ojo Caliente, jurisdiction of this name, on the twenty-fifth day of the month of March, one thousand eight hundred and thirty-six, in compliance with the decree of the civil and military governor of the Territory of New Mexico, Alvino Perez, of date February 25th of the same year, in which he directs me to place in possession the petitioners who have applied for the Petaca tract of land, and as is set forth in their petition of date 29th of January of the same year, I proceeded to distribute said land in the presence of the parties interested, giving to each one of those mentioned in the list one hundred and fifty varas in a direct line, designating to them as their boundaries on the south the entrance to the canoncito and lands of Jose Miguel Lucero, on the north the hill commonly called the Tio Ortiz Hill, on the east the creek of the aguaje of the

[504] Petaca, and on the *west the boundary of the Vallecito grant, within which limits the said new grantees were located. Of these I donated only to citizen Felipe Jaquez from the boundary of Vicente Martin to that of Eusebio Chaves, the land being a narrow strip and of little utility; thereupon I donated to citizen Manuel Lujan two small valleys, which were not measured with the line and reach to the distribution of the said canoncito, and I donated to citizen Mariano Pena two small valleys, very narrow, without varying; and, continuing, I donated to citizen Antonio Eluterrio Ortiz, in the same canoncito, a small valley, also without varying; following the same course in the said canoncito, I donated to citizen Jose Francisco Lucero a small valley, also without varying, and to Jose Antonio Lucero another small valley, the boundary thereof being on the south the mouth of the same canoncito, leaving therefor a plaza one hundred and fifty varas, and fifty for women's gardens and fifty for ingress and egress, there remaining at the mouth of the canada de la Dorada, for common watering places, one hundred and fifty varas in a direct line, which donation I made in the name of the national sovereignty, in conformity with the law on the subject, the grantees mentioned in the annexed list understanding that the pastures, forests, waters, and watering places are in common, and they were further informed that he who fails to occupy and cultivate the land granted within the term of five years, in order to acquire title, the same cannot be by him sold, exchanged, or alienated, nor will he be admitted in a new settlement; and if any should of their own accord abandon the tract, they remain informed further that they possess no right, such being the requirements of law; and being informed of and agreeing to all this, they received the accepted possession, in virtue of which they plucked up herbs, leaped, cast stones, and shouted with joy, saying, God be praised, long live the nation, long live the sovereign congress and the law that governs and protects us, and other manifestations of pleasure, by virtue of which they took possession; and, that it may so appear, at all times, I, under this decree, signed this grant and donation with all the authority His Excellency was pleased

[505] to confer *upon me for the purpose set forth in the above petition and expressed in said decree attached to the present grant, the witnesses being the citizens Jesus Maria Barela and Jose Maria Barela and Jose Francisco Lucero, as properly made.

Jose Antonio Martinez.
Jesus Maria Barela.

There was given to Juan de Jesus Jaquez from the boundary of Jose Gabriel Vigil to a pinabete on the north; valid (Rubric)

At the close of this follows the list referred to in the report.

What was the scope and effect of this grant? Obviously we think to give to each individual named in the list the particular tract set apart to him. It was a grant in severalty, and not one of a single large tract

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to several persons to be by them held in common or distributed among each other. It matters not that the petition for this grant was in the name of only two or three individuals, for it was not an uncommon thing for one or more to appear as the representatives of a body or a number of persons. The language of the order of the governor seems to contemplate a grant in severalty, for it speaks of "the general donation, in which shall necessarily be stated the boundaries of said possession." The outer limits within which the grants are to be made are to be stated, and within those limits the several grantees are to have their possessions. Again, the provisions that "the alcalde shall take charge of the general document of distribution" and "give testimonios therefrom as may be requested," carries the same suggestion. The alcalde is to take charge of this general document for filing in the archives, but while holding it he is to give testimonios from it to the several parties who receive grants within the out-boundary limits.

But whatever doubts might arise from an examination of the governor's order, if that was the only document to be considered, the report of the alcalde's proceedings shows affirmatively that he distributed the lands in the presence *of the parties interested, "giving to each one 150 varas in a direct line." [506] He evidently understood that he was to distribute this land among certain individuals. He proceeded to do so and gave juridical possession accordingly. Whatever may be thought of his interpretation of the governor's order, the only juridical possession which is shown to have been given is juridical possession in severalty to the parties named in the list. The original petitioners were never put, so far as the record shows, in juridical possession of the entire tract, and such a grant, if it was so intended, was never made effective by any juridical possession. We think it more in consonance with justice and equity to hold, not that the grant was of an entire tract which never became operative because of a failure to give juridical possession, but that the alcalde rightfully understood it as a grant in severalty, and giving juridical possession vested in the grantees the tracts of which they were so placed in possession. *United States v. Santa Fé*, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472; *United States v. Sandoval*, 167 U. S. 278, 42 L. ed. 168, 17 Sup. Ct. Rep. 868; *Rio Arriba Land & Cattle Co. v. United States*, 167 U. S. 298, 42 L. ed. 175, 17 Sup. Ct. Rep. 875.

While the evidence as to the possession subsequent to the action of the alcalde is not very specific or entirely satisfactory, yet we think it is a fair conclusion that the parties did go into possession and continued that possession until the cession by the treaty of Guadalupe Hidalgo. It is very likely, as suggested, that during the war between Mexico and the United States the possession was in some respects at least interrupted, but such interruption cannot be adjudged fatal

to the validity of the grant. We, therefore, are constrained to hold that this grant should be sustained as a grant in severalty to the individuals named in the list.

The other matter which requires notice arises upon these facts: The treaty of Guadalupe Hidalgo was signed February 2, 1848, ratifications were exchanged May 30, 1848, and proclamation made July 4, 1848. By this treaty New Mexico was ceded to the United States, but for some time prior to and during that year our forces were in possession of that territory. In the month of [507] March, 1848, these proceedings *were had. The prefect, upon application, made an order to the alcalde, of which this is a copy:

In fulfilment of the discharge of your duty you will go to the point of La Petaca to place in possession all the individuals who are noted down in the grant of said possession, which ought to be in the archive under the charge, giving the lots which are found vacant to those persons who ask for them and who are unprovided, the equality in all the possessions, and that they pay you your fees.

Ojo Caliente, March 20, 1848.

Salvador Lucero (Rubrica)

Prefect of Rio Arriba.

To the Alcalde Don Vicente Jaramillo.

In pursuance of this order the alcalde proceeded to make the further distribution, as appears from the following report:

General list, formed at the new possession which they commonly call La Petaca, made to-day, the 27th of March, of the year of our Lord 1848, in conformity to the superior decree of the prefect, Don Salvador Lucero, where he orders me that I place in possession those citizens who justly may have died or are not present; thus it is that, having stopped at the first boundary, which consists of the plaza, upwards, accompanied by the retiring justice, Don Bernardo Valdez, and my clerk, Vicente Abilucea y Cordoba, and all the municipality of citizens, and for the exact fulfilment I stated in a loud voice that I was going to measure the land in the name of the Territory of New Mexico, and that they shall receive that concession in the name of the Constitution of the United States, etc., and that measurement to the parties placed in possession was begun by the retiring justice of the peace, Don Bernardo Valdez, of that which he had donated from the year 1843, and they are the following.

Then follows a list of names, and the report closes in these words:

And in order that this may in all time ap- [508] pear, which are *required by the law, they took possession of it by the authority and in the name of the Territory of New Mexico and respecting the Constitution of the United States. and I, the attending witness, 254

and the retiring justice signing to-day, the day of the above date *ut supra*.

Note.—The citizens placed in possession in this grant with 150 varas and with the others who may have more shall have to enjoy them in the name of the Territory of New Mexico and the Constitution of the United States, as this is the authentic disposition of the retiring and new officials, and by superior order there was given and donated to them the said possessions in the regular rule of 150 varas and in a straight line on both sides of the stream. In order that this favor may have the force and validity which the laws cite, we sign and authenticate it with all the powers which are conferred, in order that there may be no change and that it may not be again donated by another justice, except on account of abandonment of five years, or on account of not wishing to work in the fulfilment, benefit, proper, but then through the mayordomo report will be made to this court in order that another may enjoy that which he may reject; and this donation was signed and given to-day, the 27th of March, of the year of our Lord 1848.

Jose Vicente Jaramillo, [Scroll.]

Justice of the Peace

of the County of Rio Arriba.

Attending:

Vicente Abilucea. [Scroll.]

Bernardo Valdez, Retiring Justice.

In respect to this it is enough to say that in so far as it was an attempt to create new rights it was beyond the power of the officials who assumed to act. The order of the prefect has a twofold aspect. It directs the alcalde to put in possession those who were named in the original grant, and this may have been within the scope of his authority. But it also attempts to make a grant to additional persons, and this was beyond his power. *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53. Neither could the alcalde make such a grant. *Hays v. United States*, 175 U. S. 248. *ante*, [509] p. 150, 20 Sup. Ct. Rep. 80. Indeed it may well be doubted whether, since the country was in the possession of the United States forces, and a treaty had already been signed, which was shortly thereafter ratified, for the cession of the entire territory, any Mexican official could by new grants diminish the amount of land which was to become the property of this government. And of course it goes without saying that no such officials had authority under the Constitution and laws of the United States to grant public lands. This whole proceeding may rightfully be ignored except so far as it indicates those who took title under the original grant, or discloses those who were their successors in interest. Further than this it has no significance.

The decree of the court of private land claims will be reversed, and the case remanded with instructions to enter a decree in favor of the original grantees or their successors in interest for the lands granted in severalty. It may be necessary to take further testimony for identifying such par-

ties, and the trial court is at liberty to take such testimony.

UNITED STATES, *Appt.*,

v.

J. FRANCISCO CHAVEZ and Pueblo of Isleta.

UNITED STATES, *Appt.*,

v.

J. FRANCISCO CHAVEZ and Pueblo of Isleta.

(See S. C. Reporter's ed. 509-525.)

Mexican grant—effect of ancient possession—presumption in favor of title—presumption on presumption—confirming grant to successors in title—form of confirmation.

1. Long and uninterrupted possession of real property, in the absence of rebutting circumstances, creates a presumption that formal instruments or records of title have once existed, even if they cannot be found.
2. A presumption of title arising from long possession extends to all that may be necessary to the repose of the title, and is not limited to a presumption of only one step in the title.
3. Confirmation of a grant to persons claiming to derive title by conveyances and legal succession from the grantee may be made under the act of Congress of 1891, § 8, to the claimants alone, without making it more generally to the "assigns and legal representatives of the original grantee," since the confirmation excepts lands disposed of by the United States, and is made subject to any conflicting private interests, rights, or claims.

[Nos. 38 & 39.]

Argued October 16, 17, 1899. Decided December 18, 1899.

A PPEALS from decisions of the Court of Private Land Claims confirming title to petitioners. *Affirmed.*

Statement by Mr. Justice **McKenna**:

To the land involved in these cases the appellees claimed a complete and perfect title, and petitioned the court of private land [510] claims under § 8 of the act establishing *the court to so adjudge and confirm it. After due hearing the court did so adjudge, and entered a decree confirming the title to petitioners, from which decree the United States prosecuted this appeal.

The basis of the title to the southern portion of the tract (No. 38) is a grant made on the 5th day of November, 1716, to Captain Antonio Gutierrez by Captain Felix Martinez, the then Governor and Captain General of New Mexico. The appellees claim to derive from Gutierrez by conveyances and legal succession, and also claim a continuous possession in him, their predecessors in interest, and themselves, from the date of the grant to the present time.

The course and the conveyance of the title
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is exhibited by an abstract filed by the claimants in the lower court. It is as follows:

Abstract of Title.

The claimant is unable to present any direct conveyance from the original grantee or from his heirs with which he is in any way connected. He relies upon the papers contained in archive No. 178 in the office of the surveyor general for New Mexico, to show that the original grantee, Antonio Gutierrez, took possession of the said tract of land and afterwards transferred the same to Diego Padilla, and that said Diego Padilla conveyed said land to Diego Borrego, who in turn conveyed the same to Nicolas de Chavez, these conveyances being made in the years 1734 and 1736. Claimant files herewith copies and translations in triplicate of said archive No. 178.

Claimant avers that it appears from archive No. 371, in the office of the surveyor general for New Mexico, that at some time prior to the year 1785 the tract claimed had become the property of Clemente Gutierrez, the said archive No. 371 is a record of proceedings as to the estate of the said Clemente Gutierrez, and claimant files herewith copies and translations in triplicate of so much thereof as shows the inventory of all the real estate belonging to said Clemente Gutierrez and the *hijuela* given to each of the heirs showing their respective shares of said real estate.

*Claimant relies upon the following described deeds to connect him with the title of said Clemente Gutierrez and through him with the original title to the grant: [511]

Deed of Jose Lorenzo de la Pena, for himself and his sister Mariana and his brother Jose Rafael de la Pena, to Francisco Xavier Chavez, dated September 20, 1818, for an undivided fifth of the Bosque de los Pinos, bounded on the north by the lands the pueblo of Isleta, on the south by the lands known as those of Los Lentes, on the east by the hills, and on the west by the Rio del Norte, a translation of which deed, made in the year 1855 by the official translator of the office of the surveyor general for New Mexico, is now on file in this court in case No. 64, and triplicate copies thereof are filed herewith.

Deed from Francisco Sarracino, representing his mother, Maria Luisa Gutierrez, one of the children of Clemente Gutierrez, to Francisco Xavier Chavez, for an undivided interest in the ranch of the Bosque de los Pinos, bounded on the north by the league of the pueblo of Isleta, on the south by residents of Valencia, on the east the plain, and on the west the Rio del Norte, dated October 19, 1821, a translation of which deed, made in the year 1855 by the official translator of the office of the surveyor general for New Mexico, is now on file in this court in case No. 64, and triplicate copies thereof are filed herewith.

A deed from Juan Nepomuceno Gutierrez and Apolonia Gutierrez to validate the sale made by their father, Lorenzo Gutierrez, of the portion to which he and Lorenzo Gutierrez

rez were entitled in the Bosque de los Pinos, dated December 27, 1839, a translation of which deed, made by the official translator of the office of the surveyor general of New Mexico in the year 1855, is now on file in this court in case No. 64, and triplicate copies thereof are filed herewith.

Claimant avers that the originals of the three deeds above described were filed in the office of the surveyor general in 1855, and that they appear to have been withdrawn from that office by J. Bonifacio Chavez on the day of , 187 , and cannot now be found, although the official translations made at that time have been preserved.

[512] *The said Francisco Xavier Chavez, to whom the said deeds were made, was the grandfather of this claimant, and claimant has inherited from his said grandfather an interest in the property conveyed by said deeds.

A fuller statement of the documentary evidence may be omitted except of the original grant. It was produced from the Spanish archives, and its translation is as follows:

Plaintiff's Exhibit A. Archive 315.

[Translation.]

1716 (1.) No. 449.
To the Governor and Captain General:

I, Captain Antonio Gutierrez, a resident of the town of Albuquerque and a native of this Kingdom, appear before you in due legal form, and I state that, being very much in need of lands on which to plant in order to support my family, and also to the end that my sheep may have room to scatter out, and there being an uncultivated and unoccupied tract of lands below Ysleta, apparently at a distance of two leagues, which formerly was held by Cristobal de Tapia, of which tract will you be pleased to make me a grant in the name of His Majesty in the same manner as it was held by said Cristobal de Tapia, and, if you be pleased to grant it to me, will you also order that the real possession be given me, designating to me boundaries and landmarks, in order that no prejudice may result to me in its possession?

Wherefore, I ask and pray, with due humility, that you will be pleased to make me the grant that I ask for in the name of His Majesty, as one who represents his royal person, and I swear in the name of God our Lord, and by the sign of the Holy Cross, that this my petition is not in bad faith, and whatsoever is necessary, etc.

Antonio Gutierrez. [Scroll.]

Note.—I ask and pray that the boundaries belonging to said tract be designated to me—on the north an arroyo with some cottonwood trees that comes down from the hills, on the south the pueblo of San Clemente, on the east the Del Norte *river, and on the west the hills of the Puerco river; and I swear in due legal form that my petition is not in bad faith, and whatever is necessary.

Antonio Gutierrez. [Scroll.]

Presentation.

At the town on Santa Fé on the fifth day

of the month of November, in the year one thousand seven hundred and sixteen, before me, Captain Felix Martinez, Governor and Captain General of this Kingdom and provinces of New Mexico, and castellan of its forces and garrisons for His Majesty, it was presented by the party therein named.

Decree and Grant.

And it having been examined by me, I treated as properly presented in accordance with law, and, in view of the fact that it is His Majesty's will that his lands should be settled and fortified, in his royal name I make to the petitioner the grant that he asks for, as he describes it and as Cristobal de Tapia formerly enjoyed it, without prejudice to a third party who may have a better right, and I command Captain Baltazar Romero that as soon as he be notified with this my decree he shall place the petitioner in real possession; and this shall serve him as a sufficient formal title for his protection, and when these proceedings shall have been had he will transmit this grant and possession to my civil and military secretary, in order to make him a certified copy thereof, and that this original petition remain in the said archives; and in witness thereof I sign it with my civil and military secretary.

Felix Martinez. [Scroll.]

Before me,

Miguel Tenorio de Alba, [Scroll.]

Civil and Military Secretary.

Archive No. 178 consisted of three instruments. Two of them were respectively entitled an "instrument of donation," and of "real sale," and were respectively executed on the 7th and 11th of January, 1734, one Don Diego Borrego being grantee in both. The third was a conveyance from Borrego *to [514] Don Nicolas Chavez. It is only necessary to quote portions of the first two instruments. From the first as follows:

"In this villa of San Felipe de Albuquerque, on the seventh day of January of the year one thousand seven hundred and thirty-four, before me, Captain Juan Gonzales Bas, alcalde, mayor and war captain of the said town and its jurisdiction, personally appeared Diego Padilla, whom I certify I know, who, in the presence of two witnesses, said that he gave and did give freely to Don Diego Borrego, to wit, a piece of land which, as will hereinafter more fully appear, he had and possesses by donation, which, in favor of the said Padilla, was made by Captain Antonio Gutierrez, and its boundaries are: On the north, lands of Joaquin Sedillo; on the east, the Rio Grande; on the south, land of the said Diego Padilla, there serving as a landmark on the said boundary the midway line between the two houses which the said Padilla built near the boundary line of the said donation, and on the west with the boundary line called for in the title papers of the whole tract which the said Padilla has; and as I say of the said lands, he makes gift and donation and conveys his own right, domicil, and seign'ory, the said Diego Padilla, with the consent of his wife

and children, to the said Don Diego Borrego, without any consideration other than his own will. . . ."

From the second the following recital, "personally appeared before me [the same officer as in the other instrument] Antonio Sedillo, the legitimate son of Joaquin Sedillo, and forced heir of the aforesaid." And further, that "he gave and did give in real sale a tract of land down the river and below the pueblo of Iseleta. . . . And as I say, the said Antonio Sedillo gives and did give in real sale the said tract, after consultation and with the consent of his mother and brothers and sisters, who gave him authority for the same, because the said Joaquin died in debt, and in order to procure the amount which he owed; and the said Antonio Sedillo acknowledges that the said tract was acquired by his said father in part by grant in the name of His Majesty and in part acquired and held under real sale, as shown by five instruments which he delivered; and the boundaries of the said tract

[515] are: On the north, the *line of the league of the Iseleta pueblo; on the east the Rio Grande; on the south a twin alamo, called by some the Culebra; and on the west the ridge of the Puerco river; and he says that the said tract he gives to Don Diego Borrego for the price and sum of two hundred dollars. . . ."

It will be observed that there are only direct conveyances from the original grantee, Antonio Gutierrez, to Don Diego Borrego, who received the title in 1734. Borrego conveyed to Chavez in 1736. From the latter no transfer is shown to anyone, but that the title passed from him in some way to Clemente Gutierrez prior to 1785 is claimed to be established by what is called the "proceedings and inventory, division and partition, of the property which he left at his death among his wife and five children, concluded in the year 1785. (Archive No. 371.)"

The description in the inventory is as follows:

"Idem. A ranch below the boundary of the pueblo Isleta, commonly called San Clemente, Barrancas, and Las Pinos, of which they have possession, although there is no title deed of its boundaries, estimated at \$1,200."

The claimants trace title directly to the widow and children of Clemente Gutierrez.

The pueblo of Isleta presented a petition in the court below in which it adopted the allegations of the original petition and joined in the prayer for the confirmation of the validity of the title to the heirs and legal representatives of Antonio Gutierrez.

At the close of the testimony counsel for claimant stated, counsel for the government not objecting, that "it is admitted by the United States to be a fact that the pueblo of Isleta has had open and notorious possession and use of lands on the west side of the Rio Grande along between the boundary of the pueblo and the lands of the Los Lentos as far back as the memory of the oldest man living within the pueblo can extend, and that

such possession and use have been claimed to be under a purchase from the heirs of Clemente Gutierrez, of which some documentary evidence has been presented in the paper executed by Lorenzo Gutierrez, dated May 3, 1808, and *that said paper, which is [516] marked "Plaintiff's Exhibit G," and also Plaintiff's Exhibits H and I, come from the custody and control of the officers of said pueblo, who have had them as far back as memory can extend."

Exhibit G, referred to, is as follows:

[Translation.]

Don Lorenzo Gutierrez, captain of militia, commandant in the field, alcalde of second election of the town of Albuquerque, its jurisdiction and frontier, etc., etc.

Whereas the principal men of the pueblo of San Agustin de la Isleta have come before me asking for a deed of conveyance for the lands which, from the boundary of the said pueblo to that of Los Lentos, from south to north, were sold to the said pueblo by my predecessor, Don Mariano de la Pena, from the estate of my mother, Dona Josefa Polonia Baca, of which I am the administrator, of which sale the documentary evidence is in the possession of the alcalde of first election of this said jurisdiction, Don Manuel de Artega, from whom, he being seriously ill, it cannot be obtained until he gets better or dies, and it being probable that it is deposited in the archives under his charge, in order to avoid the repeated petitions of the said men, and knowing that the purchase was really made, I give them the present, which I sign for their security, signing it in order that it may so duly appear, with two assisting witnesses, in this place of Parjarito, on the third day of the month of May of the year one thousand eight hundred and eight.

Lorenzo Gutierrez. [Rubric.]

Assisting witness:

Agustin de la Peña. [Rubric.]

Assisting witness:

Manl. Ruvi. [Rubric.]

The appellees also presented to the court of private land claims a petition for the confirmation of grant alleged to have been made "by the proper authorities of the government of Spain to one Joaquin Sedillo, which land lies immediately south of the lands of the Indian pueblo of Isleta, and was bounded on the north by the line of the league of said pueblo, *on the east by the Rio Grande, on the [517] south by a twin alamo, called by some the alamo de la Culebra, and on the west by the cefa of the Rio Puerco." This is the northern portion of the tract contained in the decree of confirmation.

It was further alleged "that the original grant papers evidencing the said grant have been lost or destroyed, and cannot now be produced. The fact of the existence of said grant is, however, shown by papers which constitute a portion of the archive 178 in the office of the surveyor general for New Mexico, copies and translations whereof are filed herewith in duplicate."

The matter of the petition constitutes case

No. 39 on the docket of this court, which, though separately appealed, has been submitted with case No. 38. The lands in each being contiguous—the north boundary in one being the south boundary of the other, and having common claimants and possession, and the title in each being supported in part by the same evidence—the court of private land claims consolidated them and included their confirmation in the same decree.

The petition alleged on information and belief, as to the southern boundary, as the petition in 38 alleged as to the northern boundary of the land therein described, that it “has been completely destroyed and its location cannot now be identified with certainty, and it is probable that no tradition of its location now exists, for the reason that the said tract of land and the one immediately south thereof had become united in ownership in the hands of one person as early as the year 1734, as will fully appear by reference to the said archive 178, hereinbefore mentioned.”

The archives referred to and the documentary evidence are the same as in No. 38, except there is no grant.

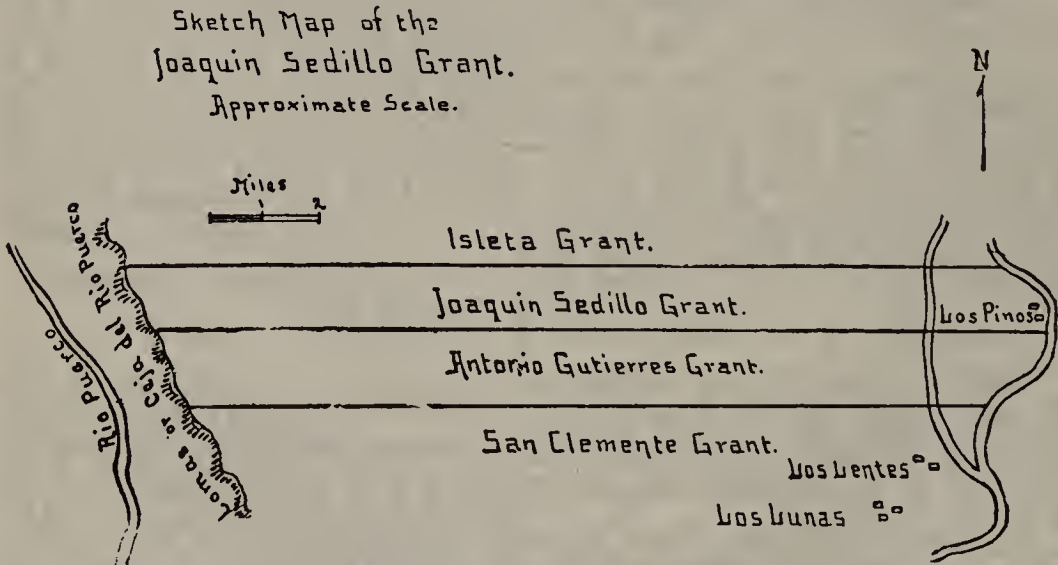
The oral evidence of possession was given by the claimant, Francisco Chavez. He testified that he became personally acquainted with the tract of land commonly known as Bosque de los Pinos, in Valencia county, New Mexico (the tract confirmed to him),

about 1839, and it was then in the possession of a relation of his grandmother. And from the records he *knew his grandfather [518] died in 1829, and from what he had been told by the family, his grandfather, before the latter’s death, “possessed it, farmed it, and kept cattle and sheep upon it.” He further testified since he has known it, his father had possession, then his mother, and after her death the heirs, and the possession had never “in any way been disturbed or encroached upon by other people.” The boundaries of the Bosque de los Pinos he gave as follows: “On the north, by the Isleta Indian pueblo lands; on the east, by the old river bed; a stone marks the northeast boundary, and on the south by the town of Peralta; on the west, by the present river.”

The river referred to is the Rio Grande del Norte, which at the time of the original grants was their eastern boundary, but which some time subsequently to their date changed its channel. The land between the old and new channels is denominated in the evidence and in the decree of the court as “Bosque de los Pinos,” and was confirmed to Francisco Chavez. All the rest of the tract was confirmed to the pueblo of Isleta.

The following sketch, which was introduced in connection with the testimony of Chavez, shows the relation of the grants, the location of some of the natural objects referred to, and the change in the river bed:

[519]



Mr. William H. Pope argued the cause and, with Solicitor General John K. Richards and Mr. Matthew G. Reynolds, filed a brief for appellant.

Mr. Frank W. Clancy argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[518] *Mr. Justice McKenna delivered the opinion of the court:

The title asserted by appellees is deficient in the support of direct evidence. Is the deficiency supplied by the probative force of the possession of the land? Private ownership of the property with possession is

claimed for over one hundred and thirty years before the cession of the territory to the United *States. A continuous possession is shown from some time prior to 1785, inferentially from 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico. Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the territory to the United States no one questioned them. Succeeding to the power and obligations of those governments, must the United States do so? This is insisted by their counsel, and yet they have felt and expressed the equities which arise from the circumstances of the case.

[520]

Whence arise those equities? That which establishes them may establish title. Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment, in the absence of rebutting circumstances, as formal instruments, or records, or articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, Do such presumptions arise in this case, and do they solve its questions?

Fletcher v. Fuller, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. Rep. 667, was an action of ejectment. Both parties claimed the land in controversy under one Francis Richardson, who died in 1750; the plaintiffs under his daughter, Abigail Fuller; the defendants under his grandson. The question arose whether a deed could be presumed to have been executed by Abigail Fuller to the grandson or to his father, uniting all interests in him. It was presented in instructions. The defendants asked an instruction that the jury might presume the execution of such a deed to their ancestor in title. The court refused, and instructed the jury as follows: "Of course, gentlemen, if you find that you can presume a grant, if you find from the testimony that there was a lost deed which passed from Abigail Fuller to Jeremiah Richardson, or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jencks, that makes the title of the defendants here complete. . . . But, gentlemen, you are to look into the evidence upon this question of a grant, and if the evidence in favor of the presumption is overcome *by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."

"The defendants requested the court to instruct the jury 'that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor.' This instruction was refused, and on error to this court it said, through Mr. Justice Field, that the purport of the charge was in effect 'that in order to presume a lost deed the jury must be satisfied that such a deed had in fact actually existed; . . . therein there was error."

"In such cases 'presumptions,' as said by Sir William Grant, 'do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says (*Elldridge v. Knott*, 1 Cowp. 215), merely for the purpose, and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles must forever remain imperfect, and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested.' *Hillary v. Waller*, 12 Ves. Jr. 239, 252."

And quoting Mr. Justice Story in *Ricard* 175 U. S.

Williams, 7 Wheat. 59, 119, 5 L. ed. 398, 413, "a grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.' It is not necessary therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its *existence would be a so-[522]lution of the difficulties arising from its non-execution."

And, further, the supreme court of Tennessee in *Williams v. Donell*, 2 Head, 695, 697, "it is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish a probability of the fact that, in reality, a grant was ever issued. It will afford a sufficient ground for the presumption to show that, by legal possibility, a grant might have been issued. And this appearing, it may be assumed—in the absence of circumstances repelling such conclusion—that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

These principles were affirmed as applicable to grants of the kind we are considering in *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57. Mr. Justice Shiras, speaking for the court, said:

"Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenleaf, Ev. 12th ed. § 17; *Ricard v. Williams*, 7 Wheat. 59, 109, 5 L. ed. 398, 410; *Coolidge v. Learned*, 8 Pick. 503.

"Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time, accompanied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *Nulum tempus occurrit regi*, yet, if the adverse claim could have had a legal commencement juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus

found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenleaf, Ev. § 45.

[523] *—"The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon (Best, Principles of Evidence, § 366), and was therefore a feature of the Mexican law at the time of the cession."

The application of these principles to the case at bar does not need many directing words.

It is contended by the government that no juridical possession is shown under the grant to the southern portion of the tract; that there is no grant shown to Sedillo of the northern portion of the tract; that admitting both are shown there is no evidence that the title which Don Diego Borrego received in 1734 was conveyed to Clemente Gutierrez, who was shown to have had the possession claiming title in 1785. To infer all these things, it is argued, is to build presumption on presumption, and carry constructive proof too far. The argument is not formidable. The instances mentioned are of the same kind as those in the cited cases, and the principle of the cases is not limited or satisfied by the presumption of only one step in the title. It requires the presumption of all that may be necessary to the repose of the title—to the absolute assurance and quietude of the possession. Quoting the language of the supreme court of Tennessee, approved by this court, it assumes that all "that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law." And, "There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Even acts of Parliament may thus be presumed, as also will grants from the Crown." Best, Presumptions, § 109.

The number of steps presumed does not make the principle different, and whether it would give more strength to rebutting testimony we might be concerned to consider if there was any such testimony.

We think there can be but one conclusion in the case. The possession of the land began in wrong or began in right. If in wrong, it must be shown. The maxims of the law declare the other way. Besides it is admitted that the pueblo of Isleta *has had open and notorious possession as far back as the memory of the oldest living inhabitant can extend, and that it was claimed under the heirs of Clemente Gutierrez, and evidenced by documents which came from the custody and control of the officers who have had them during like memory. Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose.

But there is some documentary evidence coming from a remoter time, and it has been discussed by counsel. We do not think it is necessary to consider it at any length. It

consists of the original grant to Antonio Gutierrez, three instruments of conveyance, one reciting the grant to Sedillo, and all asserting ownership and possession of the lands, and an inventory made of the estate of Clemente Gutierrez by the governor of New Mexico, then an official of Spain. The latter was made a judicial record, and the lands mentioned in it distributed among the heirs. It is to this possession that the appellees trace, as we have seen, and the questions which can arise about it—from whom derived and the rightfulness or wrongfulness of it—depend upon principles already sufficiently discussed. It is enough to say that Clemente Gutierrez died in possession, and his possession was proof of ownership.

It is further contended by the government that the record shows that the appellees do not hold the interests of all of the heirs of Clemente Gutierrez, and that, therefore, the court of private land claims should have confirmed the grant, "not to the claimants appearing before it, but to the assigns and legal representatives of the original grantee." And it is urged that "to make a decree in any other form is to conclude and affect the private rights of persons as between each other," and this the statute [of 1891] prohibits."

We do not concur in this view of the statute. By careful distinction it precludes such view. Section 8 of the statute under which the petitions were presented provides that persons claiming lands under a Spanish or Mexican title "that *was complete and perfect at the date when the United States acquired sovereignty therein shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for in other cases for confirmation of such title;" but the confirmation of such title "shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person, as between himself and other claimants or persons in respect of any such lands, shall be in any manner affected thereby."

It will be observed that the provision is that from the confirmation there shall be excepted land that shall have been disposed of by the United States. It is, however, made subject to "conflicting private interests, rights, or claims." The distinction is obvious, and the reason for it equally so. The proceeding is not a litigation between conflicting private interests; it is one against the United States, and determinative only of the title against the United States. To avoid confusion the lands that have been disposed of by the United States are required to be excepted from confirmation. To all other

interests and claims the confirmation is made subject. The forum for their determination is the ordinary courts. *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, ante, p. 78, 20 Sup. Ct. Rep. 28, and *United States v. Valdez de Conway*, 175 U. S. 60, ante, p. 72, 20 Sup. Ct. Rep. 13, decided at the present term.

Decree affirmed.

[526] FRED BARDES, Trustee, etc., Complainant,

v.

FIRST NATIONAL BANK of Hawarden,
Iowa, et al.

(See S. C. Reporter's ed. 526-528.)

Certificate of question of jurisdiction of district court—made before final judgment.

The use of a certificate to present to the Supreme Court of the United States a question of the jurisdiction of a district court in an action arising under the bankruptcy act of July 1, 1898, is subject to the general limitations of the act of Congress of March 3, 1891, under which the trial court cannot by certificate send up a question as to its own jurisdiction until after final judgment.

[No. 429.]

Submitted December 20, 1899. Decided December 22, 1899.

ON CERTIFICATE from the District Court of the United States for the Northern District of Iowa presenting the question of the jurisdiction of that court in a bankruptcy case which had not proceeded to final judgment. *Dismissed.*

The facts are stated in the opinion.

Mr. Clarence A. Brandenburg submitted the cause for complainant. Messrs William F. Lohr, Henry C. Gardiner, Frederick W. Lohr, Deloss C. Shull, and William H. Farnsworth were with him on the brief.

Mr. William Milchrist submitted the cause for defendant. Mr. John Hutchinson was with him on the brief.

[526] *Mr. Chief Justice Fuller delivered the opinion of the court:

This is a certificate from the district court of the United States for the northern district of Iowa. It appears therefrom that a bill of complaint was filed in that court sitting in bankruptcy by Bardes, trustee of the estate of Walker, who had been therein adjudged a bankrupt on his own petition, seeking to set aside the transfer of a stock of goods by the bankrupt, and to compel defendants to account for the goods or their proceeds, because the transfer was in fraud of the provisions of the bankruptcy act and of the creditors of the bank; that defendants inter-

[527] posed a demurrer to *the bill on the ground that the court could not take jurisdiction of the case, and that thereupon it was certified that the court "desiring to obtain the opinion and instruction of the Supreme Court of the United States for its guidance in the premises, hereby certifies to the Supreme Court for its consideration and determina-

tion the following questions," and four questions were thereupon propounded. And it was further ordered that the transcript transmitted to this court should contain the bill, the demurrer, and the certificate.

By the 24th section of the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), the Supreme Court of the United States, the circuit courts of appeals, and the supreme courts of the territories were invested with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." And it was also provided, § 25, d, that "controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

By the 5th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), it was provided that appeals or writs of error might be taken from the district courts or from the circuit courts direct to this court, among other cases, in any case in which the jurisdiction of the court was in issue, but that in such cases the question of jurisdiction alone should be certified from the court below for decision; by the sixth section, that in cases made final in the circuit courts of appeals, those courts might at any time certify to this court any questions or propositions of law concerning which they desired instruction for the proper decision of the cases, and this court might answer the questions, or might require the whole record and cause to be sent up for consideration; and also that in respect of cases so made final, it should be competent for this court to require by certiorari or otherwise any such case to be certified to this court for review and determination *with the [528] same power and authority as if it had been brought here by appeal or writ of error.

It was early held under that act (*McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118), that appeals or writs of error in cases in which the jurisdiction of the court was in issue could only be taken directly to this court after final judgment; and subsequently, in *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983, that review by appeal, writ of error, or otherwise, must be as prescribed by that act, and that the use of certificate was limited by it to the certificate by the courts below, after final judgment, of questions made as to their own jurisdiction, and to the certificate by the circuit courts of appeals of questions of law in relation to which the advice of this court was sought as therein provided. We there held that the act of March 3, 1891, covered the whole subject-matter, and furnished the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate.

The bankruptcy act has made no change in this regard, and as this case has not gone to judgment, the certificate must be dismissed.

NOTE.—As to cases certified,—see note to *Webster v. Cooper*, 13 L. ed. U. S. 325.

175 U. S.

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J. W. CUMMING, James S. Harper, and
John C. Ladeveze, *Plffs. in Err.*,
v.

COUNTY BOARD OF EDUCATION of
Richmond County, State of Georgia.

(See S. C. Reporter's ed. 528-545.)

*Injunction against maintaining high school
for white children—discrimination against
colored children—rights under Fourteenth
Amendment.*

1. An injunction that would compel a board of education to withhold all assistance from a high school maintained for white children is not the proper remedy for error of the board in failing to provide a high school for colored children and in turning the building and funds formerly used therefor to the use of primary schools for colored children.
2. A decision by a state court denying an injunction against the maintenance, by a board of education, of a high school for white children, while failing to maintain one for colored children also, for the reason that the funds were not sufficient to maintain it in addition to needed primary schools for colored children, does not constitute a denial

NOTE.—As to constitutional equality of privileges, immunities, and protection,—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

Constitutional equality of school privileges.

The right accorded to the youth of the state to attend the public schools maintained by the state is not a privilege or immunity appertaining to a citizen of the United States as such. Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Lelew v. Brummell, 103 Mo. 546, 11 L. R. A. 828, 15 S. W. 765; State ex rel. Clark v. Maryland Inst. for Promotion of Mechanic Arts, 30 Chicago Legal News, 138.

And the privilege of receiving an education at the expense of the state, being created and conferred solely by the laws of the state, and always subject to its discretionary regulation, may be granted or refused to any individual or class at the pleasure of the state. People ex rel. King v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232.

But when a uniform system of public schools has been adopted under the authority of the state, any discrimination in the enjoyment of its privileges on account of race is forbidden by the "equal protection" clause of the 14th Amendment. State ex rel. Clark v. Maryland Inst. for Promotion of Mechanic Arts, 30 Chicago Legal News, 138; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

In conflict with the cases first cited is a decision that the exclusion of negroes from public schools is a violation of their rights to equal privileges and immunities. State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 8 Am. Rep. 713.

Also that a statute excluding negro children from any share of the proceeds of the common school fund set apart by the Constitution, as well as from the annual school tax levied on the property of white persons, is unconstitutional. Dawson v. Lee, 83 Ky. 49.

So, a tax on persons of one color for schools open only to children of that color is unconstitutional as denying equal privileges and immunities. Pulitt v. Gaston County Comrs. 94

to colored persons of the equal protection of the law or equal privileges of citizens of the United States.

[No. 164.]

Argued October 30, 1899. Decided December 18, 1899.

IN ERROR to the Superior Court of Richmond County, State of Georgia, to review a decision refusing an injunction against a board of education to prevent maintenance of a high school for white children without also maintaining one for colored children. *Affirmed.*

See same case below, 103 Ga. 641, 29 S. E. 488.

Statement by Mr. Justice Harlan:

*The plaintiffs in error, Cumming, Harlan, [529]
per, and Ladeveze, citizens of Georgia and persons of color, suing on behalf of themselves and all others in like case joining with them, brought this action against the board of education of Richmond county and Charles S. Bohler, tax collector.

N. C. 709, 55 Am. Rep. 638; Markham v. Manning, 96 N. C. 132, 2 S. E. 40.

But the refusal by a private educational institution to admit a negro as a pupil on account of his color is not an abridgment of the "privileges or immunities of citizens of the United States," notwithstanding its agreement, in consideration of an annual appropriation from a municipal corporation, to educate a certain number of pupils to be nominated by members of the city council. State ex rel. Clark v. Maryland Inst. for Promotion of Mechanic Arts, 87 Md. 643, 41 Ati. 126.

Establishing separate schools for white and colored children does not violate the constitutional right to equal privileges and immunities if equal advantages are afforded for each class. People ex rel. King v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; McMillan v. School Committee of Dist. No. 4, 107 N. C. 609, 10 L. R. A. 823, 12 S. E. 330; People ex rel. Dietz v. Easton, 13 Abb. Pr. N. S. 159; State ex rel. Barnes v. McCann, 21 Ohio St. 198; State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 8 Am. Rep. 713.

So, a provision of a state Constitution that white and colored persons shall be taught in the same school is not repugnant to the 14th Amendment. Martin v. Board of Edu. 42 W. Va. 514, 26 S. E. 348.

And the neglect of the legislature and the board of education to make proper provision to afford equal facilities to colored children does not entitle them to attend the school provided for white children. *Ibid.*

The establishment of separate schools for white and colored children does not violate the constitutional right of the latter to the equal protection of the laws, although a school for colored children is not established in any district unless there are fifteen or more of them, and if there are less than that number they are allowed to attend any district in the county in which such school is established, and although the effect may be to compel them to go farther to reach school than white children have to go. Lelew v. Brummell, 103 Mo. 546, 11 L. R. A. 828, 15 S. W. 765.

In the petition filed by them it was alleged—

That the plaintiffs were residents, property owners, and taxpayers of Richmond county, the defendant board being a corporation created under an act of the general assembly of Georgia of August 23d, 1872, regulating public instruction in that county empowering the board to annually levy such tax as it deemed necessary for public school purposes;

That on the 10th of July, 1897, the board levied for that year for the support of primary, intermediate, grammar, and high schools in the county, a tax of \$45,000, which was then due and being collected;

That the petitioners interposed no objections to so much of the tax as was for primary, intermediate, and grammar schools, but the tax for the support of the system of high schools was illegal and void for the reason that that system was for the use and benefit of the white population exclusively;

That the board was not authorized by law to levy any tax for the support of a system of high schools in which the colored school population of the county were not given the same educational facilities as were furnished the white school population;

[530] That at least \$4,500 of the tax of \$45,000 was being collected *and when collected would be used for the support of such system of high schools;

That the board had on hand the sum of \$20,000 or other large sum, the proceeds of prior tax levies, in trust to disburse solely for legal educational purposes in the county, and would receive from the tax levy of 1897 and from other sources large sums in like trust, and that it was the owner and had the custody and control of school fixtures, furniture, educational equipments and appliances generally, holding the same in like trust; and,

That although the board was not authorized by law to use any part of such funds or property for the support and maintenance of a system of high schools in which the colored school population were not given the same educational facilities as were furnished for the white school population, it was using such funds and property in the support and maintenance of its existing high-school system, the educational advantages of which were restricted wholly to the benefit of the whiteschool population of Richmond county, to the entire exclusion of the colored school population, and that by such use of those funds and property a deficiency for educational purposes would inevitably result, to make which good additional taxation would be required.

The petitioners also alleged that they were persons of color and parents of children of school age lawfully entitled to the full benefit of any system of high schools organized or maintained by the board; that up to the time of the said tax levy and for many years continuously prior thereto, the board maintained a system of high schools in Richmond county in which the colored school population had the same educational advantages as the white school population, but on July

10th, 1897, it withdrew from and denied to the colored school population any participation in the educational facilities of a high-school system in the county, and had voted to continue to deny to that population any admission to or participation in such educational facilities; and that at the time of such withdrawal and denial the petitioners respectively had children attending the colored high school then existing, but who were *now debarred from participation in the bene- [531] fits of a public high-school education though petitioners were being taxed therefor. They averred that the action of the board of education was a denial of the equal protection of the laws secured by the Constitution of the United States, and that it was inequitable, illegal, and unconstitutional for the board to levy upon or for the tax collector to collect from them any tax for the educational purposes of the county from the benefits of which the petitioners in the persons of their children of school age were excluded and debarred.

The petitioners prayed that the tax collector, Bohler, be enjoined from collecting so much of the tax levy of July 10th, 1897, as had been levied for the support of said system of high schools; that the board be enjoined from using any funds or property then held by it or thereafter to come into its hands for educational purposes in the county for the support, maintenance, or operation of that system; and that they have such other and further relief as was equitable and just.

The board of education demurred to the petition and also filed an answer. It denied that it had established any system of high schools in the county, and averred that it was neither its duty nor had it authority to establish such a system, although it had authority in its discretion to establish high schools at such points in the county as the interest or convenience of the people required; that in pursuance of such authority it had established the Neely High School in 1876, but in 1878 its name was changed to that of the Tubman High School, when Mrs. Emily H. Tubman presented to the board a large lot and building for the purpose of affording a higher education to the young women of the county, the Richmond Academy affording this benefit and advantage to the male sex; that the demand was urgent for the continuance of the Tubman school by the board, and it was so accordingly determined, each pupil paying \$15 for tuition per annum and nonresidents of the county \$40, which was the charge made by the Richmond Academy for Boys; and that the property, the value of which with the fixtures, furniture, and appliances was worth not less than \$30,000, was *donated by Mrs. Tubman upon [532] the express condition that in the event the board failed to use the building for a high school the same was to inure instantly to the benefit of the Richmond Academy and the Augusta Free School;

That in June, 1876, the board deemed it wise to give its assistance to the Hephzibah High School, conducted and controlled by the Hephzibah Baptist Association in the village of Hephzibah, in the southeastern

part of the county, charging and receiving for high school scholars the sum of \$15 per annum;

That, in 1880, there being no high school in the county for the colored race, the funds of the board justifying it, and other schools of lower grade having been established by the local trustees in Augusta sufficient to accommodate the colored children, the board deemed it wise and proper to establish the Ware High School, charging for each pupil taught therein \$10 per annum; and

That in June, 1897, a special committee appointed by the board investigated the status of the high schools in the county and ascertained the condition of each, and the committee recommended that, for "purely economic reasons in the education of the negro race," the Ware High School be discontinued and the city conference board requested to open four primary schools in the same building at a cost of about \$200 each for the accommodation of those negro children who were annually denied admittance to the schools.

[533] The answer of the board further stated: "Touching the Ware High School, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with every respect and consideration. They were told the reasons that controlled the committee in its intention to recommend its discontinuance for the present. These were: Because 400 or more of negro children were being turned away from the primary grades unable to be provided with seats or teachers; because the same means and the same building which were used to teach 60 high-school pupils would accommodate 200 pupils in the rudiments of education; because the board at this time [533] was not financially *able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education, and because there were in the city of Augusta at this time three public high schools,—the Haines Industrial School, the Walker Baptist Institute, and the Payne Institute—each of which were public to the colored people, and were charging fees no larger than the board charged for pupilage in the Ware High School." After stating that the action of the special committee was approved by the board, the answer continued: "At the same time when the vote was taken on the report of the Ware High School it was unanimously resolved that the board of education reinstate the said school whenever in their judgment the board could afford it. Subsequently to the board's temporary suspension of the Ware High School a number of colored people petitioned the board for rescission of this action, among whom were the complainants herein. A full board was called and convened on the — day of August, and the petitioners were heard and their request fully considered. The board, after a session and deliberation of over two hours, refused to rescind for the reasons heretofore set out, and says, in their view, until the local trustees—i. e., the city conference board—should have furnished a sufficiency of pri-

mary schools for the colored population it would be unwise and unconscionable to keep up a high school for 60 pupils and turn away 300 little negroes who are asking to be taught their alphabet, and to read and write. No part of the funds of this board accrued or accruing and no property appropriated to the education of the negro race has been taken from them. This board has only applied the same means and moneys from one grade of their education to another grade; and in this connection defendant says that the enrolment in the colored school is this year 238 more than the last, the Ware High School building accommodating 188 pupils."

The answer of the board, referring to the act of 1872, averred that "§ 9 of said act commands the local trustees to provide the same facilities to each race as regards school-houses and fixtures, attainments and abilities of teachers *and length of term, but that [534] this section refers only to the schools established by the trustees of each school district under § 6 of said act, and does not apply to schools of higher grade; that § 10 of said act, which empowers this respondent to establish schools of higher grade than those established by the local trustees, ordains their establishment to such as the interest and convenience of the people may in the judgment of this board require. It admits that on the 10th day of July last it suspended the Ware High School for the reason that in its judgment the interest and convenience of the people did not require it, and that it caused to be established in its stead three primary schools for colored children, and for reasons heretofore in its answer set forth. Whether or not the petitioners at the time of said suspension had children attending the Ware High School this defendant is not advised, but denies that they are debarred from a high-school education in this community, since for the same charges as were made by this board for pupilage in the Ware High School they can find this education in three other colored high schools open to the public in the city of Augusta. Defendants deny the allegations specially pleading that the acts of 1872 and 1877 deny to the colored race equal protection of the law, or that the course and conduct of this board thereunder is obnoxious to this constitutional inhibition."

The plaintiffs amended their petition, alleging: "1st. That 'the Payne Institute,' 'the Walker Baptist Institute,' and 'the Haines Normal & Industrial Institute' mentioned in said answer, are purely private and pay educational institutions under sectarian control, and have been in existence for years past, and have no connection, and never have had any connection, whatsoever with the public-school system conducted by said board. 2d. That said board has no legal right to charge for extending a public high-school education to the children of school age of actual residents of said county. 3d. That if a deficiency of means exists for extending a public primary-school education to the colored school population of the city of Augusta in said

[535] county, said deficiency is due to the illegal action of said board in appropriating to the white *school population of said city largely more of the public-school fund than it is legally entitled to, to the corresponding detriment of the colored school population of said city, and but for such illegal action there would be no such deficiency as said board avers."

In answer to this amended petition, the board admitted that the Payne Institute, the Walker Baptist Institute, and the Haines Normal & Industrial Institute mentioned in its answer were private educational institutions under sectarian control, and had no connection with the public-school system conducted by the defendant board. But it averred that the impression sought to be conveyed that there was sectarian, denominational teaching in those schools was untrue; that the schools referred to were open to the public generally, and any child of sufficient scholarship and moral character could enter them, whatever his or her religious belief. The board also asserted its right to charge for tuition in high schools, and denied that any deficiency of means for extending a public primary-school education to the colored school population was due to any action it had taken.

The defendant Bohler, the tax collector, demurred to the petition and also filed an answer.

The cause having been heard upon the demurrers and pleadings, the court sustained the demurrer of defendant Bohler, and refused to grant any injunction against him as tax collector. But the demurrer of the board of education was overruled, and an order was entered restraining the board from using "any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of any white high school in said county until said board shall provide or establish equal facilities in high-school education as are now maintained by them for white children, for such colored children of high-school grade in said county as may desire a high-school education, or until the further order of the court." This order was, however, suspended until the supreme court of the state should render its decision in the cause.

[536] The plaintiffs did not appeal from the order refusing to *grant an injunction against the tax collector. But the case was carried to the supreme court of Georgia by the board of education, where the judgment of the superior court of Richmond county was reversed upon the ground that it erred in granting an injunction against the board of education. And in accordance with that decision the superior court, upon the return of the cause from the supreme court of the state, refused the relief asked by the plaintiffs and dismissed their petition. The plaintiffs in error complain of the latter order as being in derogation of their rights under the Constitution of the United States.

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Mr. George F. Edmunds argued the cause and filed a brief for plaintiffs in error.

Messrs. Joseph Ganahl and Frank H. Miller argued the cause and filed briefs for defendant in error.

*Mr. Justice Harlan, after stating the facts as above, delivered the opinion of the court: [541]

*This writ of error brings up for review a final order made in the superior court of Richmond county, Georgia, in conformity to a judgment rendered in the supreme court of the state. That order, it is contended, deprived the plaintiffs in error of rights secured to them by the Fourteenth Amendment to the Constitution of the United States. [542]

The supreme court of Georgia, after stating in its opinion that counsel for the petitioners did not point out in his brief what particular paragraph of the Fourteenth Amendment was violated, said: "If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty, or property without due process of law, or whether his clients are denied the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board. There is no complaint in the petition that there is any discrimination made in regard to the free common schools of the county. So far as the record discloses, both races have the same facilities and privileges of attending them. The only complaint is that these plaintiffs, being taxpayers, are debarred the privilege of sending their children to a high school which is not a free school, but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain white high schools to which negroes are not admitted. We think we have shown that it was in the discretion of the board to establish high schools. It being in their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a county denominational high school for boys. In our opinion, it is impracticable to distribute taxes equally. The appropriation *of a portion of the taxes for a white girls' high school is not more discrimination against these colored plaintiffs than it is against many white people in the county. A taxpayer who has boys and no girls of a school age has as much right to complain of the unequal distribution of the taxes to a girls' high school as have these plaintiffs. The action of the board appears to us to be more [543]

a discrimination as to sex than it does as to race. While the board appropriates some money to assist a denominational school for white boys and girls, it has never established a high school for white boys, and, if the contention of these plaintiffs is correct, white parents who have boys old enough to attend a high school have as much right to complain as these plaintiffs, if they have not more. Without, therefore, going into an analysis of the different clauses of the Fourteenth Amendment of the Constitution of the United States, we content ourselves by saying that, in our opinion, the action of the board did not violate any of the provisions of that amendment. It does not abridge the privileges or immunities of citizens of the United States, nor does it deprive any person of life, liberty, or property without due process of law, nor does it deny to any person within the state the equal protection of its laws."

The Constitution of Georgia provides: "There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the state, but separate schools shall be provided for the white and colored races." Art. 8, § 1.

It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of [544] which "the rule as to the separation of races is enforced. We must dispose of the case as it is presented by the record.

The plaintiffs in error complain that the board of education used the funds in its hands to assist in maintaining a high school for white children without providing a similar school for colored children. The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant board to cease giving support to a high school for white children. The board had before it the question whether it should maintain, under its control, a high school for about 60 colored children or withhold the benefits of education in primary schools from 300 children of the same race. It was impossible, the board believed, to give educational facilities to the 300 colored children who were unprovided for, if it maintained a separate school for the

60 children who wished to have a high-school education. Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high-school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the board.

We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race. But if it be assumed that the board erred in supposing that its duty was to provide educational facilities for the 300 colored children who were without an opportunity in primary schools to learn the alphabet and to read and write, rather than to maintain a school for the benefit of the 60 colored children who wished to attend a high school, that was not [545] an error which a court of equity should attempt to remedy by an injunction that would compel the board to withhold all assistance from the high school maintained for white children. If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the board of education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court.

The state court did not deem the action of the board of education in suspending temporarily and for economic reasons the high school for colored children a sufficient reason why the defendant should be restrained by injunction from maintaining an existing high school for white children. It rejected the suggestion that the board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined; and as this view disposes of the only question which this court has jurisdiction to review and decide, the judgment is affirmed.

[546] S. ENDICOTT PEABODY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 546-552.)

Mexican grant—giving mere possession without title—effect of continued possession.

1. No title was granted by the Mexican government to claimants of land whose petition asked for the grant of possession of the land in order to plant grain thereon for harvesting, where the order based thereon directed them to be placed in possession "in order that they may not lose time in their labor until the necessary formalities can be had," while the act of possession made by the alcalde states that they were not "authorized to exchange, sell, or alienate the same until they shall have acquired title or have sufficient time to do so."
2. A Mexican grant is not presumed to have been made from the fact of continued possession of the land, where possession was originally taken under a permission or license to use the land, and there is nothing to show that the character of possession was subsequently changed.
3. Reference in a land grant to another grant as a boundary is inadequate as proof of the legal existence of the latter grant, or of any change of the character of the possession of the land referred to, when that was originally taken, not under a grant of title, but under a mere permission or license.

[No. 50.]

Argued October 17, 1899. Decided December 22, 1899.

APPEAL from a judgment of the Court of Private Land Claims against a claimant of land in the territory of New Mexico. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank W. Clancy argued the cause and filed a brief for appellant:

The act of possession was satisfactory proof of the making of the grant.

Strother v. Lucas, 12 Pet. 437, 9 L. ed. 1147; *United States v. Peralta*, 19 How. 347, 15 L. ed. 680.

The long unbroken possession under a claim of a grant is sufficient proof upon which to base a presumption of the making and ratification of the grant as claimed.

United States v. Rocha, 9 Wall. 646, 19 L. ed. 614; *United States v. De Haro*, 22 How. 297, 16 L. ed. 344; *United States v. Chaves*, 159 U. S. 463, 40 L. ed. 220, 16 Sup. Ct. Rep. 57.

Mr. Matthew G. Reynolds argued the cause and, with *Solicitor General John K. Richards*, filed a brief for the United States:

Admitting the full force that can be given to all the muniments of title in the record, it was a presumptive possession which never ripened into a grant entitled to recognition under the law of March 3, 1891.

De Haro v. United States, 5 Wall. 599, 18 L. ed. 681; *United States v. Baltimore*, 98 U. S. 42, 25 L. ed. 167; *Serrano v. United States*, 5 Wall. 451, 18 L. ed. 494.
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The recital of the alcalde in the act of possession in the Petaca grant, that it was bounded on the west by "the boundary of the Vallecito grant," does not furnish evidence of a grant to Samora and others.

Act of 1891, §§ 7, 13; *United States v. Teschmaker*, 22 How. 404, 16 L. ed. 356; *United States v. Castro*, 24 How. 346, 16 L. ed. 659.

***Mr. Justice Peckham** delivered the [546] opinion of the court:

This is an appeal from a judgment of the court of private land claims dismissing the petition of the appellant, and rejecting his claim to some 114,000 acres of land in the territory of New Mexico, on the ground that it had not been sustained by satisfactory proof.

The petitioner in the court below in his petition for confirmation of the grant stated that on the 23d of February, 1824, José Rafael Zamora, a citizen and resident of Ojo Caliente, on behalf of himself and twenty-five other persons, citizens of the Republic of Mexico, and residents of said district in the territory of New Mexico, presented his petition for a grant to them of the tract therein described and called the Vallecito de Lovato, and the appellant's petition alleged that the governor granted the prayer, made the grant of land therein asked for, and directed the alcalde to place the grantees in possession, and that on September 22, 1824, the alcalde did place the grantees in juridical possession of the land, and executed his certificate thereof, which was presented to and *approved by the governor and delivered [547] to the grantee, José Rafael Zamora, for himself and his associates.

Various other facts were set up in the petition to show title in the petitioner, which it is not necessary to state.

The answer of the government put the facts in issue, and the case duly came on for trial.

The following papers were put in evidence on the trial by the appellant:

(1) Translation of Muniments.
Hon. Constitutional Alcalde of Abiquiu, Francisco Trujillo:

I, José Rafael Zamora, citizen and resident in the district of Ojo Caliente, together with twenty-five individuals of the same district, appear before you with the greatest respect and humility and in due form of law, and state, sir, that, there being sufficient land in the Vallecito de Lovato to give us in possession, we now ask that in the goodness of your heart you grant us the same, for we have not any place wherein to plant grain for harvesting, whereby we think the others, the residents of said district, will receive no injury.

Wherefore we humbly request your honor, as our protector and as a lover of our country, to grant us said possession, whereby we will receive favor and benefit.

Abiquiu, February 23, 1824. For all those stated. José Rafael Samora.

I do hereby certify that the above is true and the land applied for public, and I do not

recognize those applying for the same as property holders. Francisco Trujillo.

(2) (Unsigned Order.)

The land applied for by José Rafael Samora, together with the twenty-five accompanying individuals in his petition, in virtue of your report, you may proceed to place them in possession, in order that they may not lose time in their labor until the necessary formalities can be had, which cannot be verified at this time, the excellent deputation not being in session to whom the matter pertains.

[548] *I charge you to treat those unfortunate persons with consideration on placing them in possession, charging for your labor according to their wants and not more than the fee bill allows.

God and (liberty). February 27, 1824.

(No Signature.)

To the alcalde of Abiquiu.

(3) The act of possession. This paper is signed by Francisco Trujillo, constitutional alcalde of the proper district, and after declaring that by virtue of the decree of Bartolome Baca, actual political chief of the province, given at Santa Fé on the 27th of February, 1824, on the petition presented by José Rafael Samora and his associates, requesting that there be adjudged to them a tract of public land, the alcalde states: "And having examined the said land and seeing its extent and proportions, the parties interested being present and others who joined them according to the list they presented, and all having agreed among themselves that at no time there should be interruptions or differences among them;" he thereupon measured off to each one a certain quantity of land and placed them in possession.

The alcalde also states that he charged them to endeavor to fortify themselves for their own defense, etc.; and as to the lands of which he then delivered possession, he gave them "to understand that as new colonists they shall exert themselves, not being authorized to exchange, sell, or alienate the same until they shall have acquired title or have sufficient time to do so." This paper is dated the 22d of September, 1824. It is signed by Francisco Trujillo, but it does not appear when the possession was delivered, the certificate being dated at Abiquiu, which is many miles from the Vallecito, the location of the grant.

There was also put in evidence the act of possession in what is called the Petaca grant, dated March 25, 1836, in which it is stated that it is bounded on the west "by the boundary of the Vallecito grant," which it is claimed by the appellant is an admission of the existence of the grant in question.

[549] *Evidence in regard to possession was also introduced.

Upon the question whether the papers thus proved showed any grant of lands, the counsel for the government contended that they did not purport to grant any land or pass any interest therein, but gave only a permissive possession preliminary to a grant which was never obtained.

Without discussing the various other objections which were raised against the confirmation of this alleged grant to the petitioner, we are of opinion that the above objection was well taken, and that there was no sufficient evidence of any grant whatever.

The petition signed by Samora in behalf of himself and twenty-five other individuals of the same district asks that the alcalde may give them possession of the land, as they have no other place wherein to plant grain for harvesting, and they think that the others, the residents of the district, will receive no injury, and therefore they request that the alcalde, as their protector and as a lover of their country, may grant them such possession, etc. At the very commencement, therefore, we find that the petition was not one for the granting of title, but simply one for the granting of possession to land, in order that they might plant their grain for harvesting. Trujillo certifies that the statement in the petition is true and the land applied for is public, and that he does not recognize those applying for the same as property holders.

Then comes the unsigned order directing the alcalde of Abiquiu to "proceed to place them (Samora, with the twenty-five accompanying individuals named in the petition) in possession, in order that they may not lose time in their labor until the necessary formalities can be had, which cannot be verified at this time, the excellent deputation not being in session to whom the matter pertains." Then the certificate of Trujillo, which is termed by the appellant "the certificate of the delivery of juridical possession of the lands to the petitioner," shows on its face that it was not the ordinary delivery of juridical possession under a grant of title to land, but that it was a mere placing of the petitioner in possession under a license of the authorities accompanied by a distinct statement that the petitioner *and his associates [550] were not "authorized to exchange, sell, or alienate the lands until they shall have acquired title or have sufficient time to do so."

These three papers, which form the basis of the appellant's claim of title, fail when examined to show any title whatever in him. There is in these papers no evidence of any grant of title to these lands to Samora or his associates. It may be that he and his associates hoped thereafter to obtain title, but it was certainly not granted by these papers. This unsigned order and the act of possession, when taken together, show that the possession that was delivered and taken was preliminary to the title which was afterwards to be acquired, and there is no proof that such title ever was thereafter obtained.

In *De Haro v. United States*, 5 Wall. 599, 627, 18 L. ed. 681, 688, the decree of the government was, in that case, held to be a naked license to occupy the land provisionally, and hence was not entitled to confirmation under the act of Congress of March 3, 1851. The distinction between the effect of a license to enter upon lands uncoupled with an interest therein, and a grant of some title, right, or interest in lands, is stated by Mr. Justice Davis in that case, in

which he said: "A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it."

It is urged that the fact of the possession by Samora and his associates, and their heirs, grantees, etc., down to the time of the American occupation of the country, is strong, if not conclusive, evidence of the making of a grant in accordance with the original claims of those petitioners, and that a grant should therefore be presumed.

The possession must be adverse, exclusive, and uninterrupted, and inconsistent with the existence of title in another.

[551] Its character in this case, however, appears from the papers not to have been adverse to the government, nor to have originated with a claim of title under a grant; and from the time it was delivered up to the time of the American occupation, *whatever possession there was was entirely consistent with that which was given by the above act, a merely permissive occupation, and therefore we cannot presume that it was subsequently changed to that of a possession under a grant, without any evidence of the existence of the grant other than that derived from the papers put in evidence, which show that such possession was permissive or by license only.

As is stated in *Serrano v. United States*, 5 Wall. 451, 461, 18 L. ed. 494, 497: "There is no adverse holding here, but the possession was a permissive one, and consistent with the proprietary interests of Spain and Mexico; and the fact that those governments did not terminate the possession, which was a mere tenancy at will, cannot create an equity entitled to confirmation. Serrano held under a license to occupy, and that license could be revoked at any time. The failure to revoke it cannot change the original character of the possession into an adverse one. If Serrano had entered into possession under a claim of right, and had title papers, though imperfect, he might say that the length of his possession entitled him to the favorable consideration of the court. Not so, however, where he had no interest in the land, never applied for any, either to Spain or Mexico, and was content with a permission to occupy it for the purposes of pasturage." This was the character of the possession of the grantors of the petitioner. Indeed, while under the civil law, including the Spanish law, one may prescribe beyond his title, he cannot do so contrary to the title. See *Zerique v. Harang*, 17 La. 349; *Neel v. Hibard*, 30 La. Ann. 809.

One of the difficulties in petitioner's case is that the act of possession absolutely negatives the giving of it under a grant passing any interest in the lands. That act stated that those who are placed in possession are not "authorized to exchange, sell, or alienate the same until they shall have acquired title," etc. A grant, therefore, would not be

presumed even upon proof of exclusive and uninterrupted possession, so long as it was entirely consistent with the evidence produced in the case, which shows that it originated in a mere license, and there is no proof from which it can be claimed that its character changed from that of a licensee to that of *one in possession adversely and under a claim of title by a grant from the government. [552]

The fact that a subsequent grant to other parties of other lands was therein bounded by "the boundary of the Vallecito grant" is no evidence of a change of the character of the possession already mentioned. The petitioner being in possession, any particular boundary thereof may very well have been taken as a boundary for a grant to other parties subsequently made of other lands, and the description of the land in the other grant, that it was bounded by the Vallecito grant, is inadequate as proof of the legal existence of that latter grant.

Upon the ground that there is no proof of any grant in this case, we are of opinion that the judgment of the Court of Private Land Claims was right, and it is therefore affirmed.

J. FRANCISCO CHAVEZ, *Appt.*,

v.

UNITED STATES.

Mexican grant—power of departmental assembly or territorial deputation—acquiescence of governor as president of the deputation—ratification by governor—effect of continued possession.

(See S. C. Reporter's ed. 552-563.)

1. The department assembly or territorial deputation of New Mexico in 1831 had no power or authority to make a grant of lands.
2. The governor of New Mexico cannot be held to have made a grant of lands by reason of his being *ex officio* president of the territorial deputation at the time when that body attempted to make a grant of lands, although he was present and attested the action of the deputation.
3. Ratification by the governor of a grant of lands which the departmental assembly had attempted to make is not shown by a letter signed by him, in which he simply acknowledges the receipt of an official communication from an alcalde, reporting the execution of a decree of the deputation making the grant, and asking how much his fee should be, as to which the governor says he is ignorant, but advises him to ask the assessor, although the governor does not make any protest against the validity of the grant.
4. Possession under an alleged grant made in 1831 by the territorial deputation of New Mexico up to the time of the treaty of Guadalupe Hidalgo, in 1848, is not sufficient to raise the presumption of a grant.

[No. 14.]

Argued October 17, 18, 1899. Decided December 22, 1899.

APPEAL from a judgment of the Court of Private Land Claims refusing confirmation of an alleged grant. *Affirmed.*

The facts are stated in the opinion.

Mr. F. W. Clancy argued the cause and filed the brief for appellant.

Mr. Matthew G. Reynolds argued the cause and, with *Solicitor General John K. Richards*, filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[552] *Mr. Justice Peckham delivered the opinion of the court:

This is an appeal from a judgment of the court of private land claims refusing to confirm the title of the appellant to *some 5,000 acres of land in New Mexico, about 1 league from the Manzano grant. The title is evidenced by a grant by the territorial deputation of New Mexico, made in 1831, and the first question in the case relates to the authority of that body to make the grant.

It is also contended that if the territorial deputation did not have the power to make the grant, and that power rested with the governor of the department, his presence in the territorial deputation as its *ex officio* president when the grant was made, and, so far as the record shows, his not protesting but acquiescing in its action, was equivalent to and the same as a grant made by himself in his official character as governor.

It is further stated that by reason of the action of the governor in writing the letter dated December 22, 1831, and hereinafter set forth, that officer ratified and confirmed the grant, and in effect made it his own.

It appears from the record that on February 28, 1831, citizen Nerio Antonio Montoya petitioned the honorable corporation of Tome, and asked it that it would append to his petition its own report to the most excellent deputation, so that that body should grant him the land described in the petition. The corporation of Tome, on the 19th of March, 1831, granted the prayer of the petitioner, and adopted a resolution which provided that his petition should "go before the most excellent territorial deputation, which, as the authority competent, may accede to the donation of the land prayed for by the said petitioner without injuring the pastures and watering places for the passersby." The resolution was accordingly forwarded to the territorial deputation, and that body on November 12, 1831, took action as follows:

(Extract from record of proceedings of the territorial deputation, session of November 12, 1831.)

The foregoing record having been read and approved, a petition of citizen Nerio Montoya, a resident of Valencia, in which he asks for the donation, for agricultural purposes, of a tract of vacant land in the Manzano within the limits of the Ojo de en Medio as far as the rancheria, was taken up and

[554] the *report of the respectable corporation council of Tome, in which it is set forth that there is no objection to the concession of the said land, having been heard it was ordered that it be granted.

The session was adjourned.

Santiago Abreu, President. (Rubric.)

Juan Rafael Ortiz. (Rubric.)

Anto. Jose Martinez. (Rubric.)

Jose Manl. Salazar. (Rubric.)

Teodosio Quintana. (Rubric.)

Ramon Abreu, Secretary. (Rubric.)

In accordance with this action, the following direction by the deputation, signed by its secretary, was given the alcalde of the proper jurisdiction:

Santa Fé, November 12, 1831.

The honorable the deputation of this territory, having received the report of the constitutional council of Tome, appended to this petition, has resolved in this day's session to grant the land prayed for by the petitioner, charging the alcalde of said jurisdiction to execute the document that will secure the grantee in the grant hereby made to him.

Abreu, Secretary.

The alcalde thereupon executed a document which, after reciting that, "in obedience to the decree of the most excellent deputation of this territory made under date of November 12 of the current year on the margin of the petition which, under date of February 28, the citizen Nerio Antonio Montoya, resident of this said jurisdiction, presented to this honorable council, and on which petition is recorded the report made by this council, in accordance with which report its excellency has deemed it proper to accede to the petition of Montoya, granting him full and formal possession of the tract he prayed for," etc., declared that "Montoya, whenever he may choose or think best to do, may notify me to proceed with him to the locality to place him in possession of the property granted him, with all the customary formalities," etc. This was dated December 7, 1831, and signed by the alcalde.

On December 12 in the same year the same alcalde, "in compliance with the provision made by this most excellent deputation of this territory and the notification given me by the citizen Nerio Antonio Montoya," proceeded with Montoya to the tract of land granted him and placed him in possession thereof, the act being signed by the alcalde.

There was also put in evidence on the trial of the action in the court below, on the question of ratification, the following:

Office of the Political Chief of New Mexico.

By your official communication of the 20th instant, I am advised of your having executed the decree of the most excellent deputation granting to the citizen Nerio Antonio Montoya a tract of land.

But in regard to the inquiry you make of me, as to how much your fee should be, I inform you that I am ignorant in the premises, and that you may, if you choose to do, put the question to the assessor (asesor) who is the officer to whom it belongs, to advise the justices of first instance in such cases.

God and Liberty.

Santa Fé, December 22d, 1831.

Jose Antonio Chavez.

To Alderman Miguel Olona.

Various mesne conveyances were put in evidence on the trial, showing the transfer to the appellant of whatever title Montoya had to the land described, and it was then admitted that the appellant herein has succeeded to all the rights of the original grantee, if any, in this case. Evidence of possession under this grant was also given.

[556] The court below held that the departmental assembly or territorial deputation had no power or authority to make a grant of lands at the time the grant in this case was attempted to be made, and that the fact that the governor may have presided at the meeting at the time the action was taken made no difference, as the power to make the *grant was exclusively in the governor, and the territorial deputation had no jurisdiction in the matter. The claim was therefore rejected.

We think that in thus deciding the court below was right.

We refer to some of the cases which show the territorial deputation did not have the power to make a grant, but only the power to subsequently approve it.

In *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232, it was held that the Mexican law of 1824 and the regulations of 1828 altered and repealed the Spanish system of disposing of public lands, and that the law and the regulations from the time of their passage were the only laws of Mexico on the subject of granting public lands in the territories. It was also held that the governor did not possess any power to make grants of public lands independently of that conferred by the act of 1824 and the regulations of 1828. Mr. Justice Nelson, who delivered the opinion of the court in that case, refers to the various sections of the law of 1824, and also to the regulations of November, 1828, for the purpose of showing that the governors of the territories were authorized to grant vacant lands within their respective territories with the object of cultivation or settlement, and that the grants made by them to individuals or families were not to be definitively valid without the previous consent of the departmental assembly, and when the grant petitioned for had been definitively made, a patent, signed by the governor, was to be issued, which was to serve as a title to the party. This case did not decide that the territorial deputation could not make a valid grant, because the grant was made by the governor, but the various extracts from the law and regulations indicate very plainly that the authority to initiate a grant of public lands existed in the governor alone, and not in the assembly.

In *United States v. Vigil*, 13 Wall. 449, 20 L. ed. 602, it was held that departmental assemblies (territorial deputations) had no power to make a grant.

[557] In his argument, at the bar, counsel for this appellant contended that the territorial deputation had lawful power and *authority to make the grant to Montoya, and in order to maintain that proposition stated that it was necessary to discuss the effect of the decision of this court in *United States v. Vigil*, 13 Wall. 449, 20 L. ed. 602. He claimed
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that what was said as to the lack of power in the territorial deputation to make a grant was not necessary to the decision of the court in that case, and that such expressions as were therein used regarding the question would not, therefore, constitute a precedent now binding on this court.

In *Vigil's Case* there was a petition to the departmental assembly, through the governor of New Mexico, asking for a grant of land which in fact amounted to over 2,000,000 acres, the grantees binding themselves, if the grant were made, to construct two wells for the relief and aid of travelers, and to establish two factories for the use of the state, and to protect them from hostile invasion. The governor transmitted the petition to the assembly, but declined to recommend that favorable action should be taken upon it. The assembly, notwithstanding this refusal, granted the tract on January 10, 1846, for the purpose of constructing wells and cultivating the land, etc., and the question was as to the validity of this grant.

The opinion was delivered by Mr. Justice Davis, who stated that it had been repeatedly decided by this court that the only laws in force in the territories of Mexico, for the disposition of public lands, with the exception of those relating to missions and towns, were the act of the Mexican congress of 1824 and the regulations of 1828. In the course of his opinion he said:

"These regulations conferred on the governors of the territories, 'the political chiefs,' as they are called, the authority to grant vacant lands, and did not delegate it to the departmental assembly. It is true the grant was not complete until the approval of the assembly, and in this sense the assembly and governor acted concurrently, but the initiative must be taken by the governor. He was required to act in the first instance—to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. In case the *information was satisfac-[558] tory on these points, he was authorized to make the grant, and at the proper time to lay it before the assembly, who were required to give or withhold their consent. They were in this respect an advisory body to the governor, and sustained the same relation to him that the Senate of the United States does to the President in the matter of appointments and treaties."

A subsequent portion of the opinion dealt with the case upon the assumption that the grant had been made by the governor, and even in that case it was said the grant would have been invalid because it violated the fundamental rule on which the right of donation was placed by the law; that the essential element of colonization was wanting, and that the number of acres granted was enormously in excess of the maximum quantity grantable under the law. This in no wise affected the prior ground upon which the opinion was based, that the departmental assembly had no power to make the grant. That was the essential and material ques-

tion directly involved in the case, while the second ground mentioned was based upon an assumption that, even if the governor had made the grant, it would still have been void for the reason stated. The court did not base its decision that the departmental assembly had no power to make the grant because of its enormous extent. It held that the assembly had no power to make any grant, no matter what its size. It is, as we think, a decision covering this case.

In *Hayes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735, the grant was by the territorial deputation of New Mexico, and it was stated by Mr. Justice White, speaking for the court, that "it cannot be in reason held that a title to land derived from a territory which the territorial authorities did not own, over which they had no power of disposition, was regularly derived from either Spain or Mexico or a state of the Mexican nation."

No presumption that the territorial deputations had authority to make grants can arise from the fact that in some instances those bodies assumed to make them. The case in this respect bears no resemblance to *United States v. Percheman*, 7 Pet. 51-96, 8 L. ed. 604-620, or to *United States v. Clarke*, 8 Pet. 436, 447, 453, 8 L. ed. 1001, 1005, 1007.

[559] In those cases it was not denied that the governor had authority in *some circumstances to make grants, and it was therefore held that a grant made by him was prima facie evidence that he had not exceeded his power in making it, and that he who denied it took upon himself the burden of showing that the officer by making the grant had transcended the power reposed in him. There is in the case before us no evidence that the territorial deputation had the power in any event to make grants other than the fact that in some instances it assumed to make them.

The cases heretofore decided in this court, and some of which have been above referred to, show that such fact is inadequate to prove the existence of the authority.

It is, however, urged that the record of the action of the territorial deputation in regard to this grant shows that the governor and *ex officio* president of the deputation was present when the deputation decided to make the grant as petitioned for, and that his being so present and attesting the action of the deputation was equivalent to the making of the grant himself as governor. We do not think so. He did not assume to make any grant whatever, and certainly none in his character as governor. It does not even appear beyond doubt that he was present when the deputation made the grant. His signature is perfectly consistent with a mere authentication of the previous action of that body.

The petition of Montoya was addressed primarily to the corporation of Tome, and he requested that corporation to send his petition, approved by it, to the deputation to make him a grant of the land described in his petition. Acting under that request, the corporation of Tome sent his petition to the "most excellent territorial deputation,"

and asked that body to accede to the donation of the land prayed for. In conformity to the petition, the territorial deputation itself made the grant. The fact that the governor, being *ex officio* a member of the deputation, signed as president of that body the record of the act of the deputation, is not the equivalent of a grant by him in his official character of governor, nor does such act bear any resemblance to a grant by him. No one on reading the record would get the idea that the governor *was himself making the grant or that he thereby intended so to do. It does not even show that he was in favor of the grant as made by the deputation. His signing the record constituted nothing more than an authentication of the act of the deputation. It purported to be nothing else. He might have properly signed the record if in fact he had voted against the grant, and had been opposed to the action of the assembly. He might have signed the record as an authentication, and yet have been absent at the time of the action of the assembly. In any event, it was his signature as an *ex officio* member or presiding officer of the deputation, attesting or perhaps assenting to its action, and it was not his action as governor making a grant in that capacity. The signature by the secretary alone, to the instrument (above set forth, dated November 12, 1831) which recites the previous action of the deputation, and charges the alcalde of the jurisdiction to execute the document which will secure the grantee in the grant, is simply a direction to the alcalde, and has no materiality upon this branch of the case other than as confirming the view that the grant was solely that of the deputation.

We cannot hold that, when the power was given under the laws of Mexico to the governor to make grants of lands, he in any manner exercised that power or performed an act equivalent to its exercise, by presiding *ex officio* at a meeting of the territorial deputation which made a grant of lands in conformity to a petition solely addressed to it, and by authenticating as president the action of the deputation in deciding that the grant should be made.

The two positions, president of the deputation and governor, are separate and distinct, and the action of a governor merely as president of the deputation, and of the nature above described, is not in any sense and does not purport to be his separate and independent action as governor, making a grant of lands pursuant to a petition addressed to him officially. As governor he might refuse the grant upon a petition addressed to himself, when as president of the deputation he might sign the record authenticating its action in regard to a petition *addressed solely to that body. And it is ob-[561] vious from the wording of the record that the president of the deputation was not assuming to act as governor upon a petition addressed to himself, but only as the president of the deputation. It might have been that he acquiesced in the assumption by the deputation of the right to make the grant,

but his act of signing the record cannot be tortured into a grant or as the equivalent of a grant by himself.

It is further urged that there has been what amounts to a grant by the governor by reason of his letter of December 22, 1831, signed by him and above set forth, thus, as is claimed, ratifying the grant of the deputation and making it his own.

The only evidence that the person who signed the letter was the governor at that time is the heading of the letter, "Office of the Political Chief of New Mexico." It will be also noted that the person signing it is not the same one who signed the record of November 12, 1831, as president of the deputation. But assuming that Chavez was governor in December, 1831, when he signed the letter, he therein simply acknowledged the receipt of the official communication of the alcalde, in which that officer reports that he had executed the decree "of the most excellent deputation, granting to the citizen Nerio Antonio Montoya a tract of land." In reply to the question as to how much the alcalde's fee should be, he answered that he was ignorant of the premises, and advised the alcalde to put the question to the assessor, the officer to whom it belonged to advise the justices in the first instances in such cases.

Now what does the governor ratify by this letter? Nothing.

The contention in favor of the grant, based upon the letter, is, that assuming the governor had power to make the grant, it was his duty when he learned from the report of the alcalde that one had been made by the deputation, and that possession had been delivered under it, to protest against and to deny the power of the deputation to make such grant, and unless he did so, his silence was evidence of the fact that he not only approved the act of the deputation in making the grant, but that he approved it [562] as his own, and that such *approval was the same as if the governor had himself made the grant, and in substance and effect it was his grant.

This contention, we think, is not founded upon any legal principle, and is in itself unreasonable. The writer of the letter is not the same person who signed the record of the proceedings of the deputation. The report of the alcalde gave him the information which, it is true, he may have had before, that the deputation had assumed the power to grant the land. His protest as to the legality of such action would not have altered the fact that it had occurred, while, on the other hand, his silence might simply be construed as evidence of his unreadiness at that time to dispute, or possibly of his belief in the validity of the action of the deputation. Or his silence might have been simply the result of his approval of the act of the alcalde in obeying the commands of the deputation, while he thought it was not the proper occasion upon which to contest or deny the validity of the grant which the deputation had actually made. Many reasons for his silence might be suggested, but the claim
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that it equaled in law a positive grant by the governor is, as we think, untenable.

While such silence is entirely consistent with other views that might have been held by the governor, it certainly cannot properly be ascribed, as a legal inference from the facts stated, to his desire to make the grant himself, nor could it be said that his desire (if he had it) was the legal equivalent of an actual grant.

His knowledge that another body had assumed to make a grant is not equivalent to the making of the grant himself, and he was the person who alone had power to make it. There is nothing in the letter which aids the plaintiff herein.

Finally, it distinctly appears that the possession of the parties is insufficient in length of time to prove a valid title. In *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57, the possession was under the claim of a grant made by the governor of New Mexico to the alleged grantees. The grant had been lost, but it had been seen and read by witnesses, and its existence had been proved by evidence sufficient, as was stated in the opinion *(page 460, L.[563] ed. p. 219, Sup. Ct. Rep. p. 60), to warrant "the finding of the court below that the complainants' title was derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the territory of New Mexico, within which the land was situated." We do not question the correctness of the remarks made by Mr. Justice Shiras in regard to evidence of possession and the presumptions which may under certain circumstances be drawn as to the existence of a grant.

We do not deny the right or the duty of a court to presume its existence in a proper case, in order to quiet a title and to give to long-continued possession the quality of a rightful possession under a legal title. We recognize and enforce such rule in the case of *United States v. Chavez*, decided at this term, 175 U. S. 509, ante, 255, 20 Sup. Ct. Rep. 159, in which the question is involved. We simply say in this case that the possession was not of a duration long enough to justify any such inference.

There is no proof of any valid grant, but, on the contrary, the evidence offered by the plaintiff himself and upon which he bases the title that he asks the court to confirm, shows the existence of a grant from a body which had no legal power to make it, and which, therefore, conveyed no title whatever to its grantee, and the evidence is, as given by the plaintiff himself, that it was under this grant alone that possession of the lands was taken. We cannot presume (within the time involved in this case) that any other and valid grant was ever made. The possession of the plaintiff and of his grantors up to the time of the treaty of Guadalupe Hidalgo, in 1848, had not been long enough to presume a grant. *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53; *Hayes v. United States*, 170 U. S. 637, 649, 653, 42 L. ed. 1174, 1179,
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1180, 18 Sup. Ct. Rep. 735; *Hays v. United States*, just decided (175 U. S. 248, ante, p. 150, 20 Sup. Ct. Rep. 80). The possession subsequently existing, we cannot notice. *Ibid.*

We think the judgment of the court below should be affirmed.

[564] NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

MARIA AMACKER, J. J. Amacker, Her Husband, G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed, and George Dibert.

(See S. C. Reporter's ed. 564-570.)

Public lands—homestead entry—filing railroad map—entry validated by act of 1876—bona fide transferees of claim.

1. Homestead entries made prior to the time when notice of withdrawal of the lands was received at the local land office, although after the time when the map of the general route of a railroad was filed in the office of the Secretary of the Interior and an order of withdrawal of the lands made, were made valid by the act of Congress of April 21, 1876, if the entries were made in good faith by actual settlers upon tracks of not more than 160 acres each, and were therefore subject to the provisions of the act of June 15, 1880, authorizing the purchase of such lands by persons who have entered them, or their transferees by bona fide instruments in writing.
2. Lands which a limited class of persons are entitled to purchase by the act of Congress of June 15, 1880, because of entries thereof made under the homestead laws, are "appropriated" by that statute so as to be excluded from a railroad grant of lands not otherwise appropriated.
3. The widow of a person who has made a homestead entry, and to whom the lands are devised by his duly probated will, is a transferee thereof "by bona fide instrument," so as to be entitled to purchase them under the act of June 15, 1880, even if she would have no such right simply as widow.

[No. 61.]

Argued October 24, 1899. Decided January 8, 1900.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment for defendants in an action of ejectment rendered in the Circuit Court of the United States for the District of Montana. *Affirmed.*

See same case below on former review, 15 U. S. App. 279, 58 Fed. Rep. 850, 7 C. C. A. 518.

Statement by Mr. Justice **Brewer**:

[565] *This was an action of ejectment commenced on May 8, 1891, in the circuit court of the United States for the district of Montana by the railroad company, plaintiff in

error, to recover possession of the south one half of the northwest one quarter of section 17, township 10 north, range 3 west of the principal meridian of Montana. A trial was had, which resulted in a judgment for the plaintiff. 53 Fed. Rep. 48. This judgment was reversed by the court of appeals for the ninth circuit, 15 U. S. App. 279, 58 Fed. Rep. 850, 7 C. C. A. 518, and the case remanded for a new trial. The new trial was had before the circuit court upon an agreed statement of facts, and resulted in a judgment for the defendants, which judgment was affirmed by the court of appeals, and thereupon the plaintiff sued out this writ of error.

The important facts are these: On February 21, 1872, the railroad company filed in the office of the Commissioner of the General Land Office its map of general route through the then territory (now state) of Montana. On April 22, 1872, the Commissioner, by direction of the Secretary of the Interior, transmitted to the local land office in Montana a diagram showing the portion of the line of general route extending through that district, and directed the withholding from sale or location, pre-emption, or homestead entry, the odd-numbered sections within 40 miles of such general route. This diagram and order were received and filed in the local office on May 6, 1872. On May 3, 1872, three days before the order was received at the local land office, William McLean, a citizen of the United States and duly qualified to enter the land, made a homestead entry on the tract in controversy. In that fall he moved a small building onto the land and spent his nights there until the spring of 1873, when he married, removed from the premises, and never thereafter resided or made any improvements thereon. Proceedings were taken to cancel his homestead entry, and upon September 11, 1879, it was canceled. On July 6, 1882, the railroad company filed a plat of the definite location of that portion of its line adjacent to the premises, and thereafter duly constructed its road on that line. The land is within 40 miles of the line of general route, and also within 20 miles of the line of definite location and *construction. McLean died in [566] August, 1882, leaving a will by which he devised the tract to his widow. This will was duly admitted to probate.

On April 21, 1876, Congress passed an act (19 Stat. at L. 35, chap. 72), the 1st section of which is—

"§ 1. That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be con-

NOTE.—As to conflicting rights of claimant and railroad,—see note to *Sweesey v. Sparling* (Iowa) 9 L. R. A. 777.

firmed, and patents for the same shall issue to the parties entitled thereto."

And on June 15, 1880, it passed another act (21 Stat. at L. 237, chap. 227), the second section of which is—

"That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

On March 15, 1883, the widow of William McLean applied under this last act for the purchase of the tract. Her application was made as widow and not by virtue of any right given by the will of her husband. Her application was contested by the railroad company, but sustained by the Commissioner of the General Land Office, and afterwards [567] by the *Secretary of the Interior, and on his decision a patent was duly issued to her. Whereupon this suit was brought to test the title conveyed by such patent.

Mr. James B. Kerr argued the cause and, with *Mr. C. W. Bunn*, filed a brief for plaintiff in error.

Counsel's contentions sufficiently appear in the opinion.

No counsel for defendant in error.

**Mr. Justice Brewer* delivered the opinion of the court:

The contest in this case is between one claiming under a homestead entry and a company claiming under a grant in aid of a railroad. It was long ago said by this court that "the policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person" (*Clements v. Warner*, 24 How. 394, 397, 16 L. ed. 695, 696), and in a later case, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406.

There is no real hardship in enforcing this rule, for if the individual seeking to maintain his homestead entry fails by reason of any defect he has no recourse on the government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of railroad land grants is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within the indemnity limits. It is not therefore strange that the rulings of the land department, as 175 U. S.

well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land.

Yet this would never justify an ignoring of the clear rights of the company, for the purpose of Congress in the grant must be recognized and made effective in every case to which the grant applies.

*On October 5, 1868, and prior to the filing [568] of the map of general route, there was, as appears from the agreed statement, a pre-emption declaratory statement made by William M. Scott. In 1869 he settled upon the tract, built a house, and resided in it, but in the fall of that year abandoned the land, moved to Helena, and never returned. On October 14, 1872, he filed an amended pre-emption declaratory statement wholly excluding the land in controversy and substituting other land. Whatever right Scott may have acquired by his original declaratory statement was clearly lost by his amended declaratory statement. Indeed, it had undoubtedly lapsed long before. *Northern P. R. Co. v. De Lacey*, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791.

We need, therefore, only concern ourselves with the action of McLean. He did not make his homestead entry prior to the filing of the map of general route, but did before notice thereof was received in the local land office, and it is not disputed by counsel for the railroad company that if he had perfected that entry the act of 1876 would have operated to confirm his title. But the contention is that the act only applies when, as it reads, "the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels;" and it is urged that, as the agreed statement shows that McLean abandoned the land in 1873, and thereafter never complied with the requirements of the homestead law, he was not in a condition to claim any right to the land, because under the law in force at the time he made his original entry the land was not subject to entry (*Buttz v. Northern P. R. Co.* 119 U. S. 55-72, 30 L. ed. 330, 336, 7 Sup. Ct. Rep. 100), and he could claim nothing under the act of 1876, because he did not comply with the homestead laws or file proper proofs of any compliance therewith. In other words, it is said that the land was not subject to homestead entry when he entered it, and that his entry was not made valid by the act of 1876; and therefore that the act of 1880 has no application to this case.

The writer of this opinion is much impressed with the force of these contentions, but a majority of the court hold that *they [569] give too much force to the letter of the statutes, and do not carry out their real spirit. They are of opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time when the map of general route

was filed in the office of the Secretary of the Interior and the order of withdrawal made; that the withdrawal authorized by the 6th section of the act making the land grant to the Northern Pacific Railway Company (13 Stat. at L. 365, 369, chap. 217) did not vest in the company any title to the lands within the withdrawal limits, but only operated by legislative declaration and subsequent executive action to withdraw those lands from homestead or pre-emption entries; that the right of the railroad company to any tract only became vested when the line of definite location was filed, and that up to that time Congress had full power to order a cancellation of the withdrawal or to make any disposition of lands within those limits which it saw fit; and that this act of 1876, rightfully construed and in accordance with the spirit of congressional dealings with individual homesteaders and pre-emptors, is to be taken as a legislative enactment that no entry was to be considered invalidated by reason of the filing of the map of general route if it was made before notice of the withdrawal was received at the local land office. If this be the true construction of this act, then McLean had all the rights which attached to a valid entry, and might have proceeded under the act of 1880 to make the purchase thereby authorized.

Before, however, the act of 1880 was passed his entry had been canceled by reason of a failure to comply with the requirements of the homestead law in occupation, proofs, and payment of the final fees. Indeed, he could not have made the proofs because he had abandoned the land. But the act of 1880 was passed before the railroad was definitely located adjacent to this land, and it was the opinion of the circuit court of appeals, which is approved by a majority of this court, that its effect was to except the tract from the grant "to the Northern Pacific. That grant was of land to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed." Counsel for the railroad company contend that this right of McLean to purchase this tract was no other or different than the right of any duly qualified citizen of the United States to purchase any tract of public lands, and that as this right had not been exercised at the time the line of definite location was fixed, it could not be said that at that time any right had attached. But we think it is not a true construction of the land laws that a specified right given to a limited class to take by purchase particular tracts is in any just sense the equivalent of the general right of all citizens to purchase public lands. It is not a strained, but a reasonable, construction to hold that Congress by this act of 1880 "appropriated" these particular tracts, thus covered by homestead entries, even of an outlawed class, for the benefit of those homesteaders, and that they were no longer to be counted among the public lands of the United States

subject to the grant to the railroad company.

One other question is presented by counsel for plaintiff in error. The right given by the act of 1880 is to the entrymen and persons to whom their rights have been transferred by "bona fide instruments in writing." It is contended that a widow cannot avail herself of the benefit of that statute because she does not take by any bona fide instrument in writing.

It is true that the application to the land office upon which the patent was issued was based upon her right as widow, and it maybe questionable whether a widow is within the scope of that act; but the agreed statement of facts shows that McLean by will devised this tract to her, and that the will was duly probated; so that she held a right, not simply as widow, but as devisee, taking under a bona fide instrument in writing, and it certainly cannot operate to defeat her right under that instrument that the land department recognized her right as widow.

For these reasons the judgment of the Circuit Court of Appeals is affirmed.

WILLIAM H. BLACKBURN, *Plff. in Err.*, [571]

v.

PORTLAND GOLD MINING COMPANY
and W. S. Stratton.

(See S. C. Reporter's ed. 571-588.)

Writ of error to circuit court—amount in dispute—necessary party—jurisdiction of Federal court—suit arising under laws of the United States—adverse mining claim.

1. An allegation that the "amount in dispute" is more than \$2,000, exclusive of interest and costs, is not insufficient to show that the case is within the jurisdiction of a Federal court merely because it says the "amount," instead of the "matter," in dispute.
2. One who appears by the proceedings in the Land Office to be the applicant for a patent to a mining claim, and to be asserting his compliance with the statute, is a proper and necessary party defendant in a suit in support of an adverse claim under U. S. Rev. Stat. §§ 2325, 2326, and not merely a nominal party, who can be disregarded in determining the question of the jurisdiction of a Federal court on the ground of diverse citizenship.
3. A suit brought in support of a protest and adverse claim under U. S. Rev. Stat. §§ 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court regardless of the citizenship of the parties, where no question is made as to the meaning and construction of the statutes of the United States.

[No. 54.]

NOTE.—As to jurisdiction of circuit courts as determined by amount in controversy,—see notes to Auer v. Lombard, 19 C. C. A. 75; Tenant-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

As to diverse citizenship as ground of Federal jurisdiction,—see notes to Roberts v. Lewis, 36 L. ed. U. S. 579; Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.

*Argued and Submitted October 18, 1899.
Decided January 8, 1900.*

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a question certified as to the jurisdiction of that court in the matter of an adverse mining claim. *Affirmed.*

Statement by Mr. Justice Shiras:

[571] *This was an action brought on August 27, 1897, in the circuit court of the United States for the District of Colorado, by William H. Blackburn, a citizen of the state of Colorado, against the Portland Gold Mining Company, a corporation of the state of Iowa, and W. S. Stratton, a citizen of the state of Colorado.

It was alleged in the complaint that the amount in dispute in the cause exceeded, exclusive of interest and costs, the sum of \$2,000; that the suit was of a civil nature at common law, and arose under the laws of the United States; that it was an adverse suit, and a suit arising under the provisions of §§ 2325 and 2326, Revised Statutes of the United States, and is what is known as a suit in support of an adverse claim; that the defendant, W. S. Stratton, had applied for a patent for a portion of the Fairplay Lode mining claim, survey lot No. 9331, under and by virtue of the provisions of § 2325, and that the plaintiff Blackburn, under and by virtue of § 2326, had filed his adverse claim and protest *against the entry of said portion of said Fairplay claim, upon the ground that a part thereof was held and owned by the plaintiff as a part and parcel of the Eacho Lode mining claim; that said W. S. Stratton, on or about the 4th day of February, 1897, had made application in the United States land office at Pueblo, Colorado, for patent on said portion of said Fairplay Lode mining claim under said § 2325, and that at the time he made his said application he was not the real owner of said portion of Fairplay Lode mining claim, neither did he have any interest or title whatsoever therein; that long prior to said time the said Stratton had by good and sufficient deed conveyed all his right title, and interest in and to said claim to the Portland Gold Mining Company, defendant, and for that reason the plaintiff brought this action against the said the Portland Gold Mining Company jointly with said Stratton; that on February 1, 1897, and ever since, the plaintiff was and is the owner of and in actual possession of the Eacho Lode mining claim, 1,500 by 300 feet, situate in the Cripple Creek mining district, El Paso county, state of Colorado, and that plaintiff has the legal right to occupy and possess the same by virtue of a full compliance with the local rules and regulations of miners in said mining district and of the laws of the United States and of the state of Colorado, and by pre-emption, discovery, and location thereof as a lode mining claim located on the public domain of the United States; that on February 4, 1897, the defendant wrongfully and unlawfully entered into and upon a parcel of the said Eacho Lode mining claim described as follows, to wit: All that part of said claim

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which is intersected by the exterior lines of survey No. 9331, known as the Fairplay Lode mining claim, as shown by plat marked B, filed on July 28, 1899, in the land office of the United States at Pueblo, Colorado, with the adverse claim of plaintiff against the entry of said survey lot for patent; that the defendant has ever since wrongfully withheld possession of said parcel of Eacho Lode mining claim from the plaintiff, to his damage in the sum of \$1,000; that this suit is brought in support of said adverse claim within thirty days after the filing of said adverse claim, and that plaintiff *has neces-[573] sarily disbursed and expended the sum of \$1,000 for plats, abstracts, and copies of papers filed in said land office with said adverse claim, and also a reasonable counsel fee, to wit, \$200 for the expense of preparing his said adverse claim.

The plaintiff prayed for a judgment that he is the owner and entitled to the possession of and patent to the above-described parcel of said Eacho Lode mining claim, and for the recovery of the same; for the sum of \$1,000 damages; for the sum of \$300 expended in behalf of said adverse claim, and for costs of suit.

On November 8, 1897, the defendants, the Portland Gold Mining Company and W. S. Stratton, moved the court to dismiss the cause for the following alleged reasons:

1st. That the court has no jurisdiction either of the parties or the subject-matter of said suit.

2d. That both the plaintiff and defendants in said suit are citizens of the state of Colorado, and the same is not one wholly between citizens of different states.

3d. That it does not appear in said complaint that the amount in controversy in said suit is \$2,000.

4th. That it appears from said complaint that said suit is one which cannot under the Constitution and statutes of the United States be brought into this court.

On December 20, 1897, the court entered judgment dismissing the cause for want of jurisdiction, and signed a bill of exceptions at the request of the plaintiff, and also certified that the said question of jurisdiction of the circuit court of the United States was the only one involved in the said cause, and was the sole question upon which said cause was dismissed, and also allowed the present writ of error.

Mr. Charles J. Hughes, Jr., submitted the cause for plaintiff in error:

Objection to the jurisdiction of the court cannot be raised by motion to dismiss, but only by demurrer or plea in abatement.

Hoyt v. Wright, 1 McCrary, 130, 4 Fed. Rep. 168; *Clarkhuff v. Wisconsin, I. & N. R. Co.* 26 Fed. Rep. 465; *Black's Dillon, Removal of Causes*, § 215.

Jurisdiction of the United States upon the ground of diversity of citizenship is not defeated by joining Stratton as a party defendant because of his connection with the original application for a patent. His ownership having ended, he had no interest in the

controversy, and was therefore a nominal party only.

Arapahoe County v. Kansas P. R. Co. 4 Dill. 277, Fed. Cas. No. 502; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *McNutt v. Bland*, 2 How. 9, 11 L. ed. 159; *Browne v. Etrode*, 5 Cranch, 303, 3 L. ed. 108; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Irvine v. Lowry*, 14 Pct. 298, 10 L. ed. 464; *Bonnafée v. Williams*, 3 How. 574, 11 L. ed. 732; *Beebe v. Louisville, N. O. & T. R. Co.* 39 Fed. Rep. 481; *Belding v. Gaines*, 37 Fed. Rep. 817; *Collins v. Wellington*, 31 Fed. Rep. 244; *Nelson v. Hennessey*, 33 Fed. Rep. 113; *May v. St. John*, 38 Fed. Rep. 770; *Myers v. Murray*, 43 Fed. Rep. 695, 11 L. R. A. 216; *Brown v. Nelson*, 43 Fed. Rep. 614; *Judah v. Iowa Barb-Wire Co.* 32 Fed. Rep. 561; *Black's Dillon, Removal of Causes*, §§ 76, 77; *Henderson v. Cabell*, 43 Fed. Rep. 257; *Ruckman v. Ruckman*, 1 Fed. Rep. 587; *Dunton v. Muth*, 45 Fed. Rep. 390; *Hoyt v. Wright*, 1 McCrary, 130, 4 Fed. Rep. 168; *Clarkhuff v. Wisconsin, I. & N. I. R. Co.* 26 Fed. Rep. 465.

This action is one arising under the laws of the United States, and therefore cognizable in the Federal court.

Frank G. & S. Min. Co. v. Larimer M. & S. Co. 1 Colo. Law Rep. 491; *Rutter v. Shoshone Min. Co.* 75 Fed. Rep. 37; *Shoshone Min. Co. v. Rutter*, 59 U. S. App. 538, 87 Fed. Rep. 801, 31 C. C. A. 223; *Burke v. Bunker Hill & S. Min. & Concentrating Co.* 46 Fed. Rep. 644; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 62 Fed. Rep. 945.

The decision of a case by one of the circuit courts of appeal of the United States until reversed by the Supreme Court should be followed by the circuit courts in another circuit.

Fairfield Floral Co. v. Bradbury, 87 Fed. Rep. 415.

As sustaining these views, although not upon the direct question here presented, see also *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 480, 17 Sup. Ct. Rep. 98; *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Ames v. Kansas ex rel. Johnston*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Dunton v. Muth*, 45 Fed. Rep. 390.

The entire value of the territory in dispute in the adverse was involved in the controversy as well as the \$1,300 of damage alleged.

Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. 43 Fed. Rep. 545; *Kenaday*

v. Edwards, 134 U. S. 117, 33 L. ed. 853, 10 Sup. Ct. Rep. 523.

There is a marked distinction between a suit to quiet title when the property is a mining claim, and an adverse suit for the purpose of determining who shall receive title thereto from the government.

Inez Min. Co. v. Kinney, 46 Fed. Rep. 832.

Mr. W. H. Bryant argued the cause and, with *Messrs. C. S. Thomas* and *H. H. Lee*, filed a brief for defendants in error:

An ordinary action of ejectment or bill in equity to settle rights connected with the mere possessory title claimed under the mining laws is not cognizable in the Federal courts.

Trafton v. Nougues, 4 Sawy. 178, Fed. Cas. No. 14,134; *Murray v. Bluebird Min. Co.* 45 Fed. Rep. 385; *Inez Min. Co. v. Kinney*, 46 Fed. Rep. 832; *Southern P. R. Co. v. Whittaker*, 47 Fed. Rep. 529; *Butler v. Shafer*, 67 Fed. Rep. 161; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656.

The conclusion of the court in *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771, is conclusive of the present case. A mere mining controversy does not necessarily present a Federal question, and a suit concerning such a controversy is not one arising under the laws of the United States.

Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

The United States is not a party to the action, is not bound by the judgment, and the only effect of the judgment is to make it evidence; and the land office is to use it simply as one of the links in the chain of title presented by the party applying for the patent.

Perego v. Dodge, 163 U. S. 160, 41 L. ed. 113, 16 Sup. Ct. Rep. 971; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733.

***Mr. Justice Shiras** delivered the opinion of the court: [574]

As the court below filed no opinion, we are not distinctly informed upon which of the several grounds alleged the court proceeded in dismissing the cause for want of jurisdiction, and therefore it will be necessary for this court to consider each and all of them.

First, then, Does the record disclose that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000? The allegation in the complaint is "that the amount in dispute in this cause exceeds, exclusive of interest and costs, the sum of \$2,000;" and it is also made to appear that the matter in dispute is the title to a mining claim, for which, and for damages and expenses amounting to \$1,300, the plaintiff demands judgment. The defendants did not think fit to traverse these allegations, but moved to dismiss on the face of the complaint. Upon such a motion, as upon a demurrer, a court will not incline to dismiss for want of jurisdiction unless the facts appearing of record create a legal cer-

ainty of that conclusion. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293. We are not impressed by the criticism that the amount, instead of the matter, in dispute, is alleged to have exceeded \$2,000. The meaning of such an allegation is clear, and in the absence of any traverse thereof, and of any pretense that, in point of fact, the matter in dispute did not exceed the sum or value of \$2,000, we think that the record fairly imports the necessary jurisdictional amount.

The next contention, that the circuit court could not take jurisdiction because the record did not disclose that the controversy was between citizens of different states, seems to us to have been well founded. The complaint alleged that Stratton, one of the defendants, was a citizen of the same state as the plaintiff. Not only was Stratton named as a party defendant in the complaint, but a summons was sued out against him as such; and the motion to dismiss the [575] complaint was made *in behalf of Stratton as well as of the Portland Gold Mining Company.

It is, however, argued that, as it is alleged in the complaint that Stratton had conveyed by deed his interest in the mining claim to the Portland Gold Mining Company, Stratton was a nominal party only, whose presence on the record would not defeat the jurisdiction of the court as between the other parties; and cases are cited in which it has been held that the jurisdiction of the Federal courts will not be defeated by the mere joinder or nonjoinder of formal parties. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651; *Wood v. Davis*, 18 How. 467, 15 L. ed. 460; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963.

But considering the nature of the suit and the relief sought thereby, we are not prepared to hold that Stratton was a purely formal and unnecessary party. It is clear, from the provisions of §§ 2325 and 2326, Revised Statutes, that they contemplate a controversy between an applicant for a patent and an adverse claimant. Under the first of these sections Stratton, as the complaint shows, made personal application in the United States land office at Pueblo for a patent.

In order, therefore, that a controversy could arise under these sections, Stratton must have complied with the provisions of § 2325 by having located a piece of land and by having filed in the land office an application under oath for a patent, showing compliance, together with a plat and field notes of the claim, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and by having posted a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and by filing an affidavit of at 175 U. S.

least two persons that such notice has been duly posted, and by filing a copy of the notice in the land office.

It is quite evident under these provisions and the allegations of the complaint, that, when Blackburn desired to file an adverse claim, he was informed by the proceedings in the *land office that Stratton was the ap-[576] plicant for the patent and was asserting his compliance with the statute, and was therefore a proper and necessary party to make defendant. Why he included the Portland Gold Mining Company as a party defendant is not quite evident, but it may be conjectured that he wished to raise some question as to the validity of Stratton's proceedings in the land office after he had, as alleged, parted with his interest in the claim. However this may be, we are of opinion that Blackburn could not proceed safely and formally to raise an issue by an adverse claim without making the person claiming the patent a party defendant when he instituted his proceedings in court.

Nevertheless, even if the circuit court could not take jurisdiction of the case because the controversy was not between citizens of different states, it is claimed that the court had jurisdiction because an adverse suit, or suit brought in support of a protest and adverse claim, under the provisions of §§ 2325 and 2326 of the Revised Statutes, is a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties.

This presents an important question, one that has been differently answered in the lower courts which have been called upon to decide it. *Burke v. Bunker Hill & S. Min. & Concentrating Co.* 46 Fed. Rep. 644; *Trafton v. Nougues*, 4 Sawy. 178, Fed. Cas. No. 14,134; *Rutter v. Shoshone Min. Co.* 75 Fed. Rep. 37; *Shoshone Min. Co. v. Rutter*, 59 U. S. App. 538, 87 Fed. Rep. 801, 31 C. C. A. 223.

It may be well to quote in full the language of the sections in question:

"Sec. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States *sur-[577] veyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled

to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that a plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

"Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, *and extent of said adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certification of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for

the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patent shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

The first observation to be made is that Congress did not intend to prescribe jurisdiction in any particular court, state or Federal. "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings *in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment."

The natural inference from this language is that the competency of the adjudicating court was not to be determined by the mere fact that the mining claims in controversy consisted of lands the title to which was in the United States. If that fact alone were to be decisive no other than a Federal court would have been mentioned. We think the intention of Congress, in this legislation, was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of different states, and if the matter in dispute exceeded the sum or value of \$2,000, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed \$2,000, then the party claimant could proceed in a state court.

This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question. Thus, in *Romie v. Casanova*, 91 U. S. 379, 23 L. ed. 374, which was an action brought to recover the possession of certain lands in the city of San José, the question to be determined was, which of two parties had actually obtained a grant of the particular premises in question. The title of the city had originated before the cession of California to the United States. But this court said: "The title of the city was not drawn in question. Even if it depended upon the treaty of Guadalupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the

case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it." Accordingly the writ of error to the supreme court of California was dismissed for want of jurisdiction.

[580] *Again, in *McStay v. Friedman*, 92 U. S. 723, 23 L. ed. 767, where in ejectment for a part of the lands conferred to the city of San Francisco by an act of Congress, the validity and operative effect of which were not questioned, this court held that it had no jurisdiction to review the judgment of the supreme court of California, saying: "No Federal question was involved in the decision of the supreme court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the 'Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.'"

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656, was a suit in equity in a state court of California, and brought on petition into the circuit court of the United States on the allegation that its determination involved the construction of certain laws of the United States affecting rights in public and mineral lands. The circuit court remanded the case to the state court on the ground that no real or substantial controversy, properly within the jurisdiction of a Federal court, appeared to be involved. That judgment of the circuit court was affirmed by this court in an opinion of Mr. Chief Justice Waite, a portion of which was as follows:

"The attempt to transfer this cause was made under that part of § 2 of the act of 1875 which provides for the removal of suits 'arising under the Constitution or laws of the United States.' In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohen v. Virginia*, 6 Wheat. 379, 5 L. ed. 285. Or when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction.' *Osborn v. Bank of United States*, 9 Wheat. 822, 6 L. ed. 224."

[581] "In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the 'channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as 175 U. S.

well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. . . . The statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."

What is meant by the provision in § 2326, that the question of the right of possession should be determined by a court of competent jurisdiction, was thus spoken of in *Chambers v. Harrington*, 111 U. S. 350, 23 L. ed. 452, 4 Sup. Ct. Rep. 428:

"It is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a Federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent upon the laws of the United States, we see no reason why, if the amount in controversy is *sufficient in a case tried in a court of the United States, or a proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review as in other similar cases." [582]

This statement is not inconsistent with the cases herein previously cited, as the right to review the judgment of a state court is said to be limited to a proper case having been made, clearly implying that some Federal question should be involved, and that a mere controversy as to the right of possession would not make such a proper case; for otherwise every case arising under § 2326 would be a proper case.

In *Iron Silver Min. Co. v. Campbell*, 135 U. S. 299, 34 L. ed. 160, 10 Sup. Ct. Rep. 765, Mr. Justice Miller, in discussing the scope of these sections, said:

"It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original statute from which they were transferred to the Revised Statutes, the

words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

[583] The ruling in *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771, is directly applicable to the present case. There a writ of error brought to this court a judgment of the supreme court of the state of Colorado. The suit was in ejectment brought by the Crooke Mining Company in a state court against Bushnell, to recover possession of a certain portion of the surface *location of a mining claim on Ute mountain, and grew out of conflicting and interfering locations of mining claims. The claim of the latter was first located, but when the company applied for a patent Bushnell filed an adverse claim to a portion of the same location, and thereafter, under § 2326 of the Revised Statutes, and within the time prescribed therein, commenced his action in the state court. In the complaint it was alleged that the plaintiff was the owner of the Annie Lode mining claim, and that defendants had, at a certain date, entered upon and ever since wrongfully held possession of a part of said claim, specifically described, and that the action was in support of plaintiff's adverse claim to such portion of the surface location. The question presented on the trial of the controversy arose out of conflicting and interfering locations, and the court gave and refused certain requests to charge the jury, which appear at length in the report of the case in this court. The trial resulted in a verdict and judgment in favor of the plaintiff. An appeal was taken to the supreme court of Colorado, which affirmed the judgment of the lower court. The supreme court of Colorado rested its judgment upon the general proposition that the trial court had correctly stated to the jury the principal point in controversy, and had left it properly to them to determine, as a matter of fact, what was the course of the conflicting lodes. The case was then brought to this court, and was heard on a motion to dismiss the writ or affirm the judgment.

Mr. Justice Jackson, in sustaining the motion to dismiss, said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the opinion of the supreme court affirming the action of the trial court as to instructions given, as well as to its refusal to give the instructions asked by the

defendants below, fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant *below, or that any such right was denied them, or was even passed upon by the supreme court of the state, nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States. [584]

"The decision of the supreme court of Colorado in no way brought into question the validity or even construction of any Federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the Chief Justice, in *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 653, 34 L. ed. 1116, 11 Sup. Ct. Rep. 435: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'"

Accordingly the writ of error to the supreme court of Colorado was dismissed.

The legal import of this decision plainly is that a controversy between rival claimants under §§ 2325 and 2326 of the Revised Statutes may be properly determined by a state court, and that the judgment of a state supreme court, in such a case, cannot be reviewed by this court simply because the parties were claiming rights under the Federal statute.

Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35, was brought to this court on a writ of error to the circuit court of appeals for the eighth circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the circuit court of the United States for the district of Colorado, and determined in the plaintiff's favor. The case was taken by writ of error to the United States circuit court of appeals for the eighth circuit, and the judgment was there affirmed, and thereupon a writ of error was allowed to this court. The case was here heard on a motion to dismiss on the ground that the suit was between citizens of different states, and that, therefore, under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals was final. An attempt was made in argument to sustain the right *of this court to take jurisdiction because, [585] although the suit was between citizens of different states, yet that the solution of the disputed ownership depended upon the construction and application of § 2322 of the Revised Statutes, concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed.

While it is true that the conclusion reached was mainly put upon the ground that the record did not disclose affirmatively

that any distinctive Federal question was involved, yet, as the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the circuit court could take jurisdiction irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question.

A similar principle was involved in *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131. That was a suit brought in a state court of California, and concerned the ownership of a mining claim. The case was brought to this court, and it was claimed that, as the question in dispute could only be determined by an application of §§ 2322 and 2336 of the Revised Statutes of the United States, such a state of facts appearing by the record, there was disclosed a Federal question which, of itself, gave this court jurisdiction to review the judgment of the supreme court of the state. But a motion to dismiss the writ of error was allowed. It is true that this court put its judgment on the ground that the judgment of the state supreme court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and that to enable

[586] this court to review the judgment in such a case it must appear, not only, that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.

In *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34, it was held that the mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under the treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, does not in any way draw in question the validity or construction of that treaty, so as to confer jurisdiction on this court to review the judgment of a circuit court of the United States. In this case *Gill v. Oliver*, 11 How. 545, 13 L. ed. 806, was cited, in which a writ of error to the court of appeals of Maryland was dismissed because, although the matter in dispute was money derived under a treaty with Mexico, yet such a dispute did not involve any question as to the validity or construction of the treaty, Mr. Justice Grier saying: "Both parties claim money in court; and, in order to test the value of their respective assignments, . . . introduce the history of the claim from its origin. The treaty and award are facts in that history. They were before the court but as facts, and

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not for construction. If A hold land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs, devisees, or assignees dispute as to which have the best title under him, this does not make a case for the jurisdiction of this court under the twenty-fifth section of the judiciary act. If neither the validity nor the construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or treaty, it is plainly no case for our interference under this section. That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it."

It should not be overlooked that §§ 2325 and 2326 form a part of a general scheme in reference to the mineral *lands of the United States. That scheme is contained in chapter 6 of the Revised Statutes of the United States, and includes sections from 2318 to 2352. Some light is thrown upon the intention of Congress, in the particular we are now considering, by other provisions than those expressed in §§ 2325 and 2326. [587]

Thus, § 2319 enacts that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, . . . by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2324 provides that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," etc.

Section 2332 enacts that where claimants "have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim," etc.

Section 2339 provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," etc.

Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially Federal in its *nature, we hold that clearly where a pat-

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ent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations, and customs of the mining district in which the lands are situated. In a case, therefore, like the present, where Federal jurisdiction does not arise because the parties are citizens of different states, and where no question is made as to the meaning and construction of the statutes of the United States, the state courts are to be regarded, within the letter and meaning of § 2326, as courts of "competent jurisdiction" to determine the right of possession." The judgment of the Circuit Court is therefore affirmed.

Mr. Justice **Brown** did not sit in this case, and took no part in its decision.

Mr. Justice **McKenna** dissents.

UNITED STATES, Appt.,

v.

JOHN R. GLEASON and George W. Gosnell.

(See S. C. Reporter's ed. 588-609.)

Contracts—construction of, as to extension of time—stipulation as to decision of engineer—effect of previous delinquencies—finality of engineer's judgment—stating basis of decision.

1. A contract providing that, if the parties of the second part shall, "by freshets, ice, or other force or violence of the elements, and by no fault of his," be prevented from completing the work at the time agreed upon, such additional time may be allowed for the completion as in the judgment of the party of the first part shall be just and reasonable; while a previous provision of the contract provides that it may be annulled, with the sanction of the chief of engineers, for failure to prosecute the work faithfully and diligently in accordance with the requirements,—must be interpreted to mean that the engineer shall determine whether a failure to complete the work within the time limited has been occasioned by freshets or other force of the elements and by no fault of the contractor, and, if so, what additional time shall be just and reasonable.
2. Previous delinquencies of contractors, and the futility of previous extensions, may be taken into consideration by an engineer in determining whether a further extension of time for performance should be allowed.
3. The judgment of an engineer to whom a contract refers the determination of the question of performance can be revised by the court only upon allegation and proof of bad faith, or of mistake or negligence so gross as to justify an inference of bad faith.
4. The basis of the decision of an engineer in the exercise of his power to determine the right of a contractor to an extension of time because of interruption by the elements without his fault need not be expressly stated in order to give efficacy to his decision.

5. The conclusion of an engineer as to the right of a contractor to an extension of time is not prevented from constituting a judgment, within the meaning of a contract provision referring the matter to his judgment, merely because the court reaches a different conclusion.

[No. 59.]

Argued October 23, 24, 1899. Ordered for reargument November 6, 1899. Reargued December 7, 8, 1899. Decided January 8, 1900.

A PPEAL from a decision of the Court of Claims in favor of claimants on contracts with the United States. *Reversed.* See same case below, 33 Ct. Cl. 65.

Statement by Mr. Justice **Shiras**:

*This appeal is from a decision of the court [589] of claims covering two suits in that court, Nos. 17,782 and 17,783, consolidated and heard and decided as one suit, in which judgment was entered for the plaintiffs.

The first suit was on a contract entered into August 4, 1885, between Colonel William E. Morrill, Corps of Engineers, United States Army, for and on behalf of the United States, and John R. Gleason and George W. Gosnell as partners, for the excavation of 110,000 cubic yards, more or less, of rock, in the improvement of the head of the Louisville & Portland Canal at Louisville, Kentucky, which excavation was called, in this litigation, the Upper Work.

The second suit was on a contract entered into January 13, 1887, between Major Amos Stickney, of the Engineer Corps of the United States Army, for and on behalf of the United States, and the firm of Gleason & Gosnell, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of rock, more or less, for enlarging the basin near the lower end of the same canal, and called herein the Lower Work.

*In the first suit, upon findings of fact and law, there was a judgment in favor of the plaintiffs for retained percentage in the sum of \$3,011.99, and for net profits which they would have made if they had been allowed to complete the work in the sum of \$60,537.50. In the second suit there was a judgment for retained percentage in the sum of \$2,401, and for net profits, if the contract had been carried on to completion, in the sum of \$2,827.50. The aggregate judgment in the two cases was for the sum of \$68,777.99.

There was a motion for a new trial, which was overruled, and also for an amendment of the findings of fact, which was granted in part. Thereupon this appeal was taken.

The findings of fact in the suit upon the first contract were as follows:

"I. On August 4, 1885, Lieutenant Colonel William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full, with and made a part of the petition herein, whereby the claimants agreed to

commence work on or before August 20, 1885, and make '110,000 cubic yards, more or less, of rock excavation in the enlargement of the Louisville & Portland Canal,' as therein provided for, at the rate of 85 cents per cubic yard, and to complete the same on or before December 31, 1886.

"Said contract further, and among other things, provided that—

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such [591] notice all money or reserved percentage *due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in § 3709 of the Revised Statutes of the United States; provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the forceable precisely as if the new date for such same shall subsist, take effect, and be commencement or completion had been the date originally herein agreed upon."

"II. The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for by the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only 'completed 14 per cent of their entire work' during the contract period, 1½ per cent of which was done in 1885.

"III. In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their contract to December 31, 175 U. S.

1887, which was granted on conditions stated in a supplemental contract, as follows:

"Articles of Agreement.

"Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887), *between [592] Major Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, state of Kentucky, of the second part.

"This agreement witnesseth that the said Major Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

"That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville & Portland Canal, be extended to December 31st (thirty-first), eighteen hundred and eighty-seven (1887), upon the following conditions viz.:

"First. That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with the government work of contractor Molloy or the work of the contractor for the new wall of the said Louisville & Portland Canal.

"Second. That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell."

"The foregoing agreement was made subject to approval of the Chief of Engineers, United States Army, and was thereafter duly approved by the acting Secretary of War.

"IV. The claimants not having completed their contract during the year's extension thereof as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date, which is as follows:

"* "Louisville, Ky., Dec. 31st, 1887. [593]

"Major Amos Stickney,

"Corps of Engineers, U. S. A.

"Dear Sir: We respectfully ask an extension of time on our contract for enlarging the Louisville & Portland Canal at the head of the Falls of the Ohio river until the 31st of December, 1888, for the following reasons, to wit:

"There was so much work being done upon railroads during the last year throughout the state that labor was very hard to get.

"We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so. We even employed agents in New York and other cities to procure and ship labor to us here, and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot; so very hot that for sixty to ninety days, in many instances, the men would work only two or three hours a day.

"We propose to provide not less than ninety cars of the same capacity as those now used, and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

"We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

"We propose to provide, maintain, and operate not less than ten steam drills on the work and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

"The method of carrying on the work will be such as will be approved by the officer in charge.

"When practicable, during the summer season, we propose to provide and operate an adequate force at night.

[594] "All additional plant will be obtained and available for use by the time rock excavation can be commenced, and we propose *to bear all extra cost to the United States occasioned by the extension of time for completing our contract."

"Which letter was forwarded to the Chief of Engineers with the following communication:

"U. S. Engineer Office,

Louisville, Ky., December 31st, 1887.

"The Chief of Engineers, U. S. Army,
Washington, D. C.

"General: I have the honor to forward herewith an application of Gleason & Gosnell for extension of time for completion of their contract on work of excavating for enlargement of the head of the Louisville & Portland Canal.

"The work of these contractors during the past season has been exceedingly unsatisfactory. Whilst they have had some difficulties to contend with in procuring labor, they have not conducted their work in a manner to produce the best results, and hardly seemed to comprehend the magnitude of their undertaking.

"After a number of consultations with the contractors and their principal bondsman, I have, however, concluded that the interests of the government will be best served by an extension of time with the provisions which they have inserted in their application.

"These provisions call for nearly double the plant heretofore used and the adoption

of method of work which will be approved by the engineer in charge; also the bearing of all extra expense to the United States occasioned by the extension of time. With these provisions, I believe the engineer officer in charge will be able to push the work more rapidly than if it were relet to other contractors. I therefore recommend that the time for completing of their contract be extended as requested to December 31, 1888, on condition that the provisions in their application are faithfully carried out."

"The extension of the time of said contract to December 31, 1888, *as requested and recommended, was granted and approved by the Chief of Engineers 'on condition that the provisions in their application are faithfully carried out,' of which approval the claimants were notified by the following letter:

"U. S. Engineer Office,

Louisville Ky., January 9th, 1888.

"Messrs. Gleason & Gosnell,
Louisville, Ky.

"Sirs: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louisville & Portland Canal is extended to December 31st, 1888, on condition that the provision in your letter of December 31, 1887, a copy of which is inclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract. Very respectfully,

Amos Stickney,

Major of Engineers, U. S. A."

"V. The rock to be excavated under the contract was in the river bed in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the government cross dam, which cross dam was 5 feet high, measured by the canal gauge.

"VI. Before the contract aforesaid was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications (7) contained the provision that the contractor 'must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water.'

"They were advised by the ninth specification so exhibited that their contract would provide 'that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements, and by no fault of his or their own.'

"VII. The condition of the Ohio river was during the season *of 1888, the period of the last extension, unusual and unprecedented for repeated and continued freshets and high water, overflowing the cross dam aforesaid; in consequence of which freshets and high water the working season of 1888, in the Ohio river at Louisville, Ky., was limited to about thirty-five days, mostly in July and August, as will more fully appear from the official monthly report of the defendants'

officers of the progress of the work (known as section 3) from December, 1887, to December, 1888, as follows:

"December, 1887.

"On section 3, Gleason & Gosnell, contractors, very little was done in December, except the removal of loose material which had been left above grade and in getting out machinery in anticipation of closing for the season. The water is several feet deep over both sections.'

"March, 1888.

"The stage of the river has prevented any work being done on the contracts of John Molloy, Gleason & Gosnell, and the Salem Stone & Lime Co.'

"April, 1888.

"No work has been done by the contractors on account of high water in the upper section.'

"May, 1888.

"No excavation has been made by the contractors for the upper sections on account of high water.'

"June, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam has been constructed, the pumps started, and drilling on high points of rock begun. The first blasting was done June 30th.'

"July, 1888.

"On section 3, Gleason & Gosnell, contractors, drilling on high points of rock was [597] continued and a temporary dam of earth finished. The pit was pumped out and tracks surfaced. The contractors were run out by high water on the 11th instant and have not resumed.'

"August, 1888.

"On section 3, Gleason & Gosnell, contractors, excavation was continued until the 18th of August, on which date the work was flooded by high water.'

"September, 1888.

"On section 3, Gleason & Gosnell, contractors, no work has been done since the contractors were run out by high water in August.'

"October, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam was begun on October 5th. The contractors' pump was started on October 9th, and on the 11th the river washed away the dam, since which time no work has been done.'

"November, 1888.

"On section 3, Gleason & Gosnell have done no work since October 11th. The river has been over their section since that date.'

"December, 1888.

"No work has been done by the contract-

ors during the month. The contract of Gleason & Gosnell expired on December 31st.'

"VIII. During the working season of 1888 the claimants were diligent in the prosecution of work embraced in the contract, in preparing therefor, and in endeavoring to exclude the water and freshets of the river.

"They provided for the additional plant mentioned in their application for extension, and had it ready for operation at the beginning of the season of 1888. But there was insufficient *working time to complete the work by December 31, 1888, at the rate of [598] 640 cubic yards for each practicable working day of twenty-four hours, and this from no fault of the claimants during the last extension of their said contract. No act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888.

"IX. The force of the defendants' officer in charge of this same work after December 31, 1888, was, by reason of the overflow of the river, compelled to cease the work of excavation, to wit, in 1889 and 1890, at stages of water at from 6.1 to 6.10 feet, and they did not complete the work in three seasons subsequent to 1888.

"X. After the working season of 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract so extended for the reason that they had been, by freshets and force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract, whereupon the engineer in charge refused to allow such additional time.

"The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness, or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon.

"No judgment or decision was given by said engineer on the question as to whether the (J. R.) claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

"XI. The amount of the reserved 10 per [599] centum under said contract is \$3,011.99, and has never been paid by the defendants to the claimants.

"XII. The total amount of rock in the area covered by the contract, as finally estimated by the defendants, was 118,935.22

cubic yards, of which the claimants had removed 35,435.22 cubic yards, leaving unremoved at the end of the season of 1888, 83,500 cubic yards.

"XIII. The cost to the claimants of performing this remaining work, 83,500 cubic yards, would have been \$1.25 per cubic yard, and their total loss thereon at the contract price therefor would have been 40 cents per cubic yard, or \$33,400.

"XIV. Under the specifications (2), made part of the contract and set out in the petition aforesaid, it is provided that 'all material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission.'

"Every yard of solid rock would have produced, by crushing, 1½ yards of broken stone and upon this basis the remaining rock in the area covered by the contract at the end of the season of 1888 would have produced 125,250 cubic yards of broken stone.

"XV. The rock, when excavated and crushed, was a valuable commodity, for which there was a ready market in Louisville at \$1.25 per cubic yard.

"XVI. The cost to the claimants of crushing and delivering the rock for the market was 50 cents per cubic yard and the net value to the claimants of the crushed and delivered rock was 75 cents per cubic yard, or \$93,937.50, less the loss of \$33,400, as set forth in Finding XIII., leaving \$60,537.50 as the claimants' net profit under the contract for the remaining work.

[600] "XVII. From the foregoing official reports, as well as from the other facts found herein, the court finds the ultimate fact that the condition of the river was as herein set forth; *and the time remaining for active work, after deducting the time when it was impossible to do work by reason of the high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and that it was impossible for the claimants to complete the work within the working time thus remaining."

The findings in the second case were substantially similar.

Mr. George Hines Gorman argued the cause and, with Assistant Attorney General Pratt, filed a brief for appellant:

Courts will follow a practical construction placed upon a contract by the parties thereto, even though the courts would not be inclined to concur in the same as a matter of legal construction.

Chicago v. Sheldon, 9 Wall. 54, 19 L. ed. 596; *Topliff v. Topliff*, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; *District of Columbia v. Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585.

If the contract as written did not express the true agreement, it was the claimant's folly to have signed it

Brawley v. United States, 96 U. S. 168, 24 L. ed. 622; *Simpson v. United States*, 172 U. S. 379, 43 L. ed. 484, 19 Sup. Ct. Rep. 222.

If a party seeks to make out that certain words used in the contract have a different acceptation from their ordinary sense, he must prove it by clear, distinct, and irresistible evidence.

Carter v. Crick, 4 Hurlst. & N. 412; *DeWitt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; *American Merchants Mfg. Co. v. Kantrowitz*, 77 Ill. App. 155.

The word "may" naturally and ordinarily and properly means "is permitted to; has liberty to." Bouvier, Law Dict. ed. 1897, p. 384.

In the absence of fraud or such gross error as would imply bad faith, the decision of the engineer must be held as conclusive on the appellees.

Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; *Kennedy v. United States*, 24 Ct. Cl. 139; *Ogden v. United States*, 13 U. S. App. 615, 60 Fed. Rep. 725, 9 C. C. A. 251; *Elliott v. Missouri, K. & T. R. Co.* 40 U. S. App. 61, 74 Fed. Rep. 707, 21 C. C. A. 3; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023.

Messrs. H. N. Low and Temple Bodley argued the cause and, with Mr. John G. Simrall, filed a brief for appellees:

The interpretation of a contract should be favorable and liberal.

Story, Cont. § 640.

Effect must be given, if possible, to every part and word.

1 Shep. Touch. 87; Story, Cont. §§ 640, 658a; *Washburn v. Gould*, 3 Story, 162, Fed. Cas. No. 17,214.

All parts are to be taken together to ascertain and give legal effect to the true intention of the parties, without merely weighing the precise effect of single words.

Washburn v. Gould, 3 Story, 162, Fed. Cas. No. 17,214.

And, as a last resort, doubtful words are to be taken most strongly against the speaker or person engaging himself by them.

Story, Cont. § 662; 2 Kent, Com. 556; 1 Powell, Cont. 395.

If the inducement or proposition upon which a contract is founded be ambiguously stated by one party so as to operate as a surprise upon the other, such statement will be construed in favor of the party deceived, although the deception be unintentional.

Story, Cont. § 664.

The word "may" upon adjudication is ordinarily held to be mandatory and to be the same as "shall."

King v. Derby, Skinner, 370; *Rex & Reg. v. Barlow*, 2 Salk. 609; *Rock Island County Supers. v. United States ex rel. State Bank*, 4 Wall. 435, 13 L. ed. 419.

Where power is given to public officers the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires

shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, who would otherwise be remediless.

Rock Island County Supers. v. United States ex rel. State Bank, 4 Wall. 435, 18 L. ed. 419.

While the above language was used in construing a statute, the same principles of exposition apply both to statutes and contracts.

Smith, Cont. 6th ed. 483, 501.

The extensions of time having been granted upon sufficient grounds and having eliminated all necessity for inquiring into those grounds, there was no occasion for the contractors to prove that they had not been in default.

Pigeon v. United States, 27 Ct. Cl. 167.

[600] *Mr. Justice Shiras delivered the opinion of the court:

Gleason & Gosnell, a firm of contractors, entered into agreements with officers of the Engineer Corps of the United States Army, acting for and on behalf of the United States, whereby the former undertook to perform certain specified work within a certain specified time. The work specified was not completed within the time fixed, nor at any time. Nevertheless, the contractors claimed in the court below that they were entitled to recover the contract price for the portion of the work which was actually done and damages for the uncompleted portion, because, as they alleged, they had been prevented, by no fault of their own, but by freshets, ice, and other force and violence of the elements, from doing the work within the time stipulated, and had been prevented by the officers of the United States, without just cause and contrary to applicable provisions in the contract, from a subsequent completion of the work.

The material questions are determinable by a proper construction of the following clauses contained in the contracts:

[601] "If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, *in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the

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public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in § 3709 of the Revised Statutes of the United States; provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

"The contractor must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water; and within thirty days thereafter his working force must consist of at least 200 men, if working by hand, or the equivalent thereof in case excavating machines are used. If, at any time, the working force be reduced to 150 men or less, the engineer in charge shall have the right to terminate the contract; and in such case the retained percentage shall be forfeited to the United States.

*"The contract will expire on the 31st day of December, 1886; but the right is reserved to annul the contract in January, 1886, in case 40 per cent of the work covered by the same shall not have been completed on or before the 31st day of December, 1885. The annulment of the contract under the provisions of this paragraph will, however, involve no forfeiture of moneys previously earned."

While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. *Dermott v. Jones*, 2 Wall. 1, *sub nom. Ingle v. Jones*, 17 L. ed. 762; *Cutter v. Powell*, 6 T. R. 320, 2 Smith, Lead. Cas. 7th Am. ed. 1.

Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to

the revisory power of the courts. *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290.

We do not understand that these principles are now called into question, but their applicability is denied; and we are called upon to consider a very acute and ingenious argument, successfully urged in the court below, aiming to show that, in the present case, the controverted matter, to wit, whether the contractors were entitled to a further and additional extension of time, was not left to the determination of the engineer in charge of the work, but is open, under the language of the agreement and the facts as found, to be inquired into and determined by the court.

[603] *The material terms of the contract calling for constructions are as follows:

"The said Gleason & Gosnell shall commence work under this contract on or before the 20th day of August, 1885, and shall complete the same on or before the 31st day of December, 1886. . . . Provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor shall be just and reasonable."

Passing by, for the present, the fact that several extensions of time were granted by the engineer, and having regard only for the above language, what does it mean? The construction put upon it by the court below was thus expressed:

"In the cases at bar the contracts in terms provide that 'additional time may in writing be allowed' for the completion of the work if prevented therefrom 'by freshets, ice, or other force or violence of the elements, and by no fault of their own; not that such additional time may or may not be allowed as the engineer in charge may determine, but that 'such additional time may in writing be allowed' as in his judgment 'shall be just and reasonable.' The language, taken together, leaves no discretion in the officer except in respect of the additional time to be allowed, and even that, the contract provides, 'shall be just and reasonable.' The claimants in effect agreed that no additional time should be allowed them except on condition that they were prevented from the completion of the work (1) by freshets, ice, or other force or violence of the elements, and (2) by no fault of their own; and to hold, when those conditions are present, that it is within the discretion of the engineer in charge to say whether any or no additional time may be allowed would be to eliminate that mutuality essential in conscionable contracts.

[604] "Hence, taking into consideration the circumstances of this *case, and to effectuate
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the intention of the parties gathered from the contracts as a whole, we must hold that the word 'may' should be construed to mean 'shall.'

"As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power, but by the exercise of a just and reasonable judgment; and any additional time thus allowed would have been final."

We cannot accept this exposition of the language as sound. Rather do we interpret it to mean that, as between the United States and the contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own; and that, if and when, in his judgment, the failure to complete was, in point of fact, due to the extraneous causes, he was also to decide what additional time should be just and reasonable. In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable. Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail.

In support of its construction the court below points to a difference in the language between the clause respecting materials which provides that "the decision of the engineer officer in charge as to quantity and quality shall be final," and that used in the claim under consideration in which it is not said that the judgment of the engineer shall be final. But it is obvious that, from the very nature of the case, the decision of the engineer in the latter case must be final. The contract fixes the time within which the work must be completed, but provides that, in case failure to complete is providential and *without fault, such additional time [605] may be allowed as the engineer may judge to be just and reasonable.

As, then, his granting of additional time would be final and irrevocable, so his refusal to allow it was necessarily final. The privilege of procuring an extension of time is conditional on the action of the officer, whether he grant or refuse it.

By changing the phrase "such additional time may be allowed" into the phrase "such additional time shall be allowed," the court below substituted for an appeal to the discretion and decision of the officer, an absolute right to have the question of prevention, whether by freshets or by fault, determined by the courts.

The fallacy of such reasoning is obvious, and is pointed out in the case of *Kihlberg*
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v. *United States*, 97 U. S. 398, 24 L. ed. 1106. That was a case of a contract between the United States and A, for the transportation by him of stores between certain points, provided that the distance should be ascertained and fixed by the chief quartermaster, and that A should be paid for the full quantity of stores delivered by him. It was not said in terms that the action of the chief quartermaster should be conclusive; and the distance, as ascertained and fixed by him, was less than the usual and customary route.

It was said by Mr. Justice Harlan, delivering the opinion of the court:

"The action of the chief quartermaster, . . . cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous, litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and [606] fixed by the *chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

It was further suggested by the court below, and has been vigorously pressed upon us in the argument, that the engineer in charge was improperly influenced in refusing the third extension asked for, by a consideration of delinquencies in previous years, whereas it is claimed that the extended contracts were, in respect of their several dates, new contracts, the performance or nonperformance of which did not depend upon anything done or omitted to be done thereunder prior to the last extension.

It may be that, by granting the previous extensions, the right of the government to forfeit the compensation already earned and withheld under the terms of the contract was abandoned. But to say that the engineer in charge, when applied to for a third extension, may not take in view previous delinquencies and the futility of the extensions theretofore granted, seems to us quite unreasonable. He might well think that his duty to the government and to the public interested in the early completion of the work forbade a further experiment in that direction. An indefinite succession of extensions was surely not within the contemplation of the contract. We do not wish to be understood

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to say that it would have been competent for the engineer in charge, if in his judgment the contractors had been duly diligent during the period of the last extension and had acted up to the conditions upon which such extension was granted, to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a bona fide exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past action, in deciding what weight to give to their promises as respected the future, and consider *whether previous [607] grants of extension had brought forth such efforts on the part of the contractors as the circumstances required.

But was it at all the case that the engineer, in refusing the last application for further extension, based such refusal wholly upon a consideration of prior condoned delinquencies? Even if we cannot take notice of the affidavit of Major Stickney, contained in this record, in which he states that his refusal to grant a further extension was based upon the failure of the contractors to make proper provisions during the period of the last extension for carrying on their work, and that they had not fulfilled the conditions upon which the time had already been extended, we are permitted, and indeed required, in absence of evidence of bad faith on his part, to presume that he acted with due regard to his duty as between the government and the contractors.

The fallacy, as we think, in the position of the court below, was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. This, we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof. The only allegation in the petition which can be pointed to bearing on this subject is as follows: "That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by the force and violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work. And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract."

In other words, the plaintiffs allege that they were prevented *from completing their [608] work by force and violence of the elements, and not by any fault of their own, and that

the judgment of the engineer in refusing an extension was therefore wrongful and unjust. But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. Of course, such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer.

But, even if we pass by the insufficiency of the allegation, we perceive no evidence, or finding based on evidence, which would have sustained a stronger and more adequate allegation. Indeed, no evidence whatever would appear to have been offered to sustain a charge of bad faith or gross mistake equivalent thereto. The court below does indeed say, in the twenty-first finding, that "no judgment or decision was given by said engineer on the question whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented." But, as it was expressly alleged in the petition, and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiff, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

These are propositions of law, and not of fact, and we cannot assent to either of them.

Without protracting the discussion, our conclusions are that, under a proper construction of the contracts in this case, the [609] right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension, and that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties.

These views lead to a reversal of the judgment of the court below in so far as it sustains the claim to recover damages for profits expected to inure to the plaintiffs if they had been permitted to complete the work.

As no actual damage or loss was definitely shown to have been suffered by the government by reason of the noncompletion of the work, and as no forfeitures were declared at the time of the several extensions, and may therefore be deemed to have been waived, we

affirm that portion of the judgment of the court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted.

Accordingly the judgment of the Court of Claims is hereby reversed, and the cases are remitted to that court, with directions to enter judgment in accordance with this opinion.

Mr. Justice Harlan, Mr. Justice Brown, and Mr. Justice White do not agree with the construction of the contract on the subject of the power of the engineer officer, and therefore dissent.

CANADA SUGAR REFINING COMPANY,
Limited, *Petitioner*,
v.
INSURANCE COMPANY OF NORTH
AMERICA.

(See S. C. Reporter's ed. 609-626.)

Marine insurance—insurance on profits on cargo—total loss—abandonment of cargo—portion saved by insurers and delivered to former owners as part payment.

A recovery of insurance on profits of a cargo under a policy insuring against total loss only, and valuing the profits at the sum insured, will not be prevented, where the cargo was abandoned as a total loss, by the fact that other insurers of the cargo subsequently saved a portion of it and then delivered it to the former owners in part payment, on a settlement of their liability for the total loss of the cargo.

[No. 69.]

Argued October 26, 1899. Decided January 8, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing a decree of a District Court in favor of a libellant for insurance on the profits of a cargo of sugar. *Reversed.*

See same case below, 58 U. S. App. 22, 87 Fed. Rep. 491, 31 C. C. A. 65.

Statement by Mr. Justice Shiras:

*The Canada Sugar Refining Company, a [610] Canadian corporation, on November 27, 1894, filed a libel and complaint in the district court of the United States for the southern district of New York against the Insurance Company of *North America, a [611] Pennsylvania corporation, to recover insurance effected by the libellant with the respondent in the amount of \$15,000 on profits

NOTE.—As to marine insurance; right to abandon; time for abandonment; notice of; revocation of; acceptance and effect of; technical total loss,—see note to Mayo v. India Mut. Ins. Co. (Mass.) 9 L. R. A. 831.

As to right of abandonment,—see note to Bradlee v. Maryland Ins. Co. 9 L. ed. U. S. 1123.

As to marine insurance; right to abandon; acceptance of an abandonment; adjustment of loss,—see note to London Assurance v. Companhia De Moagens Do Barreiro, 42 L. ed. U. S. 113.

on a cargo of sugar shipped on board the British ship John E. Sayre, at and from Iloilo to Montreal, Canada. The respondent answered, the cause came on to be heard upon the pleadings, proceedings, and proofs, and resulted, June 15, 1897, in a decree in favor of the libellant for the full amount of the insurance, with interest and costs. The case was taken on appeal to the United States circuit court of appeals, where, on April 23, 1898, a final decree was entered reversing the decree of the district court, and ordering that the libel be dismissed, with costs in both courts to the appellant.

On the libellant's petition, on May 10, 1898, a writ of certiorari was granted, under which the cause and the record and proceedings therein were removed into this court.

The material facts of the case were as follows:

On April 29, 1893, the respondent company insured for the libellant's benefit:

"\$15,000 on profits on cargo sugar; against total loss only; valued at sum insured; shipped on board the British ship John E. Sayre at and from Iloilo to Montreal."

At that time the Sayre was at sea prosecuting the voyage. The libellant had 2,462 tons of sugars on board of her, amounting in value to \$181,000, and had just completed insurance of the sugars to the amount of \$166,145 in the Atlantic Mutual, of which insurance the respondent was informed before its insurance on profits was made. In July following the Sayre stranded on the coast of Newfoundland, and all the cargo was lost excepting about 300 tons, which was saved by the aid of salvors, of which one half went to them as their agreed compensation. The agreement was originally made by the master soon after the stranding; but a few days afterwards the agent of the Atlantic Mutual appeared, to whom the master turned over the salvage operations. He confirmed the previous agreement with the salvors; reimbursed to the master the expenses already incurred by him, and thenceforward, with the libellant's consent and the

[612] defendant's *knowledge and acquiescence, took the complete control and disposition of the cargo. The agent eventually bought from the salvors the moieties of the sugars allotted to them under the agreement, and then shipped all the sugar saved to the order of the insurers to Montreal. The value of all the sugar that reached Montreal was about \$20,000, and the expenses and salvage charges paid by the Atlantic Mutual thereon, and the additional freight to Montreal, exceeded \$11,000, so that out of the whole cargo worth \$181,000, less than \$9,000 net was saved. The Atlantic Mutual settled with the libellant as for a total loss, under its policy of \$166,145, and it turned over the sugars saved in part settlement of that sum, on about the basis of the average *pro rata* policy valuation. The respondent contested its liability upon the policy on profits on the ground chiefly that the receipt by the libellant of a portion of the sugars, viz.,

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about \$20,000 in value, prevents the loss from being "total" within the terms of its policy.

Mr. Wilhelmus Mynderse argued the cause, and Messrs. Butler, Notman, Joline, & Mynderse filed a brief, for petitioner:

Insurance under the phrase "total loss" simply is satisfied by a constructive total loss with a seasonable abandonment.

Arnould, Marine Ins. 952; McArthur, Marine Ins. 275; Lowndes, Marine Ins. 132; 2 Parsons, Maritime Law, 338-341; Phillips, Ins. §§ 1485, 1487.

If the underwriter desires to protect himself from liability for a constructive total loss, he makes his insurance read "against actual total loss only or free from all average."

Monroe v. British & Foreign Marine Ins. Co. 5 U. S. App. 179, 52 Fed. Rep. 777, 3 C. C. A. 280; Burt v. Brewers & Maltsters' Ins. Co. 78 N. Y. 400; Carr v. Security Ins. Co. 109 N. Y. 504, 17 N. E. 369.

A "constructive total loss" of a vessel or cargo occurs when more than 50 per cent of its value has been destroyed.

Phillips, Ins. § 1608; 2 Parsons, Maritime Law, 371; Heebner v. Eagle Ins. Co. 10 Gray, 131, 69 Am. Dec. 308; Greene v. Pacific Mut. Ins. Co. 9 Allen, 217; Snow v. Union Mut. Marine Ins. Co. 119 Mass. 592, 20 Am. Rep. 349.

An abandonment of profits is not necessary or proper when there is an insurance upon the goods themselves, for the reason that the insurer on goods has a right to a complete and absolute abandonment of the cargo with all of its increments and incidents.

Tyser, Marine Ins. § 109; 2 Parsons, Maritime Law, 394; Phillips, Ins. § 1503. Mumford v. Hallett, 1 Johns. 433.

Even a defendant underwriter may be held responsible for a constructive total loss where there has been no formal abandonment, upon the ground either that he has waived an abandonment or that his actions indicated that the proceedings were sufficient to constitute an abandonment.

2 Parsons, Maritime Law, 398; Arnould, Marine Ins. 950, 959; Phillips, Ins. § 1678.

Mr. Clifford A. Hand argued the cause and filed a brief for respondent:

Loss of the cargo is regarded as a prerequisite of loss of profits independently of any state of market.

Patapsco Ins. Co. v. Coulter, 3 Pet. 222, 7 L. ed. 659; Loomis v. Shaw, 2 Johns. Cas. 36.

The rule of constructive total loss of over 50 per cent of the value is not applicable to a policy on profits, in favor of the owner of the goods.

2 Phillips, Ins. 3d ed. p. 356.

As an abandonment of the profits alone can pass nothing it is not easy to see that there can be any effectual abandonment of profits, or that an actual partial loss of profits can be made constructive total loss by abandonment. If a part of the goods, the profits on which are insured, is lost, this is necessarily a partial loss of the profits.

2 Parsons, Marine Ins. 170; *Waln v. Thompson*, 9 Serg. & R. 115, 11 Am. Dec. 675; *Tom v. Smith*, 3 Cai. 245.

The rule of 50 per cent does not apply if any substantial part of the goods insured arrives in safety at its destined port. Nor can a loss of part of the goods at the port of destination be made a constructive total loss by abandonment, however large that part may be.

2 Parsons, Marine Ins. 159; *Forbes v. Manufacturers' Ins. Co.* 1 Gray, 371.

Underwriters are free from all partial losses of every kind which do not arise from the contribution toward a general average.

Biays v. Chesapeake Ins. Co. 7 Cranch, 415, 3 L. ed. 389; *Hernandez v. Sun Mut. Ins. Co.* 6 Blatchf. 317, Fed. Cas. No. 6,415; *Salut v. Ocean Ins. Co.* 14 Johns. 138; *Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co.* 50 U. S. App. 231, 82 Fed. Rep. 296, 27 C. C. A. 231; *Morean v. United States Ins. Co.* 1 Wheat. 219, 4 L. ed. 75.

Neither *Wallerstein v. Columbian Ins. Co.* 44 N. Y. 204, 4 Am. Rep. 664, or *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216, admits of the idea that, where the loss does not extend to at least totality of value, the underwriter who has undertaken the risk against total loss only, or with a warranty against average, can be charged with liability. The farthest claim of both these cases is to consider annihilation of value an equivalent of physical annihilation of the subject insured.

[612] *Mr. Justice Shiras delivered the opinion of the court:

The district court held that, by the stranding of the vessel John E. Sayre, there had been caused, under the provisions of the contract of insurance between the Canada Sugar Refining Company and the Insurance Company of North America, a total loss of profits, and accordingly entered a decree in favor of the libellant for the full amount of the insurance, with interests and costs. 82 Fed. Rep. 757.

The circuit court of appeals, being of the opinion that there had not been a total loss of profits within the meaning of the contract, reversed the decree of the district court, with directions to dismiss the libel. 58 U. S. App. 22, 87 Fed. Rep. 491, 31 C. C. A. 65.

This difference of opinion arose from opposite views of the legal conclusion to be drawn [613] from the evidence of the facts *attending the loss of the vessel and its cargo. Did those facts disclose a total loss of the cargo, and, consequently, a total loss of profits? Or did they disclose that, within the meaning of the contract, a portion of the cargo was delivered to and received by the insured at the port of destination, and that, therefore, there was not a total loss of profits?

On February 10, 1893, the ship John E. Sayre, having on board a cargo of sugar belonging to the Canada Sugar Refining Company, sailed from Iloilo for Montreal. By several contracts of insurance between the refining company and the Atlantic Mutual

Insurance Company the latter had insured the former against the loss of the cargo in the sum of \$166,145. On April 29, 1893, the ship being still on her voyage, the refining company entered into a contract with the Insurance Company of North America, of which the material terms were as follows:

"This to certify that, on the 29th day of April, 1893, this company insured under policy 117,407, made for Robert Hampson, fifteen thousand and $\frac{90}{100}$ dollars on profits on cargo sugar against total loss only, valued at sum insured, shipped on board of the Br. ship John E. Sayre at and from Iloilo to Montreal, and the loss, if any, subject to the terms and conditions of the policy, has been made payable to the order of Canada Sugar Refg. Co. Ltd. on surrender of this certificate."

It was provided in the policy referred to in the certificate that "the acts of the insured or assurers, or of their joint or respective agents, in preserving, securing, or saving the property insured, in case of damage or disaster, shall not be considered or held to be a waiver or acceptance of abandonment;" and likewise, "it is further agreed that if the said assured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance may be deficient towards fully covering the premises hereby insured, without any deduction for the insolvency of all or any of the underwriters, and shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from."

*It is admitted that notice of the prior in-[614] surance was given to the Insurance Company of North America at the time when it entered into its contract with the refining company; nor does it appear that the insurance company, before the libel was filed, claimed that it was exonerated from any portion of its liability by reason of such prior insurance, or ever tendered a return of any part of the premium by reason of any such alleged exoneration.

On July 6, 1893, the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The crew left the vessel, but the master remained, and, in the discharge of his duty as agent of all whom it might concern, made an arrangement with the local fishermen for the saving of cargo by them at one half of what was saved. This resulted in removal from the wreck of a portion of the cargo until July 8, when the work was finally abandoned. On that day an agent of the Atlantic Mutual Insurance Company arrived in the interest of that company. He at once took charge, and relieved the master, who, under instructions of the owner of the vessel, turned over the rescued portion of the cargo to the agent. The previous disbursements made by the master, amounting to \$200, were paid to him by the agent of the Atlantic Mutual Insurance Company.

The agent thereupon adjusted the claims
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of the salvors, in pursuance of the agreement made by the master. The portion saved from the wreck weighed about 320 tons, of which about one half was apportioned and set off to the salvors; but nearly all of the sugars so assigned to the salvors were subsequently purchased from them by the agent.

The agent likewise paid to the shipowner his ocean freight, and reconditioned the sugars saved from the wreck, placed them in new bags, and then shipped them to Montreal on the coasting steamer Tiber. The total expenditures of the Atlantic Mutual Insurance Company, in respect of the salvage, the care, reconditioning, and forwarding of the sugars, amounted to upwards of \$10,000—not including the ocean freight, nor the freight from Newfoundland to Montreal.

[615] Thus far, in the history of the transactions, there seems to *be a substantial agreement between the statements of the courts below of the facts upon which they based their respective judgments. But we here meet with a difference, which, in the view we take of the case, is of controlling importance.

The district court, in the opinion by Judge Brown, states that the agent of the Atlantic Mutual Insurance Company, after having settled with the master and with the salvors, "shipped all the sugar saved to the order of the insurers to Montreal;" and that "none of the sugar ever came to the libellant in the ordinary course of the voyage, or through any delivery to the libellant as consignee by the carrier; but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libellant upon an equitable basis, in part payment, and as the equivalent of its value in cash, as any other property might have been received."

The circuit court of appeals, in its narration of events, states that "the master was about to arrange for the transportation to Montreal of the part not going to the salvors, when the Atlantic Mutual Insurance Company, which meantime had been informed of the disaster, intervened and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one half of the sugar saved, and caused the sugar saved to be reconditioned and shipped to Montreal on the steamer Tiber, and delivered upon arrival there to the libellant."

Referring to the pleadings, we find it averred in the libel that the sugar, after having been brought to Montreal by the Atlantic Mutual Insurance Company, "was received by the libellant on account of and in part payment for the loss sustained by the said libellant, under its insurance with the Atlantic Mutual Insurance Company, and that credit was given therefor to the said Atlantic Mutual Insurance Company in the amount at which the said 325 tons of sugar were insured with the said the Atlantic Mutual Insurance Company; and that the mar-

[616] ket value of the said 325 tons of *sugar in 175 U. S.

Montreal at the time it was received by the libellant was about \$20,000."

The responsive allegations of the answer were as follows: "This respondent further admits and avers, upon information and belief, that from the wreck of said ship John E. Sayre there were forwarded to Montreal, the place of destination, and there delivered to and received by the libellant, about nine thousand nine hundred mats of the said sugar of about three hundred and twenty-five tons net weight, and of the value of about twenty thousand dollars," and "this respondent, upon information and belief, denies that the sugar so delivered to the libellant was a payment by any underwriter on account of a supposed total loss."

The evidence under this issue, on the part of the libellant, consisted chiefly of the bills of lading, three in number, and dated August 4, 1893, given by the master of the steamer Tiber to Harvey & Co. of St. Johns, N. F., and calling for the delivery of the saved sugar to the Atlantic Mutual Insurance Company at Montreal; and of the testimony of Drummond, of Harvey, and of Pike. Drummond testified that he was president of the Canada Sugar Refining Company; that, as such, he made a settlement with a representative of the Atlantic Mutual Insurance Company at Montreal, whereby about 300 tons of sugar were accepted by the refining company from the Atlantic Insurance Company, at market rates of value, in part payment of the claim of the refining company against the Atlantic Mutual Insurance Company for total loss of cargo; that the sugar was shipped from Newfoundland to the Atlantic Mutual Insurance Company at Montreal, and, in the opinion of the witness, belonged to the insurance company at the time of the settlement.

Harvey testified that he was a member of the firm of Harvey & Co., commission merchants, St. Johns, Newfoundland; that in July and August, 1893, his firm acted for the Atlantic Mutual Insurance Company, under instructions from that company; that his firm acted through Robert G. Pike as their representative; that the sugar saved from the wreck of the John E. Sayre was forwarded to Montreal to the order of the *Atlantic Mutual Insurance Company; that [617] for expenses incurred by his firm in paying the salvors, the master's expenses, and for storing, weighing, reconditioning, and re-shipping the sugar, their firm received payment from the Atlantic Mutual Insurance Company in the sum of \$10,066.97; that at no time, either before or after the wreck of the John E. Sayre, did his firm have any connection with or receive any instructions from the Canada Sugar Refining Company, or any of its officers or agents, or with the owners of the John E. Sayre.

Pike testified that he was sent by Harvey & Co. to the scene of the wreck; that he there, on July 8, 1893, took entire charge of the sugar that had been saved; that he settled with the master and with the salvors; that he reconditioned the sugar and shipped it to Montreal, to the Atlantic Mutual Insur-

ance Company; that everything he did was in pursuance of instructions from Harvey & Co., as agents of the Atlantic Mutual Insurance Company of New York; that he never at any time had any communication with the Canada Sugar Refining Company, or their officers or agents.

In the absence of any evidence offered under this issue by the Insurance Company of North America we think it clear that the saved remnants of the sugar were taken exclusive possession of by the agents of the Atlantic Mutual Insurance Company, were by them forwarded on account of that company to Montreal, and were finally turned over to the Canadian Sugar Refining Company, at an agreed valuation, in part payment of the claim of the latter for total loss of cargo.

It is also evident, as we think, that the facts disclose an actual abandonment by the Canada Sugar Refining Company to the Atlantic Mutual Insurance Company, and the acceptance by the latter of such abandonment. Owing to the prompt action of the insurance company in taking charge and control of the cargo, and in adopting the agreement of the master with the salvors, it was not necessary for the assured to go through with all the usual forms of an abandonment. Neither of the parties seem to have acted upon the supposition that any other or more formal act of abandonment was necessary.

[618] *In *Columbian Ins. Co. v. Catlett*, 12 Wheat. 394, 6 L. ed. 669, where the effect of actual abandonment, as dispensing, if accepted, with formal notice, was considered, Justice Story said:

"The latter gives notice of an intention to abandon, because, in its terms, it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment *in presenti*, to take effect *in futuro*. Neither the form of the notice, nor the abandonment, is prescribed in the cause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed."

"If an abandonment is wanting in any formality, the insured may waive all objection; and they do this by calling for the proof and acting as if the abandonment were altogether sufficient." 2 Parsons, Maritime Law, 398.

"The rule dispensing with any particular form of abandonment amounts substantially to the rule that it is sufficient for the assured to signify distinctly that he abandons, and he could not signify this more distinctly than by claiming a total loss. I therefore conclude that the claiming of total loss is a

sufficient expression of an intention to abandon." 2 Phillips, Ins. 387.

As the Canada Sugar Refining Company and the Atlantic Mutual Insurance Company agreed upon an actual abandonment and settled on the basis of a total loss, it is not perceived that, in the absence of any allegation or proof of fraud, the Insurance Company of North America can be heard to raise any question as to the formality of the proceedings.

It was suggested, but apparently was not pressed at the argument, that there ought to have been abandonment to the Insurance Company of North America. In *Mumford v. Hallett*, 1 Johns. 433, where there were [619] separate contracts of insurance on cargo and on profits, and where it was contended that the assured, by having abandoned the goods to the underwriter, had disabled himself from recovering the insurance on profit, it was said:

"But admitting that this is to be regarded as a valued policy, it is said that the assured, by abandoning the cargo to its underwriters, has put it out of the power of the defendant to receive any salvage on the profits, and that, therefore, he has no right to recover in this suit: This is a dilemma which the defendant ought to have foreseen at the time of his subscription. He must have supposed there was a policy on the cargo, which, in case of disaster, would naturally be abandoned to those who had insured it. It is idle to complain of what must have been clearly his own understanding of the contract; nor is it reasonable in him to expect that for the purpose of recovering on a small policy, on profits, a merchant should, by not abandoning the cargo, forego his insurance on that subject."

We shall content ourselves in this respect by quoting the conclusion expressed in 2 Phillips on Insurance, § 1503:

"A policy upon expected profits does not seem to offer anything upon which an abandonment can operate, and it does not appear from any speculation or any judicial opinion relating to this subject, which has come to my knowledge, that an abandonment of this interest can be of any importance to the underwriters, otherwise than as a notice that a total loss is claimed; and if this is its only effect, an abandonment is not necessary. . . . Under an abandonment of freight the underwriters may, in some instances, avail themselves indirectly of what has been done towards earning freight. They may receive the freight *pro rata* for the part of the voyage performed previously to the event on account of which the abandonment is made. But not so of profits; there is no profit, or anything like a profit, *pro rata itineris peracti*, which can be assigned, or prove to be of any value to the insurers. It does not appear, therefore, that an abandonment of profits can be anything more than a nugatory ceremony. . . . It has never been hinted that the assured *can make any [620] claim upon the insurers for the profits on goods abandoned to them, and if he has no such right, he cannot transfer it to the un-

derwriters on profits, or to any other persons."

To briefly rehearse the facts, this is a case where the owners of a cargo of sugar had insured the same in the Atlantic Mutual Insurance Company, on and before April 29, 1893, at and for the sum of \$166,145; had, on April 29, 1893, insured the profits on the cargo against total loss only in the sum of \$15,000 in the Insurance Company of North America; on July 6, 1893, the ship, while on her voyage, stranded on the coast of Newfoundland, became a total loss, and the voyage came to an end; the master, representing all concerned, contracted with local fishermen to give them one half of the sugar they could save; on July 5, 1893, the insurers of the cargo, having been notified of the disaster, took charge and possession of the remnants of the cargo, and purchased from the salvors the portion which, under the agreement with the master, was theirs; the sugar was then transported by a vessel chartered by the insurers, and on their account, to Montreal; the value of the sugar that reached Montreal was about \$20,000, and the expenses, salvage charges, and the additional freight from Newfoundland to Montreal, paid by the Atlantic Mutual Insurance Company, exceeded \$11,000; the insurers on the cargo settled with the refining company as for a total loss under its policy for \$166,145, and the sugar saved was turned over to the refining company in part settlement of that sum on the basis of the average *pro rata* policy valuation. The value of the entire cargo on April 29, 1893, when the insurance on profits was effected, was alleged in the libel and admitted in the answer to have been about \$181,000.

The error of the circuit court of appeals, as we view the case, was in regarding the portion of the cargo that was saved and paid for by the Atlantic Insurance Company as having been carried to Montreal and there delivered to the refining company as the owner thereof, and as respects which, in that state of facts, the refining company should be deemed to have received profits on a part of the cargo.

[621] *Without finding it necessary to enter into a discussion of refined distinctions, considered in some of the cases, between an actual and a technical total loss, we think it evident that the refining company would not receive the indemnity for which it bargained and paid unless it is permitted to recover in the present case. By such recovery it will not receive more than will, with what it has received from the Atlantic Mutual Insurance Company, make up its whole loss.

It certainly cannot be successfully claimed that, in order to recover, the refining company was bound, in this suit on a valued policy on profits, to put in evidence to show that it would have received profits if the voyage had been completed, and the entire cargo had arrived safely. Such a contention was considered and determined in *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. ed. 659. That was a case where the ship *Mary* was proceeding on a voyage from 175 U. S.

Philadelphia to Gibraltar and ulterior ports with a cargo of flour. There was an insurance on profits in the sum of \$5,000. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. In an action brought on the policy of insurance on profits in the circuit court of the United States for the district of Maryland, the court was asked to instruct the jury that as the assured had offered no evidence that the flour, if delivered and sold at Gibraltar, would have yielded a profit, they were not entitled to recover. The refusal of the court so to charge was approved in this court, in an opinion by Mr. Justice Johnson, from which we quote, as follows:

"The third prayer for instructions is in these words: 'That the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and that, therefore, they were not entitled to recover.' This was refused, and the question is whether the defendants were entitled to it, as prayed.

"This instruction presents two propositions: 1. That it was necessary to prove loss of profits, otherwise than by the loss of the cargo. 2. That the plaintiff was limited to proof of profits on a sale at Gibraltar. With regard to the second, it is clear *that [622] the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty.

"Courts of justice have got over their difficulties on the question whether profits are insurable interest; but how and where that interest must be established by proof, in case of loss, is not well settled. Here, again, there appears to be a conflict between the British and American decisions.

"The earliest of British decisions, that of *Barclay v. Cousins*, 2 East, 544, certainly supports the doctrine that the profits sink with the cargo, or, at least, that the loss of one is prima facie evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court (page 551), and the recovery was had in that case without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson v. Margetson*, 2 East, 549, of which a note is given in that case, the recovery was also had without proof that the profits would have been made, or any other proof than an interest in and loss of the cargo; and Lord Mansfield seems to have suggested the true ground for dispensing with such proof, to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port.

"The two subsequent cases which are cited in the elementary books to sustain the contrary doctrine are not full to the point. In that of *Hodgson v. Glover*, 6

East, 316, there was another question of as great difficulty, to wit, whether, in a clear case of average loss, the plaintiff could recover as for a total loss, or recover anything, without evidence to determine the average. Of the four judges who sat, two decided against the plaintiff, upon the one ground, and two upon the other.

[623] "In the second case, that of *Eyre v. Glover*, 16 East, 218, although the point was touched upon in argument, yet the court neither expressly affirm nor deny it; it was not the leading question in the cause; and, at last, judgment is rendered for *plaintiff, without requiring such proof. But the case of *Mumford v. Hallett*, 1 Johns. 439, goes further. It was a case of insurance on profits, in which there was no evidence given that profits would have been made upon an arrival, nor was any other loss proved than as incident to the loss of the goods. On that state of facts, Livingston, Justice, who delivered the opinion of the court, remarks, 'It does not follow that a profit will be made, if the cargo arrived, yet its loss would give a right to recover on such a policy.' There are other questions in the case; but after all were settled, this principle was essential to the plaintiff's right to recover. In the case of *Fosdick v. Norwich W. Ins. Co.* [3 Day, 108], decided in the supreme court of errors of Connecticut, the question was moved in argument that to justify a recovery the plaintiff must show that profits would have accrued upon safe arrival of the goods; but the language of the court, in expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the proof of loss as to the insurable interest. Yet the right of the plaintiff to recover being affirmed in that case, without other proof than the loss of the goods, it would seem to be an authority for the doctrine that no other was necessary.

"The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the cause, the Chief Justice asks "if profits are anything more than an exercise upon the value of goods, beyond the prime cost."

"As to the American cases, Mr. Phillips quotes that of *Loomis v. Shaw* (if I understand his language as he meant to use it) as going farther than the case warrants. 2 Johns. Cas. 36. The court waives the question now under consideration by suggesting that the defendant had waived it by an act of his own.

[624] "In the case of *Abbott v. Sebor*, 3 Johns. Cas. 39, 2 Am. Dec. 139, which was a motion for a new trial, the decision turned chiefly on the question, whether the court had misdirected the jury in instructing them that the plaintiff must recover the whole *sum insured on profits, or nothing—that is, that he could not recover for an average loss. The question, if proof that profits would have been made, had the vessel arrived in

safety, was necessary to his recovery, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required beyond the loss of the goods on which the profit was expected. But the authority amounts to no more than an implication.

"We must now dispose of the question upon reason and principle; and here it seems difficult to perceive why, if profit be a mere excrecence of the principle, as some judges have said, or an incident to or identified with it, as others have said, the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it, of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it would have been subjecting the rights of the plaintiff to mere mockery."

The conclusion thus reached has never been disturbed in this court, and is the prevalent doctrine in the United States. The American rule and the reason for it are thus stated in 2 Phillips on Insurance, 30:

"Under a policy on the profits of a cargo on a voyage from Philadelphia to the Mediterranean, and thence to South America, . . . the ship and cargo were destroyed by fire at Gibraltar. It was held that the assured was entitled to recover the whole amount of the valuation against the underwriters, without proving that there would have been any ultimate profit on the voyage if it had been pursued without interruption or disaster. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. ed. 659. And this is the prevalent doctrine in the *United States. . . . [625]

The profit, then, which is the subject of a policy upon this interest, is the excess of the value of the subject at the port of destination over its value at the shipping port. It is only in case of loss that the policy is of any avail to the assured, and he wishes that it may avail him in a total as well as partial loss. In the latter case, the loss may be adjusted, under an open policy, on the English doctrine, by ascertaining how much less the profit is than it would have been if the goods had arrived sound.

"But in case of a total loss by the ship never arriving, it is very difficult to say what the profits would have been had the ship arrived, since it is not possible to determine when she would have arrived; and if this difficulty is got over by assuming some probable time, there must be often a long delay in hearing from a distant port of destination, and learning the state of the markets. The prompt return of his capital to the assured in case of loss, which is a very important con-

sideration in insuring, requires a valuation of the profits, in preference to an open policy subject to an adjustment upon the English doctrine of determining the amount by the state of the market at the port of destination. The same difficulty does not arise in case of a loss on goods, which is adjusted on the invoice value. There does not appear to be any way of avoiding this difficulty but by a valuation, and this is felt in practice, since policies on profits are usually valued."

Agreeing, as we do, with the view of the evidence taken by the district court, to wit, that none of the sugar ever came to the libellant in the ordinary course of the voyage, or through any delivery to the libellant as consignee by the carrier, but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libellant upon an equitable basis in part payment, and as the equivalent of the value in cash, as any other property might have been received, the legal conclusion that we reach is that the libellant is entitled to recover the amount of the profits as valued in the policy.

[626] The appellees claim that they took no part in the settlement* between the cargo insurers and the libellant, and the doctrine of *res inter alios* is invoked.

But they had knowledge of the prior insurance, and were bound to know that, in case of disaster, there was the right to abandon. There is evidence that they were informed of what was going on between the other parties concerned. They do not impugn, by allegation or evidence, the fairness and good faith of that transaction, nor do they claim that it was conducted with a view to prejudice them.

They plant their defense solely on the proposition of fact that a sound portion of the cargo reached the port of destination in due course, and was there delivered to the libellant as consignee—a proposition of fact, as we have seen, not sustained but refuted by the evidence.

Accordingly, the decree of the Circuit Court of Appeals must be reversed, with costs, and the decree of the District Court for the Southern District of New York is affirmed.

KEOKUK & HAMILTON BRIDGE COMPANY, Plff. in Err.,

v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 626-635.)

Writ of error to state court—review of findings of fact—state tax on capital stock of bridge company—tax on franchise or interstate commerce—necessity of specifically raising Federal question.

NOTE.—As to jurisdiction as to taxation of bridge over river forming boundary of state or its division,—see *Chicago & A. R. Co. v. People ex rel. Windmiller* (Ill.) 29 L. R. A. 69, and note.

As to state taxes as affecting commerce,—see 175 U. S.

1. Findings of fact by the courts below cannot be reviewed by the Supreme Court of the United States on writ of error to a state court.
2. A state tax on the capital stock of a bridge company consolidated from corporations of different states, which maintains an interstate bridge, is not a tax on a franchise conferred by the Federal government, although the corporation has authority under an act of Congress to construct the bridge.
3. Interstate commerce is not taxed by taxing the capital stock of a bridge company which owns an interstate bridge, but does not transact any interstate business over it.
4. A Federal question not specially set up or claimed in a state court cannot be considered on writ of error from the Supreme Court of the United States to the state court, merely because another Federal question not connected with it was raised in the state court.

[No. 26.]

Submitted November 15, 1899. Decided January 8, 1900.

IN ERROR to the Supreme Court of the State of Illinois to review a decision sustaining a tax on an interstate bridge company. *Affirmed*.

See same case below, 176 Ill. 267, 52 N. E. 117.

The facts are stated in the opinion.

Messrs. W. D. Davidge and W. D. Davidge, Jr., submitted the cause for plaintiff in error:

A tax upon the valuation of the capital stock of a corporation is necessarily a tax upon its property and assets, including its franchises and especially its business. Perhaps the most important element in such valuation is the business and profits resulting therefrom.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Bank Tax Case*, 2 Wall. 200, *sub nom. New York ex rel. Bank of Commonwealth v. New York City & County Tax & A. Comrs.* 17 L. ed. 793; *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor v. Secor*, 23 L. ed. 663; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Com. v. Standard Oil Co.* 101 Pa. 119.

It is submitted that the business thus taxed was interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The decision in *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, holding a bridge to be an instrument of com-

notes to *Rothermel v. Meyerle*, 9 L. R. A. 363; *Bangor v. Smith* (Me.) 13 L. R. A. 686; *Board of Assessors v. Pullman's Palace Car Co.* 8 C. C. A. 492; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

merce, was not overruled by *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532. What is carrying on business of transportation between state and state is a matter of fact, and in the latter case it was found as a fact that the Henderson Bridge Company did not itself carry on such business. In the present case the bridge company was itself engaged in the business of transporting persons and property from shore to shore, and that surely is interstate commerce.

The franchises of the company are not only derived from Illinois and Iowa, but also from the Federal government. It is only necessary to read the act to be convinced that the bridge was intended to be an instrument of commerce, and indeed made such both in respect of transportation and as a commercial agency in navigation.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

Mr. Edward C. Akin submitted the cause for defendant in error (Mr. O. F. Berry was with him on the brief):

States have a right to tax the instruments of interstate commerce as other property of like description is taxed within their jurisdiction. Thus, an interstate bridge across a river is an instrument of commerce, and the portion lying within a state may be taxed by that state like other property of the same kind wholly within the state.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

While no state can impose any taxes or burdens upon the privilege of doing business of interstate commerce, yet it has the unquestionable right to tax the instrumentalities engaged in such commerce.

Marye v. Baltimore & O. R. Co. 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

Thus, the property of railroads, telegraph, and sleeping car companies engaged in interstate commerce may be taxed in the several states through which their lines of business run without violating any Federal restrictions of law.

Western U. Teleg. Co. v. Atty. Gen. of Massachusetts, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Massachusetts v. Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054.

Under these decisions of the United States

Supreme Court, the bridge across the Mississippi river is an instrument of interstate commerce, and each state may tax the part lying within its jurisdiction as it taxes its other property.

*Mr. Chief Justice Fuller delivered the [627] opinion of the court:

This is a writ of error to review the judgment of the supreme court of Illinois affirming a judgment of the county court of Hancock county, in that state, for delinquent taxes assessed against the Keokuk & Hamilton Bridge Company for the year 1894.

The Keokuk & Hamilton Bridge Company was incorporated by an act of the general assembly of the state of Illinois in 1857, with power to build, maintain, and use a bridge for railroad and other purposes over the Mississippi river from or near the town of Hamilton, in the county of Hancock, to Keokuk, in the state of Iowa, and was authorized to connect the bridge by railroad or otherwise with any railroad or railroads terminating thereat or approximately thereto, and to consolidate with any railroad or other company or companies in Illinois or any other state. A similar corporation was organized under the laws of the state of Iowa, and the two corporations consolidated with the main office at Keokuk.

Authority to construct and maintain the bridge was granted the two companies by the act of Congress of July 25, 1866. 14 Stat. at L. 244, chap. 246.

*The record discloses that the company ob- [628] jected to the assessment of its tangible property as made by the assessor of the township in which the Illinois end of the bridge was situated, and applied to the township board of review for a reduction, protesting that the property was overvalued: "that the Fourteenth Amendment to the Constitution of the United States has been violated, in that equal justice and protection to property of the said bridge company has been denied;" "that the property assessed and described by the assessor lies partly in the state of Iowa and is not subject to taxation in Illinois;" etc. The board of review denied the relief asked, and the bridge company appealed to the board of supervisors of Hancock county, which also refused to change the assessment. The collector of Hancock county then applied to the county court, at its May term, 1895, for judgment on the delinquent tax list, including the assessment against the bridge company, to which the company filed its objections, rehearsing the proceedings which had been theretofore taken, the objections made, and the evidence adduced. Before a hearing on these objections was had, the parties stipulated that the collector might "insert in his application for judgment the capital stock tax for the year 1894 levied by the state board of equalization against said company," which was done.

The bridge company thereupon filed its objections to any judgment for the capital stock tax, as follows:

"Objections by 'the Keokuk & Hamilton Bridge Company' to judgment against its bridge and approach.

"The original objections filed to said May term covering the application as there made.

"The application was amended in June by adding claims for capital stock tax of 1894, \$1,029.90.

"This objection is to the proposed judgment against said property for said claimed tax on the capital stock of said company—

[629] "1st. Because said bridge company is a consolidated corporation of the states of Illinois and Iowa, one half in each of said states, and its entire business is that of interstate commerce, and any tax thereon is a tax upon such *interstate commerce, and is without authority of law and void.

"2d. Such claimed capital stock tax is levied upon the whole capital stock, when only one half thereof, if any, is assessable in Illinois.

"3d. The only tax assessable against said property is upon its tangible property in Illinois.

"4th. Said pretended assessment of capital stock is wholly void because not made in the manner required by law nor according to the rules of the state board of equalization."

Considerable evidence was introduced, including the proceedings of the state board of equalization, from which it appeared that the capital stock of the bridge company was returned at \$1,000,000; that the total amount of its indebtedness except for current expenses, and excluding from such expenses the amount paid for the purchase or improvement of property, was \$1,000,000, with unpaid interest thereon amounting to \$900,000; that the assessed valuation of lands and structure was \$218,000, and that the state board of equalization placed the valuation for assessment of capital stock at \$30,080. The tax on the tangible property was \$2,708.61, and on the capital stock, \$1,019.17. Judgment was rendered by the county court for those amounts and interest. From this judgment the case was carried on appeal to the supreme court, and there affirmed.

Among the errors assigned in that court were that "the court erred in overruling defendant's (appellant's) objections to the rendition of judgment of the capital stock tax (so-called) and rendering judgment thereon. Among the reasons for said error are the following:

"a. Said capital stock tax is a tax on personal, not on real, property, and is chargeable only at the place of the main office and place of business of defendant (appellant)—Keokuk, in the state of Iowa—and is made in violation of the rights of defendant (appellant), contrary to the laws regulating commerce between the states and contrary to the Constitution and laws of the United States.

[630] "b. If any part of said capital stock of defendant (appellant) *is taxable in Illinois, it can only be that portion thereof that would correspond to the length of the bridge in Illinois as compared to the whole length of bridge, represented by said capital stock—not exceeding one half of said stock—yet the judgment is rendered for the tax assessed against the whole of the capital stock of de-

fendant (appellant) as though all was located in Illinois;" that the judgment was against the evidence as to the length of the bridge in Illinois: and that the court ignored the act of Congress fixing the western boundary of Illinois.

In the opinion of the supreme court of Illinois, *Keokuk & H. Bridge Co. v. People ex rel. Atchison*, 167 Ill. 15, 47 N. E. 313, it is said: "The grounds of reversal are, first, the assessments were fraudulently made; second, the whole of the capital stock is assessed in this state, whereas an undivided half of it is taxable in Iowa; third, the judgment is upon an assessment upon a part of appellant's bridge, not in the state of Illinois, but in the state of Iowa. The facts upon which the first two grounds are based are substantially the same as those upon which similar objections were urged in cases between the same parties in 145 Ill. 596, 34 N. E. 482, and 161 Ill. 132, 43 N. E. 691, and 514, 44 N. E. 206, and are disposed of adversely to appellant by those decisions."

The last point was disposed of on the ground that the county court was justified on the evidence in finding that no part of the bridge assessed was in the state of Iowa.

In *Keokuk & H. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482, it was held that when the middle of a navigable river becomes the boundary line between two states, the middle of the current or channel of commerce will be regarded as the boundary line: that an assessor in Illinois, in assessing a bridge over a navigable river forming the boundary of the state for the purpose of taxation, has no right to assess any part of such bridge that is located beyond such boundary line; and that unless the property has been fraudulently assessed more than its fair cash value, the courts cannot interfere with the action of the assessor. The judgment in that case was reversed because the assessor had assessed several hundred *feet of [631] the bridge as in Hancock county, Illinois, which was located beyond the boundary line of the state.

In *Keokuk & H. Bridge Co. v. People ex rel. County Treasurer*, 161 Ill. 132, 43 N. E. 691, it was ruled that in fixing the value for taxation the assessor acts judicially, and the courts cannot revise his assessment on the mere ground of erroneous valuation; that on an application for judgment for delinquent taxes, it may be shown that the tax is unauthorized by law, or is assessed on property not subject to taxation, or that the property has been fraudulently assessed at too high a rate; that the capital stock of a corporation formed by the consolidation of corporations of different states is properly taxable in one of said states so far as the corporation of that state is concerned; that the kind of property denominated in the revenue law of Illinois "capital stock" does not mean shares of stock, either separate or in the aggregate, but designates the property of the state corporation subject to taxation as a homogeneous unit partaking of the nature of personalty, and subject to the burdens imposed on it by the state of its creation. The judgment was reversed because

the assessment was illegal in including a certain number of feet of the bridge which was located in the state of Iowa.

In *Keokuk & H. Bridge Co. v. People*, 161 Ill. 514, 44 N. E. 206, the rulings in the prior case so far as involved were affirmed.

The foregoing are the decisions to which reference is made in the opinion of the state supreme court in the case before us.

The errors assigned in this court are in substance that part of the bridge assessed was in the state of Iowa; that the bridge was assessed at more than its value, and not in the same proportion as other property was assessed; that no part of the capital stock was assessable, because a tax on it was in effect a tax on interstate commerce, and was a tax on franchises conferred by the Federal government; and that the whole of the capital stock was assessed, although one half of the bridge was located in the state of Iowa.

1. In *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239, it was adjudged that the boundary line between the two states was "the middle of the main navigable channel of the Mississippi river." Where [632] "that line divided the bridge was a question of fact, and it is not within our province to review the findings of the courts below in regard to the part assessed in Illinois.

2. For the same reason, the contention as to whether the bridge was assessed at more than its value, and not at the same proportion of its value as other property was, need not be considered. Perhaps we may properly add that we perceive no adequate ground to question the conclusion that the county court did not err in declining, on the evidence, to set aside the determinations of the boards of review sustaining the action of the assessor.

3. The tax on the capital stock was not a tax on franchises conferred by the Federal government, but on those conferred by the state, and as such not open to objection. *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532. Nor was the tax a tax on interstate commerce. This was so ruled in *Henderson Bridge Co. v. Kentucky*, 166 U. S. 153, 41 L. ed. 954, 17 Sup. Ct. Rep. 533. It was there said:

"The company was chartered by the state of Kentucky to build and operate a bridge, and the state could properly include the franchises it had granted in the valuation of the company's property for taxation. *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766. The regulation of tolls for transportation over the bridge considered in *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, presented an entirely different question.

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge.

The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted." And see *Henderson Bridge Co. v. Henderson*, 173 U. S. 622, 43 L. ed. 834, 19 Sup. Ct. Rep. 553.

*4. As to the objection that the entire capital stock was assessed by the state board of equalization, it is enough to say that the question that the action of that board was in violation of the Constitution of the United States, except so far as it was claimed to be an interference with interstate commerce, was not raised. [633]

The supreme court of Illinois had repeatedly sustained the assessment on the whole capital stock as being an assessment on the capital stock of the corporation created by the state of Illinois. But in none of the cases in which the question of the validity of such capital stock assessments arose was the point considered that they were contrary to the Constitution of the United States.

In this case, and as to the tangible property, the objection was made that the assessment by the assessor of that tangible property was in contravention of the Fourteenth Amendment. But this was before the township board of review and the board of supervisors, and had no relation to the assessment of capital stock, which by the laws of Illinois was dealt with solely by the board of equalization. In the county court, the objections made in the township board of review and in the board of supervisors as to the tangible property were repeated as to that property, but the objections to the assessment on the capital stock were independent of and distinct from those, and raised no question in respect of the Constitution of the United States except that as to interstate commerce. And this was true as to the assignments of error in the state supreme court.

In *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, it was held that where a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below.

To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. "In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. . . . Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in [634]

the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment, or that such was its necessary effect in law. . . . It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904. In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough: or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904. A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can

[635] it be said that the *necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." 173 U. S. 198, 199, 200, 43 L. ed. 666, 667, 19 Sup. Ct. Rep. 381.

We are confined, then, to the only Federal questions which this record presents, and in disposing of these as we have, no opinion is intimated on the contention that the judgment was erroneous because the assessment, in effect, included the entire capital stock of plaintiff in error as a consolidated corporation.

Judgment affirmed.

HENRY F. WHITCOMB and Howard Morris, as Receivers of the Wisconsin Central Company, *Plffs. in Err.*,

v.

JOHN A. SMITHSON.

(See S. C. Reporter's ed. 635-638.)

Writ of error to state court—review of order remanding cause after removal—color

NOTE.—As to removal of separable controversies, see note to *Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A.* 38 L. ed. U. S. 105.

175 U. S.

for motion to dismiss—ruling on merits as affecting right of removal.

1. The action of a circuit court in remanding a cause to a state court after its removal is not open to revision on writ of error from the Supreme Court of the United States to the state court.
2. The question of the effect of an order remanding a cause from a circuit court of the United States to a state court, in which the contention was made that the cause was still pending in the Federal court, gives color for a motion to dismiss a writ of error from the Supreme Court of the United States to the state court.
3. A ruling on the merits instructing the jury to return a verdict in favor of one defendant, which is adverse to plaintiff and without his assent, when made on the trial after the right to a removal of the cause to a Federal court on the ground that such defendant had been fraudulently made a party in order to prevent removal had been denied, cannot operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them.

[No. 150.]

Submitted December 4, 1899. Decided January 8, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a decision affirming a judgment entered on a verdict in a state court after the cause had been removed to a Federal court and remanded again to the state court. On motions to dismiss or affirm. *Affirmed.*

See same case below, 71 Minn. 216, 73 N. W. 853.

Statement by Mr. Chief Justice Fuller:

*This was an action brought in the district [635] court of Ramsay county, Minnesota, by John A. Smithson against the Chicago, Great Western Railway Company, and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while he was serving the Chicago, Great Western Railway Company as a locomotive fireman, in a collision between the locomotive on which he was at work and another locomotive operated by Whitcomb and Morris, as receivers of the Wisconsin Railway Company, appointed by the United States circuit courts for the eastern district of Wisconsin and the district of Minnesota. The Chicago, Great Western Railway Company answered the complaint, and the receivers filed a petition for the removal of the cause into the circuit court of the United States for the district *of Minne- [636] sota, setting up diverse citizenship, and that they were officers of the United States courts; that the controversy was separable; and that the railway company was fraudulently made a party for the sole purpose of preventing the removal of the cause. Plain-

As to appeal from order of circuit court remanding cause, see note to *Whelan v. New York, L. E. & W. R. Co.* (C. C. N. D. Ohio) 1 L. R. A. 65.

tiff answered the petition and asserted that the company was made party defendant in good faith, and not for that purpose. An order of removal was entered and the cause sent to the circuit court, and thereafterwards that court, on hearing on rule to show cause, remanded it to the district court of Ramsay county. Defendants Whitcomb and Morris being in default, it was stipulated between plaintiff and themselves that in consideration that plaintiff allowed them to answer, plaintiff should have a trial of the cause at the June term, 1896, of the court, and further "in case of a final judgment in said action in favor of said plaintiff against said receivers, that the receivers will not oppose the allowance of the same before the master in chancery." Whitcomb and Morris thereupon filed their answer.

The case came on for trial on the morning of April 20, 1897, when Whitcomb and Morris asked leave to file an amended answer, setting up that the court was without jurisdiction because the cause was pending in the circuit court. The application was denied, and said defendants excepted. The trial proceeded, and after the testimony was closed, on April 21, counsel for the Chicago, Great Western Railway Company moved that the jury be instructed to return a verdict in behalf of that defendant, which motion the court granted. Thereupon the receivers asked permission to file a petition for removal supplemental to the petition already on file, and proffer of petition and bond being treated as made, the court denied the application, and exception was taken. On the morning of April 22 the court instructed the jury to return a verdict in favor of the Chicago, Great Western Railway Company, which was done, and thereupon the case went to the jury, which returned a verdict on April 23 against Whitcomb and Morris as receivers, and assessed plaintiff's damages. Motion for new trial having been made and overruled, judgment was entered on the verdict, and [637] was subsequently affirmed *by the supreme court of Minnesota on appeal. 71 Minn. 216, 73 N. W. 853. The pending writ of error having been issued, motions to dismiss or affirm were submitted.

Mr. Howard Morris submitted the cause for plaintiffs in error (*Mr. Thomas H. Gill* was with him on the brief):

The record shows that a right, privilege, or immunity under the laws of the United States set up and claimed by the defendants below, to wit, the right to remove the cause to the Federal court for trial, has been denied to defendants by the state court. That judgment is open to review in this court.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

When the railway company defendant was dismissed the joint action ended, and the case in legal significance became substantially a new action for removal purposes, by reason of taking on its separable form.

Huskins v. Cincinnati, N. O. & T. P. R. Co. 37 Fed. Rep. 504, 3 L. R. A. 545; *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660; *Evans v. Dillingham*, 43 Fed. Rep. 177; *Yarde v. Baltimore & O. R. Co.* 57 Fed. Rep. 913; *Mattoon v. Reynolds*, 62 Fed. Rep. 417; *Cookerly v. Great Northern R. Co.* 70 Fed. Rep. 277; *Yulee v. Vose*, 99 U. S. 539, 25 L. ed. 355; *Powers v. Chesapeake & O. R. Co.* 65 Fed. Rep. 129; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

Mr. John A. Lovely submitted the cause for defendant in error:

The decision of a subordinate Federal court remanding a cause to a state court is absolute.

Morey v. Lockhart, 123 U. S. 56, 31 L. ed. 68, 8 Sup. Ct. Rep. 65; *Wilkinson v. Nebraska ex rel. Cleveland Soc. for Savings*, 123 U. S. 286, 31 L. ed. 152, 8 Sup. Ct. Rep. 120; *Sherman v. Grinnell*, 123 U. S. 679, 31 L. ed. 278, 8 Sup. Ct. Rep. 260; *Richmond & D. R. Co. v. Thouron*, 134 U. S. 45, 33 L. ed. 871, 10 Sup. Ct. Rep. 517; *Gurnee v. Patriek County*, 137 U. S. 143, 34 L. ed. 602, 11 Sup. Ct. Rep. 34; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141.

The only cases that can be urged against the view that the situation, so far as the question of jurisdiction is concerned, was not changed by the order of the court at the end of the trial directing the verdict in favor of the railway company, are those where, before the actual trial commenced, there was, by the voluntary action of the plaintiff in the state court, such a change of parties as to eliminate or reform the jurisdictional conditions entirely.

Such is the case of *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

It will not be presumed to be the fault of the defendant in error, so far as jurisdiction is concerned, that the court, over his objection, ordered a verdict against one of the defendants in the action.

Arrowsmith v. Nashville & D. R. Co. 57 Fed. Rep. 169.

While the petition for removal alleged that the suit was collusively commenced against both parties, this charge was denied by answer of defendant in error, and such issue was determined in his favor by the Federal judge, whose decision is conclusive on that matter.

Black's Dillon, Removal of Causes, p. 232, § 137; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203.

Where proceedings in the trial of a cause eliminated certain defendants, leaving parties in the case that would have made the action originally removable, it is then too late to attempt such a removal even before the trial in the state court has commenced.

Rosenthal v. Coates, 148 U. S. 142, 37 L. ed. 399, 13 Sup. Ct. Rep. 576; *Jifkins v. Sweetzer*, 102 U. S. 177, 26 L. ed. 129.

[637] *Mr. Chief Justice Fuller delivered the opinion of the court:

The action of the circuit court in remanding the cause after its removal on the first application is not open to revision on this writ of error. *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 566, 40 L. ed. 539, 16 Sup. Ct. Rep. 389. And if the state court did not err in denying the second application the motion to affirm must be sustained, as we think the question of the effect of that remanding order gave color for the motion to dismiss.

The record shows that the circuit court granted the motion to remand on the authority of *Thompson v. Chicago, St. P. & K. C. R. Co.* 60 Fed. Rep. 773, in which case it was ruled that there was no separable controversy; and its judgment covered the question of fact as to the good faith of the joinder. The contention here is that when the trial court determined to direct a verdict in favor of the Chicago, Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the circuit court. This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled in *invitum*.

[638] *As stated by the supreme court of Minnesota, "it was alleged in the complaint that both of these defendants operated locomotives and trains over tracks owned by the Chicago & Northern Pacific Railway Company, in the city of Chicago, and it was on this track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago, Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track." The case was prosecuted by plaintiff accordingly, and at the close of the evidence a motion was made to instruct the jury to return a verdict in behalf of the railway company because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and the court granted the motion on that ground in view of the rules of the company, which it found "to amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point."

175 U. S. U. S., Book 44.

This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. As we have said, the contention that the railway company was fraudulently joined as a defendant had been disposed of by the circuit court. But assuming, without deciding, that that contention could have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it.

Judgment affirmed.

*TELLURIDE POWER TRANSMISSION COMPANY *et al.*, *Plffs. in Err.*,
v.

RIO GRANDE WESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 639-647.)

Writ of error to state court—supplemental transcript—authority exercised under the United States—claim under statute set up in state court—Federal question as to possession of mining claim.

1. A supplemental transcript filed after a case was argued and decided in the supreme court of a state, with nothing to show how it came to be filed, when no certiorari has been issued to bring it up, or any motion made for leave to file it, or any order permitting it to be filed, is a mere excrescence on the record, which cannot be considered in the Supreme Court of the United States.
2. Merely setting up a general right under a Federal statute does not present a case within the first category of cases specified in U. S. Rev. Stat. § 709, of "an authority exercised under the United States," where the validity of the statute is not in question.
3. The questions of priority of possession of a water right and of conformity to local customs, laws, and decisions do not constitute Federal questions under U. S. Rev. Stat. § 2339, which will give jurisdiction to a Federal court, but are merely preliminary to or the possible basis of a Federal question.

[No. 70.]

Argued December 8, 11, 1899. Decided January 8, 1900.

IN ERROR to the Supreme Court of the State of Utah to review a judgment affirming the decision of the District Court of Utah confirming and quieting title to public

NOTE.—As to jurisdiction of Federal over state courts: necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

lands against an adverse claimant. *Dismissed.*

See same case below, 16 Utah, 125, 51 Pac. 146.

Statement by Mr. Justice **Brown**:

[639] *This was asuitbroughtby the Rio Grande Western Railway Company, a corporation of Utah, in the district court of the fourth judicial district of Utah, against the Telluride Power Transmission Company and two individual defendants, named Nunn and Holbrook, to confirm and quiet the title of the plaintiff company to certain unsurveyed public lands of the United States in the county and state of Utah.

The bill of complaint was filed September 12, 1896, and set forth that the railway company was authorized to construct and operate a railway in Provo Cañon, Utah, on either of two routes described; that in March, 1896, it commenced the survey and location of a line of railroad through the cañon, which line passed over certain tracts of unsurveyed lands of the United States, of which one Murphly was in possession, prior to the survey; that it became the owner of [640] his right of way, *under an act of Congress affirming such rights, subject only to its obligation to pay the occupant the damages to his possessory right, which he subsequently released. The plaintiff further alleged that, while lawfully in possession of the land, the defendants set up an adverse claim, and by threats and force stopped its work and denied its right to use the land for railway purposes. A judgment was demanded that the adverse claim be decreed unfounded; that the right of the plaintiff be confirmed, and the defendants be enjoined from asserting their adverse claim or interfering with the plaintiff's possession.

It would appear from a supplemental transcript of the record filed in the supreme court of Utah, after its judgment upon the merits, that, prior to any further action being taken, and on or about December 5, 1896, the defendants, the Telluride Power Transmission Company, and the individual defendant Nunn, filed a petition for a removal of the case to the circuit court of the United States, on account of diversity of citizenship, except as to defendant Holbrook, who was charged with having no interest in the controversy, and with being a mere nominal party, and made such for the purpose of ousting the jurisdiction of the Federal court. Upon hearing the arguments of counsel, the petition was denied.

After filing an objection to the further exercise of jurisdiction by the state court, the defendants demurred to the bill of complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. No exception was taken by the defendants who united in an answer in which it was alleged that the defendant Holbrook had no interest in the subject-matter in controversy. The answer further denied the material allegations of the complaint, as well as the existence of the plaintiff as a corpora-

tion, and averred that the greater part of the bed of the cañon was unsurveyed public land; that the defendants took possession of a large portion of these lands for the purpose of constructing a reservoir, and of other lands for canals, flumes, and small dams, in order to carry out the purpose of the enterprise for which they were chartered; that, in 1894, *they entered upon [641] Provo Cañon and made surveys for the purpose of ascertaining whether water power could be obtained for the production of electric current, and whether by storage in reservoirs water could be obtained for agricultural and mining purposes; and that thereafter they took possession of a large part of the public domain lying in the said cañon, including the land in dispute, for the purpose of constructing a reservoir thereon; that, in order to complete this enterprise, they would require the whole of the cañon, and that, if the plaintiff or anyone else should construct a railroad through the cañon, this enterprise would be defeated; that in 1895 they began the construction of a flume, in order to obtain power with which to aid in the construction of a dam 85 feet high at Hanging Rock, the latter dam being intended to retain water for power and irrigation purposes; that they made surveys of the contour of the reservoir to be formed by the dam; that in the spring of 1896 they prosecuted the work upon the said surveys and flume; that prior to the plaintiff's entry into Provo Cañon they, the defendants the Telluride Company and Nunn, had entered upon the unoccupied, unsurveyed public land therein, with the purpose of constructing an expensive dam and reservoir; and that, on September 12, 1896, when this suit was commenced, and for more than two years prior thereto, they were and had been in actual possession of the land in dispute.

The case was tried by the court without a jury. Findings of fact and conclusions of law were made by the court to the effect that the plaintiff had prior possession of the land, and that the adverse claim of the defendants was unfounded. A judgment was thereupon entered in favor of the plaintiff; its title to the lands in question confirmed and quieted; the adverse claim adjudged invalid, and the defendants enjoined from setting up claims or exercising rights adverse to those of the plaintiff. From this judgment, defendants, the Telluride Company, and Nunn, took an appeal to the supreme court of Utah, which affirmed the judgment of the district court. Whereupon these defendants sued out a writ of error from this court, assigning, amongst other things, as error, the failure of the *district court to re-[642] move the case to the circuit court of the United States.

Mr. **Arthur Brown** argued the cause, and, with *Messrs. H. P. Henderson* and *William Story*, filed briefs for plaintiffs in error.

Mr. James H. Hayden, argued the cause, and, with Messrs. Joseph K. McCommon and R. Harkness, filed briefs for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[642] *Mr. Justice Brown delivered the opinion of the court:

1. The question of the removal of the case to the Federal court may be disposed of without difficulty. The facts are that, on January 21, 1898, four months after the case was argued in the supreme court, and six weeks after it was decided, there was filed in the supreme court of Utah a supplemental transcript containing the original petition for removal to the circuit court, the bond of the petitioners, the order of the court denying the petition, and a protest of the defendants against the further exercise of jurisdiction by the state court. But it does not appear how this supplemental record came to be filed. No certiorari was issued to bring it up. No motion was made for leave to file it. No order was entered permitting it to be filed, and, for aught that appears, it was procured by some unauthorized person and thrust upon the files without notice to either party, without consultation with the court, and for the purpose of creating a defense which was never called to the attention of the supreme court. The transcript, upon which the case was heard in the supreme court, was stipulated by the attorneys for the respective parties to be "a full, correct, true, and complete transcript of the proceedings in said cause on appeal, and of all the pleadings in said cause, of all orders on demurrer, of the findings of the court and conclusions therefrom, and of the judgment, and of notice of intention to move for a new trial, and of the notice of appeal, and of the bill of exceptions and statement of motion for new trial." In short, this supplemental transcript is a mere excrescence. It is scarcely necessary to say that, under such circumstances, it cannot be considered here. *Goodenough Horse-Shoe Mfg. Co. v. Rhode Island Horse-Shoe Co.* 154 U. S. 635, 24 L. ed. 368, 14 Sup. Ct. Rep. 1180.

[643] *2. If there be any Federal question in the case, it arises from Rev. Stat. § 2339, which reads as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

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It is insisted that the case falls within the first category of cases specified in Rev. Stat. § 709, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." But the cases in which this clause has been applied are those wherein the validity of a statute, or of an authority exercised by a public official of the United States, has been called in question, and not those where a general right is set up under a statute. *McGuire v. Massachusetts*, 3 Wall. 387, 18 L. ed. 164; *Millingar v. Hartupee*, 6 Wall. 258, 18 L. ed. 829; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257. The use of the word "authority" in the third clause in connection with the word "commission" favors the theory that a personal authority was intended, and not the assertion of an abstract right created by a statute.

We think the case falls more properly within the third clause, as one wherein a title or right is claimed under a statute of the United States. In such case such title or right must be "specially set up and claimed" before judgment in the state court. This was not done in the case under consideration. In its complaint, the plaintiff railway company makes no allusion to this act, but relies upon an act of Congress respecting a right of way for railroads through public lands of the United States (18 Stat. at L. 482, chap. 152), and upon certain *provisions [644] of the local laws of Utah. The statute is not set up in the answer of the defendants, who relied upon their priority of possession. So, also, in the thirty-three assignments of error, filed by the defendants in the state supreme court, no reference is made to an act of Congress as the basis of their right, and no intimation is made that the district court erred in the construction or applicability of any such act.

In the opinion of the supreme court it is stated that the errors alleged raised the questions, first, whether there was not a statutory forfeiture of the plaintiff's charter, in consequence of a failure to complete and put its road in operation; second, whether plaintiff had the lawful right to locate its right of way in the cañon, and had located it over the land in dispute, and was in actual possession thereof, when defendant interfered; third, whether the law required the plaintiff to file with the register of the land office a profile of its route; and, fourth, whether the defendants made such appropriation, or had such possession of the land in dispute as authorized them to hold it against the plaintiff. After discussing the validity of the plaintiff's charter, the powers granted by it, and the possession of the plaintiff, the opinion proceeds to consider whether the defendants had any right to the land in dispute, and in this connection finds that they might have obtained a vested right to own unappropriated waters of the Provo river for the purposes specified in their charter, and that such right is rec-

ognized and acknowledged by Rev. Stat. § 2339, above cited, but professed itself "unable to find from a preponderance of the evidence in the record, that the defendants or either of them, had appropriated the land in dispute, and that they were, or that either of them was, in actual possession of it when the plaintiff located its right of way, took actual possession, and engaged in grading it. We cannot regard the plaintiff as a mere intruder on the defendants' possession, nor can we hold that they had a right to prevent the plaintiff's employees from grading it and to eject plaintiff from actual possession. It is true that defendants had surveyed for dams and reservoirs at different points on the river, but they had not taken and did not hold actual possession of the land in dispute."

[645] *The petition in error for the first time set up a right and authority under the mining laws of the United States (Rev. Stat. § 2339), and charged that the decision of the trial court, as well as of the supreme court of the state, was against the authority and validity of the claim of the defendants. The assignments of error turn principally, if not wholly, upon the finding of prior possession on the part of the plaintiff, the refusal of the court to remove the cause, and its ruling that the plaintiff had the right under its charter to construct the road.

From this *résumé* of the proceedings, it is evident that there was no denial to the defendants of any right they may have possessed by virtue of a priority of possession. The statute (Rev. Stat. § 2339) provides that "whenever, by priority of possession, rights to the use of water" for certain purposes "have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions," the owners of such vested rights "shall be maintained and protected in the same," and their right of way for the construction of ditches and canals acknowledged and confirmed. But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff. The question, Who had acquired this priority of possession? was not a Federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws, and decisions, all of which were questions of state law.

In this connection, an attempt is made to distinguish between the findings of fact and the conclusions of law. Defendants concede that they are bound by the findings of fact upon the subject of possession, but that they

[646] are not * bound by the conclusions of law,

which are as follows: First, that the plaintiff, prior to the commencement of the suit, had the possession, right of possession, and the inchoate title of the lands described; second, that the defendant company had no power in Utah to engage in generating electric power for sale; third, that defendants never had the title, possession, or right of possession, to the lands, or acquired any vested right in accordance with the laws or customs of the country, or any right to flow or otherwise occupy said lands, or prevent the use and occupation thereof by the plaintiff railroad company, and that their adverse claim was unfounded; fourth, that the plaintiff was entitled to judgment.

It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a Federal question. In this particular the case is covered by *Eilers v. Boatman*, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432, which was an action for the settlement of adverse claims to mineral lands. The case turned upon the priority of location, which the court held was a matter of fact, although the court below called it a conclusion of law.

The case under consideration in its material aspects resembles that of *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771, which was an action of ejectment growing out of conflicting and interfering locations of mining claims. As stated by Mr. Justice Jackson, "the question presented on the trial of the controversy, under the pleadings, was purely one of fact, and had reference to the true direction which the Monitor lode or vein took after encountering a fault, obstruction, or interruption at a point south of the discovery shaft sunk thereon. . . . After the decision had been rendered by the supreme court of the state a petition for rehearing was presented by the plaintiffs in error, which, for the first time, sought to present a question whether § 2322 of the Revised Statutes of the United States gave to the appellants "the exclusive right of possession" and enjoyment of all other veins or lodes having their apexes within the Monitor's surface ground." The court held it to be "plainly manifest that neither the pleadings * nor the instructions given and re-[647] fused present any Federal question, and an examination of the opinion of the supreme court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fail to disclose the presence of any Federal question." In this connection Mr. Justice Jackson quotes the remark of the chief justice in *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 653, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435: "The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed." See also *Doe* 175 U. S.

ex dem. Barbarie v. Mobile, 9 How. 451, 13 L. ed. 212.

The position of the plaintiffs in error is that, as their whole case depended upon the rights asserted by them under § 2339, and that, as the courts decided adversely to the rights claimed by them, there was no necessity of a special reference to that statute, relying in this connection upon such cases as *Miller v. Nicholls*, 4 Wheat. 311, 4 L. ed. 578; *Satterlee v. Matthewson*, 2 Pet. 380, 410, 7 L. ed. 458, 468, and others cited in *Columbia Water Power Co. v. Columbia Electric Street R. Light, & Power Co.* 172 U. S. 475, 488, 43 L. ed. 521, 526, 19 Sup. Ct. Rep. 247, in which we have held that, if it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States, and the question was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms specially set up and claimed in the record is not conclusive against a review of the question here. But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local, and not Federal, questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.

The writ of error must therefore be dismissed.

[648]*LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Appts.,

v.

HENRY W. BEHLMER.

(See S. C. Reporter's ed. 648-676.)

Act to Regulate Commerce—competition as affecting similarity of conditions—greater charge for shorter haul—competition not originating at initial point—considering interest of public—nature of competition to be considered—evidence weighed by Supreme Court—entering decree nunc pro tunc.

1. Railroads which share in an agreed rate on traffic to a certain point, and in a precisely equal rate on traffic to an intermediate point, although on traffic to this point there is added an amount equal to the local rate from that point to the end of the longer haul, which additional exaction is received by the local road alone, are to be regarded as constituting a continuous line subject to the Act to Regulate Commerce (24 Stat. at L. 379).
2. Competition which is material, arising from carriers who are subject to the Act to Regulate Commerce, can be taken into consideration for the purpose of determining the ex-

istence of a dissimilarity of circumstance and condition within the meaning of § 4 of the act, although that competition does not originate at the initial point of the traffic.

3. The interest of the public,—especially at the place from which traffic moves and the place to which it is to be delivered,—as well as that of the carrier, must be taken into consideration in determining the right of the carrier to charge, of his own motion, a lesser sum for the longer haul.
4. Evidence cannot be weighed by the Supreme Court, as a matter of first impression, in a suit to enforce an order of the Interstate Commerce Commission, for the purpose of ascertaining whether it establishes such substantial and material competition as justified a carrier in concluding that dissimilarity of circumstance and condition was brought about.
5. The right of a carrier to take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions is subject to the requirement that all rates shall be just and reasonable and without undue discrimination, and that competition shall be not artificial or merely conjectural, but material and substantial.
6. A decree of reversal for further proceedings is properly entered *nunc pro tunc* as of the date of the submission of the cause on appeal, where one of the parties has died since the case was submitted.

[No. 46.]

Argued April 17, 18, 1899. Decided January 8, 1900.

APPEAL from decree of the United States Circuit Court of Appeals for the Fourth Circuit reversing the judgment of the Circuit Court dismissing a bill for the enforcement of an order of the Interstate Commerce Commission. *Reversed.*

See same case below, 42 U. S. App. 581, 83 Fed. Rep. 898, 28 C. C. A. 229.

Statement by Mr. Justice **White**:

*This controversy was commenced on De-[649] cember 29, 1892, when Henry W. Behlmer, a resident of Summerville, South Carolina, and a wholesale hay and grain dealer therein, began proceedings before the Interstate Commerce Commission, under the Act to Regulate Commerce, passed February 4, 1887, as amended, to restrain the continuance of acts asserted by him to be a violation of the statute referred to. The petition was filed by Behlmer on his own behalf, and that of other merchants, residents of Summerville, and the parties complained of were the Memphis & Charleston Railroad Company, the East Tennessee, Virginia, & Georgia Railroad Company, the Georgia Railroad & Banking Company (the owner of a railroad designated as the Georgia Railroad), the South Carolina Railway Company, and other companies and individuals, who were averred to be lessees or receivers of some of the above-named companies. All the lines of railroad mentioned were asserted to be members of a combination styled the Southern Railway & Steamship Association.

[650] It was averred that the defendants were carriers under a common control, management, or arrangement for continuous carriage, and were engaged in the transportation of passengers and property wholly by railroad between Memphis in the state of Tennessee and Summerville in the state of South Carolina and through Summerville to Charleston. The distance between *Memphis and Summerville was averred to be 748 miles, as follows: Between Memphis and Chattanooga, 310 miles over the Memphis & Charleston Railroad; between Chattanooga and Atlanta, Georgia, 152 miles over the East Tennessee, Virginia, & Georgia Railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia Railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles over the South Carolina Railway. The principal subject of complaint was, that though Summerville was 22 miles west of Charleston and was that distance nearer to Memphis, where the hay and grain shipments originated, yet the defendants exacted from the petitioner and other merchants of Summerville a freight charge of 28 cents per 100 pounds for hay, carried from Memphis to Summerville, while only 19 cents per 100 pounds were charged for the same article when carried to Charleston, the longer distance. It was averred that the rate of 28 cents to Summerville was made up of the through rate to Charleston, with the addition of the local rate from Charleston to Summerville of 9 cents per 100 pounds. It was also alleged that the shipments of hay to Summerville were made over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions. The freight charges complained of were averred to be in violation of the 4th section of the Act to Regulate Commerce, commonly referred to as the long and short haul clause. Besides, it was alleged that the local rate between Summerville and Charleston of 9 cents per 100 pounds was excessive and unreasonable, and that such also was the case as regards the charge of 28 cents from Memphis to Summerville, and hence such charges were in violation of the 1st section of the Act to Regulate Commerce. It was also asserted that the discrimination and excessive rates against Summerville existed, not only on hay, "but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants."

In their answers certain of the defendants conceded that they were subject to the [651] Act to Regulate Commerce, while *others, though admitting that they were common carriers and engaged in the transportation of passengers wholly by railroad between points in the states of Tennessee and South Carolina, averred that they had no joint through tariff from Memphis to Summerville, and therefore had no "line" from Memphis to Summerville, in the sense of the Act to Regulate Commerce, and were in consequence not affected by the statute. All the defendants averred that the aggregate

freight rate on hay carried from Memphis to Summerville, as well as the local rates from Charleston to Summerville, were just and reasonable. By some of the defendants it was alleged that the transportation of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, and hence the carriers were justified in making a lesser charge to Charleston than was made to Summerville, the shorter distance. The dissimilarity alleged was asserted to have been caused, first, by the existence between Memphis and Charleston of at least eight competing lines of railroad, and second, by the competition by sea on hay and grain and freight of that class, originating in Chicago, New York, and eastern points and destined to Charleston *via* the lakes, canal, and ocean, and by part water and part rail. The exact condition of the competition existing at Charleston because of its situation on the seaboard and consequent relations with many markets other than Memphis, was stated in the joint and several answers of the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company as follows:

"(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston, and other eastern ports from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from north Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

*"(Third.) The rates on western produce [652] to Charleston and other coast cities, such as Savannah, Port Royal, and Brunswick, are made with a view to actual, existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, and Baltimore over continuous water routes *via* the lakes and canal or over combined rail and water routes.

"The all-rail lines seeking to do business between Chicago and Charleston and other coast cities are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in the service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville, and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain, and western products generally from the states of Missouri, Kansas, Nebraska, etc.

"The rate from Memphis to Charleston on hay is therefore forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

"The controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia, or New York, thence by ocean to Charleston."

[653] On the foregoing issues testimony was taken before the Commission, which entered an order requiring the defendants to desist on or before a date named from charging any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them, *under circumstances and conditions similar to those appearing in the case, than was being charged for such transportation for the longer distance to Charleston. This order, however, stated that it was made without prejudice to the right of the defendants to apply to the Commission for relief under the 4th section of the Act to Regulate Commerce. The order not having been obeyed, Behlmer, as authorized by § 5 of the act of March 2, 1889 (25 Stat. at L. 855, chap. 382), amending § 16 of the original act, filed his complaint in the circuit court of the United States for the fourth circuit, eastern district of South Carolina, against the defendants in the proceedings before the Commission and the purchasers, assignees, and successors of some of them, praying that the court might enforce compliance with the order of the Commission. By stipulation the testimony taken before the Commission was used at the hearing in the circuit court, and by consent certain documentary evidence (consisting of railway agreements, tariffs, reports, etc.), was filed as additional evidence on behalf of the defendants.

The case was heard by the circuit court, and on January 22, 1896, the bill was ordered to be dismissed. 71 Fed. Rep. 835. The controversy was then taken by appeal to the circuit court of appeals for the fourth circuit, and that court reversed the judgment of the circuit court, and remanded the cause with instructions to render a decree substantially in accordance with the order made by the Commission. 42 U. S. App. 581, 83 Fed. Rep. 898, 28 C. C. A. 229. A motion for a rehearing having been denied, the case was then brought to this court.

Mr. Ed. Baxter argued the cause and filed a brief for appellants.

Mr. Joseph W. Barnwell filed a brief for appellants in opposition to a motion to vacate supersedeas.

Mr. Claudian B. Northrop argued the cause and filed a brief for appellee.

The contentions of counsel sufficiently appear in the opinion.

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Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

*The questions which arise on this record [654] involve the consideration of several provisions of the Act to Regulate Commerce. 24 Stat. at L. 379.

The particular questions at issue and the aspect in which they arise will be best shown by first considering the action of the Commission, then that of the circuit court in reviewing the order of that body, and, thirdly, that of the circuit court of appeals in reversing the decree of the circuit court. The Commission held, as a matter of fact, that the carriers so conducted their business as to constitute a through line within the meaning of the commerce act, and were therefore amenable to its provisions. It did not, however, consider whether the rates to Summerville and Charleston were just and reasonable, because it deemed it unnecessary to do so. The reason for this conclusion was stated as follows:

"If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition in the 4th section will afford all the reduction demanded in the complaint." 4 Inters. Com. Rep. 522.

When it approached the 4th section of the act, the Commission declined to weigh the evidence before it as to the existence of competition, except in so far as to enable it to determine that the evidence established that the competition relied upon by the carriers did not originate at the point of shipment, or if it did arise at such place it was alone engendered by the presence there of other carriers who were subject to the commerce law.

This determination of the Commission to restrict its examination of the evidence solely to the extent necessary to enable it to ascertain the source and inherent character, and not the materiality and substantiality, of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources or was wholly of *the character which [655] it was found by the Commission the proof established the competition relied on to be. That is to say, the Commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of

his own motion, to charge a lesser rate for the longer than for the shorter haul. Whilst this was held to be the law, at the same time it was decided that the character of competition, which from its very nature was decided to be inadequate to create such legal dissimilarity in the conditions as to justify the carrier, of his own motion, charging a lesser sum for the longer than that for the shorter haul, nevertheless might authorize the Commission to sanction the lesser charge if the facts were presented to the Commission and its previous sanction to making such charge was obtained. Therefore the right of the carrier to prefer to the Commission a request for authority to make the charge complained of, predicated upon the very grounds which were held insufficient to permit the carrier to do so, on his own motion, was fully reserved. The ruling was, then, this, that some kinds of competition, however material and substantial in their operation, were yet inadequate, for the purpose of creating dissimilarity in circumstance and condition, to justify the independent action of the carrier, although the identical conditions of competition might be sufficient to produce such dissimilarity as to justify the Commission, on application made to it for such purpose, to authorize the carrier to charge less for a longer than was exacted for a shorter distance. The Commission said in its report:

"There is no showing in this proceeding of competition by lines not subject to the Act to Regulate Commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water, or part rail and part water, routes *from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the 4th section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the 4th section without such a relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer-distance point of destination. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 213, 5 I. C. C. Rep. 546. The competition of markets, or the competition of carrying lines, subject to regulation under the Act to Regulate Commerce, does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the Commission on application

therefor and after investigation. *Trammell v. Clyde S. S. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; and *Gerke Brewing Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267, 5 I. C. C. Rep. 596." 4 Inters. Com. Rep. 523.

The circuit court held that one of the defendants had not been served with process so as to cause any decree which might be rendered to be conclusive, and, moreover, decided that the proof did not establish that the carriers, in the matter complained of, were under a common control and management for continuous shipment, within the meaning of the act, and therefore they were not, as to such carriage, amenable to the provisions of the act. The court, however, proceeded as follows (71 Fed. Rep. 839):

"But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th section of the act above quoted? Judge Cooley, in *Re Southern R. & S. S. Asso.* 1 Inters. Com. Rep. 278, *sub nom. Re Louisville & N. R. Co.* 1 I. C. C. Rep. 57, says: 'The charging *or [657] receiving greater compensation for the shorter than for the longer haul is sure [seen] to be forbidden only where both are under substantially the same circumstances and conditions. And, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated.' This is quoted with approbation by the United States circuit court, southern district California. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323.

"When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question: 'Among other things in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. And water competition was, beyond doubt, especially in view.'

"In the case from 50 Fed. Rep. above cited, this is one of the rubrics: 'Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water, *via* Vancouver and San Francisco; also, by ocean freights *via* Aspinwall and the Straits of Magellan, from points east of the Missouri river. And a through rate on the same kind of freight, lower than to San Bernardino, an intermediate, nonecompetitive point, 60 miles from Los Angeles, on one of the competing railroad lines, is not prohibited by the act, since the circumstances and conditions were substantially dissimilar.'

"The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all railroad routes, routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each

other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis, and all the southeast Atlantic states would be compelled to rely on other portions of the west, north, [658] or northeast for hay. **"The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it, and others like it, were permitted to share in the circumstances and conditions surrounding Charleston, and to get the benefit of the competition which Charleston enjoys, and they have not, then, ex necessitate, the South Carolina Railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus, all stations on the line of road will pay local freight on hay, and the market, to the extent of imports from Memphis, will be destroyed. The interstate commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."*

Subsequently the attention of the circuit court was called to the asserted fact that there had been a service on the defendant, as to whom it was stated, in the opinion of the court, there had been no service of process. In a memorandum opinion the court in substance said that, conceding, *arguendo*, the correctness of the fact called to its attention, as it would not change the result of the decision it was unnecessary to further consider it.

The circuit court of appeals decided that the circuit court had mistakenly held that one of the parties essential to the cause had not been properly served, and that the circuit court had also fallen into error in deciding that the carriers in question were not, within the intentment of the commerce act, a continuous line for through transportation under a common management and control. When it came to consider the conflicting conclusions of the Commission and the circuit court as to the meaning of the 4th section of the act, the court held that the interpretation adopted by the Commission was right, and that upheld by the circuit court was wrong. In other words, the circuit court of appeals decided that no competition existing at the place of delivery, however far reaching or arising at the initial point from the [659] action of other *carriers who were subject to the control of the act, could justify a carrier in making a greater charge for a shorter than for a longer haul, although such competitive conditions might empower the Commission, on application of the carrier, to grant the right to make such charge. The reasons which impelled the circuit court of appeals to the conclusion by it reached are very clearly stated in its opinion, from which a member of the court (Morris, District Judge) dissented. The court said (42 U. S. App. 594, 83 Fed. Rep. 905, 28 C. C. A. 236):

"The decisions of the Interstate Commerce Commission concerning the proper construction of § 4 of the Interstate Commerce Act have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the Commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle Case* [*Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700] there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission in a number of cases decided by it prior to such decision is the proper one. In this connection may be cited the following: *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744; *Trammell v. Clyde S. S. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 213, 5 I. C. C. Rep. 546."

Again:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission (4 Inters. Com. Rep. 520), which is, in substance, that, in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer-distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic *from any particular locality unless [660] one line could perform the service if the other did not. Such we believe to be the true meaning of § 4 so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the north Atlantic ports—to supply the trade of Charleston with the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted; nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in § 4 of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul without an order to that effect from the Commission granted by it as provided for in the proviso to the fourth section."

Approaching, then, a solution of the ques-

tions which arise from the report of the Commission and the decisions below rendered, which substantially also embrace the essential matters covered by the assignments of error and the material issues which were urged in the argument at bar, it appears that the propositions involved are threefold. First. Was it correctly decided that the carriers as the result of the arrangements between them constituted, within the purview of the 1st section of the Act to Regulate Commerce, a continuous line, so far at least as regards the shipments between Memphis, Summerville, and Charleston? Second. Was it correctly held by the Commission and decided by the circuit court of appeals, that under the 4th section of the act no competition, however material, unless it arose from certain enumerated sources or was of the inherent character stated by the

[661] Commission and the circuit court of appeals, could create such dissimilarity of circumstance and condition as would authorize the carrier, of his own motion, to charge a greater rate for a lesser than for a longer distance? The provisions of the 4th section which are involved in the second proposition are as follows:

"§ 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided*, however, that, upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

Third. If it be concluded that the Commission and the circuit court of appeals erroneously interpreted the 4th section of the act, is the record in such a condition as to justify this court in deciding, as a question of first impression, whether the through rates complained of were just and reasonable, and whether, if yes, the proof offered by the carrier established such substantial and material competition as would support a charge by the carrier, on his own motion, of a lesser rate for the longer than is exacted for the shorter distance?

The first two of the foregoing questions in effect solely involve propositions of law, for, although the essential predicate upon which they rest takes into consideration certain facts, they were not disputed below, and

[662] their existence was not denied in the argu-

ment at bar. They may be assumed, therefore, as being unchallenged for the purpose of the legal questions presented. We come, then, to the immediate consideration of the propositions above referred to in the order stated.

1st. The conceded facts from which it was deduced as a matter of law that the carriers were operating "under a common control, management, or arrangement for a continuous carriage or shipment" were as follows: The several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston. The several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to Summerville, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received by the local road on which Summerville was situated. The contention that under this state of facts the carriers did not constitute a continuous line, bringing them within the control of the Act to Regulate Commerce, is no longer open to controversy in this court. In *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, decided since the case in hand was before the Commission and the circuit court, it was held under a state of fact substantially similar to that here found, that the carriers were thereby subject to the Act to Regulate Commerce.

2d. It is, as we have said, uncontroverted that all the competition relied on by the carriers to establish that there was a dissimilarity of circumstance and condition arose solely from two sources: either that originating at Memphis, the initial point of the traffic, from the presence there of carriers who were subject to the provisions of the commerce act, or competition based on the fact that Charleston was connected with or accessible to lines of rail and water communication which brought it in relation with many other places and markets other than Memphis, thereby creating competition between Memphis and Charleston, the claim being that Memphis would have been deprived of the benefits of the Charleston traffic, and Charleston would be also cut off [663] from the Memphis supply, if the rates from Memphis to Charleston had not been made lower to meet the competition at Charleston.

The construction of the 4th section of the Act to Regulate Commerce and the question whether competition which materially operated on traffic and rates was a proper subject to be considered by a carrier in charging a greater rate for the shorter than was asked for the longer distance, on account of the dissimilarity of circumstance and condition produced by such competition, has recently, after elaborate argument and great consideration, been passed upon by this court. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct.

Rep. 666, the facts as stated by the court which are pertinent to the legal question now under consideration were briefly as follows (pp. 196-200, L. ed. pp. 940, 941, Inters. Com. Rep. pp. 406, 407, Sup. Ct. Rep. p. 668): The Interstate Commerce Commission entered an order directing the railway to "forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or at any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value, and expense of carriage." The railway company refused to obey the order, and a proceeding was initiated by complaint filed in the circuit court to compel it to do so. The substance of the answer of the railroad, so far as material to the matter now under review, was thus recited by the court (pp. 205, 206, L. ed. pp. 942, 943, Inters. Com. Rep. p. 412, Sup. Ct. Rep. 670):

[664] "The answer of the Texas & Pacific Railway Company to the petition of the New York Board of Trade & Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the circuit court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; *by steamships and sailing vessels in connection with railroads across the isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco. That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company. That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move *via* the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage. That the foreign or import traffic is upon orders by persons, firms, and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool, and other European markets; and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New

Orleans in any event. That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City, and other Missouri river points."

After stating that the foregoing facts were fully established by the proof and in effect conceded, and after remarking (p. 207, L. ed. p. 943, Inters. Com. Rep. p. 413, Sup. Ct. Rep. p. 670) that they "would seem to constitute 'circumstances and conditions' worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality," the court observed (p. 217, L. ed. p. 947, Inters. Com. Rep. pp. 422, 423, Sup. Ct. Rep. p. 674):

"The Commission justified its action wholly upon the construction put by it on the Act to Regulate Commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances*and conditions' [665] as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred."

Later, in recurring to the subject of competition as creating dissimilarity of circumstance and condition, the court said (p. 233, L. ed. p. 952, Inters. Com. Rep. p. 437, Sup. Ct. Rep. pp. 680, 681):

"That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

In *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45, the controversy was this: A proceeding was commenced to compel a carrier to obey an order of the Commission forbidding the charge of a lesser rate for transportation to Montgomery, the longer distance, than was charged to Troy on the same line, the shorter distance. The nature of the competition relied on by the carriers is fully shown by a statement in the opinion, referring to one of the assignments of error made in the cause. The court said

(Id. p. 162, L. ed. p. 421, Sup. Ct. Rep. p. 47):

[666] "Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendants, common carriers which participate in the transportation of class goods to Troy *from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities and dealers and shippers therein, in violation of the provisions of the Act to Regulate Commerce."

It will thus be observed that the facts presented were, in legal effect, the equivalent of those arising on this record. The competition which the carrier asserted had created such dissimilarity of circumstance and condition as justified, on its own motion, the lesser charge for the longer than was made for the shorter distance, was competition not only arising by water transportation, but alleged to spring from common carriers who were confessedly subject to the control of the Act to Regulate Commerce. The error which it was asserted the record contained was that such competition had been held, by the lower courts, sufficient to create dissimilar circumstances and conditions, and that the right of the carrier to avail himself of such dissimilarity without the previous assent of the Commission had been also sustained. This court said (pp. 162, 163, L. ed. p. 421, Sup. Ct. Rep. p. 47):

"Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso of the [667] 4th section *of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case."

Proceeding to the question of law, the construction of the fourth section, which was involved in supporting the interpretation of the Commission, it was stated, as follows: "It is contended in the brief filed on behalf of the Interstate Commerce Commission that

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the existence of rival lines of transportation, and consequently, of competition for the traffic, are not facts to be considered . . . when determining whether property transported over the same line is carried 'under substantially similar circumstances and conditions' as that phrase is found in the 4th section of the act." The court then examined this question, and after citing from an opinion of Judge Cooley in the matter of *Re Southern R. & S. S. Asso.* 1 Inters. Com. Rep. 278, 287, *sub nom. Re Louisville & N. R. Co.* 1 I. C. C. Rep. 31, 78, said (p. 164, L. ed. p. 422, Sup. Ct. Rep. p. 48):

"That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315, 1 Inters. Com. Rep. 317; *Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 862, 4 Inters. Com. Rep. 434; *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 925, 943, 4 Inters. Com. Rep. 332; *Behlmer v. Louisville & N. R. Co.* 71 Fed. Rep. 835; *Interstate Commerce Commission v. Louisville & N. R. Co.* 73 Fed. Rep. 409."

It is to be remarked that among the cases approvingly cited in the passage just quoted will be found the opinion of the circuit court in the very case now before us, which opinion was opposed to the construction of the law taken by the Commission and to that announced by the circuit court of appeals in this cause. Referring to the claim that under a correct interpretation of the proviso of the 4th section carriers were not allowed to avail themselves of dissimilar *circumstances and conditions, arising from competition, without the previous assent of the Commission, the court again cited from an opinion of the Interstate Commerce Commission delivered by Judge Cooley, as follows (pp. 168, 169, L. ed. pp. 423, 424, Sup. Ct. Rep. pp. 49, 50):

"That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do, without permission of anyone. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the

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special rate, rebate, or drawback, which is made unlawful by the 2d section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences: but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the 4th section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

And the approval of the construction given to the act in the passage from the opinion of Judge Cooley was not left to implication, since the court added (p. 169, L. ed. p. 424, Sup. Ct. Rep. p. 50):

"The view thus expressed has been adopted in several of the circuit courts (*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 300, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 925, 943, 4 Inters. Com. Rep. 332; *Behlmer v. Louisville & N. R. Co.* 71 [669] Fed. Rep. 835, 839); *and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the 4th section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do."

It is then settled that the construction given in this cause by the Interstate Commerce Commission and the circuit court of appeals to the 4th section of the Act to Regulate Commerce was erroneous, and hence that both the Interstate Commerce Commission and the circuit court of appeals mistakenly considered, as a matter of law, that competition, however material, arising from carriers who were subject to the Act to Regulate Commerce could not be taken into consideration, and likewise that all competition, however substantial, not originating at the initial point of the traffic, was equally, as a matter of law, excluded from view. It follows that the decree of the circuit court must be reversed unless it be the duty of this court to examine the evidence, which was not passed on by the Commission or the circuit court of appeals, for the purpose of ascertaining whether the competition relied on was so substantial and so controlling on traffic and rates as to cause it to produce a dissimilarity of circumstance and condition within the meaning of the 4th section of the act. A consideration of this subject leads to a solution of the third question which we have previously stated was involved in the cause. In passing, however, it is well to say that both the opinions of this court, just referred to, were announced

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subsequently to the decision in this case by the Interstate Commerce Commission and of the circuit court, and moreover that the opinion of this court in the last cause (the *Midland Case*) was announced after the decision of the circuit court of appeals of the case now here. Indeed, since the decision last referred to, it is not denied that the Interstate Commerce Commission have recognized that the interpretation previously given by it to the 4th section had been decided to be unsound, hence in the practical application of the law, since *the decision by [670] this court in the *Midland Case*, the construction of the statute which was announced by the Commission in previous cases as well as in this has no longer been applied. 11 Ann. Rep. I. C. C. (1897), pp. 38, 43, 91; *Savannah Bureau of Freight & Transportation v. Charleston & S. R. Co.* 7 Inters. Com. Rep. 479, 480.

Before determining the final question we notice certain contentions pressed in argument, whereby it is asserted that there is such a difference between the legal issues here arising and those which were presented in the cases referred to that this case should not be controlled by them. In any event, it is argued, the action of the Commission and the circuit court of appeals in this controversy was of such a nature as to render the previous rulings of this court inapposite, and hence it is unnecessary to apply them. Whilst it is not denied as regards competition arising from other carriers at the place of origin of the traffic, who were subject to the control of the Act to Regulate Commerce, that the decision here under review is not in accord with the rulings of this court, such it is claimed is not the case as to competition not originating at the initial point of carriage. From this premise it is argued that it was correctly decided below that substantial and material competition resulting from conditions existing at the point of delivery (such as accessibility of that place to other lines of transportation from other places by rail or water, or both, was, as a matter of law, correctly decided below to be without legal efficacy in producing dissimilarity of circumstances and conditions. In this regard, then, the decree below, it is insisted, was correct. But the facts which were presented in the records passed on by this court, in the cases to which we have referred, do not justify the premise from which this presumed difference is deduced. We do not stop, however, to analyze those facts, because, granting, *arguendo*, the assumption upon which the suggested distinction is based, we think it is without merit. What was decided in the previous cases was that under the 4th section of the act substantial competition which materially affected transportation and rates might, under the statute, be competent to produce dissimilarity *of circumstances and condi- [671] tions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind

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of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. Not only this, but if the distinction be applicable, only that competition which might deflect at the point of origin the traffic from one carrier to another would be within the purview of that portion of the 4th section now under consideration, and competition which was so great as to absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation. This would lead to the construction that the statute, in empowering a carrier, under certain competitive conditions, of his own volition, to exact a lesser rate for the longer haul, contemplated only the interest of some particular carrier, and not at all the public interest. Whilst the unsoundness of the proposition is thus shown, from the contradiction which inheres in it, the erroneous conception upon which it rests is fully demonstrated in the following excerpt from the opinion in *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 211, 40 L. ed. 945, 5 Inters. Com. Rep. 417, 16 Sup. Ct. Rep. 672:

"So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

Indeed, in the cases by which the controversy here before ^[672]us is controlled, attention was pointedly called to the fact that in considering the power of the carrier, of his own motion, to charge a lesser sum for the longer haul, not only was the interest of the carrier to be taken into account, but also the interest of the public,—especially at the place from which the traffic moved and the place to which it was to be delivered, and to these principles we shall before concluding again advert.

The argument upon which it is claimed that even if the legal principles here involved are not to be distinguished from those established by the decisions of this court, nevertheless the decree of the circuit court of appeals should be affirmed, is as follows:

The Commission and the circuit court of appeals, it is asserted, although they may have expressed erroneous opinions as to the construction of the statute, yet, ultimately, in substance, decided, as a matter of fact, that the competition was not of sufficient weight

to bring about dissimilarity of circumstances and conditions. But this suggestion is without merit. We have shown, in our previous analysis of the action of the Commission and of the views expressed by the circuit court of appeals, that whilst the facts were considered in so far as was necessary to determine that the competition was due only to certain particular causes, the result of the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates. And this, because both the Commission and the circuit court of appeals determined that competition of the particular character which they found that relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carrier.

This failure to consider the evidence points to the distinction between this cause and that of *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, upon which reliance is placed. In that case the court, from an examination of the whole record, considered that the result of the action of the Commission and the circuit court of appeals had been substantially to decide, not that the character of competition relied on could not be taken ^[673]into view, but that, fully weighing and considering it, sufficient proof did not result to show that it was so substantial and so material as to justify deciding that there were dissimilar circumstances and conditions. The judgment below was, because of this view as to such question, affirmed. The court said (p. 194, L. ed. p. 938, Inters. Com. Rep. p. 401, Sup. Ct. Rep. p. 704): "But the question was one of fact peculiarly within the province of the Commission whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion." If it be again, *arguendo*, conceded the state of the record in that case was such that an analysis of the action taken below might have well led the court to a different opinion; in other words, might have justified it in holding that both the Commission and the circuit court of appeals had rested their conclusions, not on the want of proof as to the claimed competition, but solely on the absence of legal power to assert competition of the character relied on, such concession could have no influence upon the decision of this cause. This follows because the only deduction possible from the proposition would be that the particular case had been decided on a question of fact, when it should have been controlled by a question of law, which would afford no reason for the failure to apply sound principles of law to the facts of this record. It involves a complete *non sequitur* to assert that because legal principles may not have been applied to a given case, on the assumption that the facts did not render their application necessary, therefore, in future cases, where it was found that the facts brought the controversy within the principles, they should not be applied.

It remains only to examine the last question—that is, whether this court, as a matter of first impression, should weigh the evidence for the purpose of ascertaining whether it established such substantial and material competition as justified the carrier in concluding that dissimilarity of circumstance and condition was brought about. If it were true, as asserted in the argument for the appellee, that where the inherent character of the competition was of a nature to be taken into consideration, any competition, however remote*and unsubstantialits [674] influence on rates and traffic, would be sufficient to bring about dissimilarity of circumstances and conditions, the question would be easy of solution, for then to weigh the testimony would involve no serious duty. But this suggestion rests on an entire misconception of the adjudications of this court. In considering the right of a carrier to act on competitive conditions, deemed by him to produce dissimilarity of circumstances and conditions, the court, in *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 173, 42 L. ed. 425, 18 Sup. Ct. Rep. 51), said:

“But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences.”

Again (p. 167, L. ed. p. 423, Sup. Ct. Rep. p. 49), it was said:

“In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3d and 4th sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of ‘undue or unreasonable preference or advantage,’ or what are ‘substantially similar circumstances and conditions.’ The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.”

It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this [675] latter consideration may *in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on

the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered. If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission, and were not weighed by the circuit court of appeals, because both the Commission and the court erroneously construed the statute. But the law attributes prima facie effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the circuit court of appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238, L. ed. p. 954, Inters. Com. Rep. p. 441, Sup. Ct. Rep. p. 682).

“If the circuit court of appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its *defense considered, in the first in-[676] stance at least, by the Commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.”

We think these views should be applied in the case now under review. In this case, however, the proceeding to enforce the order of the Commission was initiated by a private individual on behalf of himself and other interested parties not named, and the peti-

tioner in the circuit court has died since the argument and submission of the cause in this court. We are of opinion, therefore, that the decree of the Circuit Court of Appeals should be reversed with costs, that the case be remanded to the Circuit Court with instructions to modify its decree adjudging that the order of the Commission be set aside with costs, by providing that the dismissal be without prejudice to the right of a party in interest to apply to the Commission to be substituted in the original proceeding before the Commission in the stead of the deceased petitioner, and that upon such substitution the Commission should proceed upon the evidence already introduced before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter of controversy in conformity to law. A decree will be entered accordingly, such entry to be made *nunc pro tunc* as of the date of the submission of the cause in this court.

[677] *THE PAQUETE HABANA.

THE LOLA.

(See S. C. Reporter's ed. 677-721.)

Appellate jurisdiction in prize case—amount in dispute—exemption of fishing vessels from capture as prize—consulting records of Navy Department—sources of international law—reference to authorities—judicial notice of international law.

1. No pecuniary limit upon the appellate jurisdiction, either of the Supreme Court or of the circuit court of appeals from a district or circuit court of the United States, is imposed by the act of Congress of March 3, 1891.
2. Jurisdiction of appeals from all final sentences and decrees in prize cases may be taken by the Supreme Court of the United States, without regard to the amount in dispute and without any certificate of the district judge as to the importance of the particular case.
3. The records of the Navy Department may be consulted by the Supreme Court of the United States upon the question of the recognition of the exemption of coast fishing boats from capture.
4. The works of jurists and commentators on the subject of international law are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
5. Coast fishing vessels, with their implements, supplies, cargoes, and crews, when unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, and not employed for a warlike purpose or in such a way as to give aid or information to the enemy, are exempt from capture as prize of war by the general consent of the civilized nations of the world, and independently of any express treaty or other public act.
6. Prize courts administering the law of nations are bound to take judicial notice of

and give effect to a rule of international law exempting fishing vessels from capture as a prize, when there is no treaty or other public act of their own government in relation to the matter.

7. A vessel of 35 tons' burden, with a crew of six men, engaged in coast fishing, and on which the fish caught by the crew from the sea, amounting to about 10,000 pounds, are kept alive on board, two thirds of which belong to the crew and the other third go to the owner of the vessel as compensation for her use,—is to be regarded as engaged in coast fishery, and not in a commercial adventure, within the rule of international law exempting coast fishing vessels from capture as prize.

[Nos. 395, 396.]

Argued November 7, 8, 1899. Decided January 8, 1900.

APPEALS from decrees of the District Court of the United States for the Southern District of Florida condemning vessels as prize of war. *Reversed.*

The facts are stated in the opinion.

Mr. J. Parker Kirlin argued the cause, and Messrs. Convers & Kirlin filed a brief, for appellant.

Assistant Attorney General Hoyt argued the cause and filed a brief for the United States.

Messrs. Joseph K. McCammon and James H. Hayden filed a brief for the captors, and Messrs. George A. King and William B. King filed a brief for certain captors.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Gray delivered the opinion [678] of the court:

These are two appeals from decrees of the district court of the United States for the southern district of Florida condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron she had no knowledge of the existence of the war or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel,* and of 25 tons burden, and [679] had a crew of three Cubans, including the master, who had a fishing license from the Spanish government, and no other commission or license. She left Havana March 25,

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1898; sailed along the coast of Cuba to Cape San Antonio, at the western end of the island, and there fished for twenty-five days, lying between the reefs off the cape, within the territorial waters of Spain; and then started back for Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about 2 miles off Mariel, and 11 miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy sound, off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati, and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near that port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that, as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of \$490; and the Lola for the sum of \$800. There was no other evidence in the record of the value of either vessel or of her cargo.

[680] It has been suggested, in behalf of the United States, that "this court has no jurisdiction to hear and determine these appeals, because the matter in dispute in either case does not exceed the sum or value of \$2,000, and the district judge has not certified that the adjudication involves a question of general importance."

The suggestion is founded on § 695 of the Revised Statutes, which provides that "an appeal shall be allowed to the Supreme Court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance."

The judiciary acts of the United States, for a century after the organization of the government under the Constitution, did impose pecuniary limits upon appellate jurisdiction.

In actions at law and suits in equity the pecuniary limit of the appellate jurisdiction

of this court from the circuit courts of the United States was for a long time fixed at \$2,000. Acts of September 24, 1789, chap. 20, § 22; 1 Stat. at L. 84; March 3, 1803, chap. 40; 2 Stat. at L. 244; *Gordon v. Ogden*, 3 Pet. 33, 7 L. ed. 592; Rev. Stat. §§ 691, 692. In 1875 it was raised to \$5,000. Act of February 16, 1875, chap. 77, § 3; 18 Stat. at L. 316. And in 1889 this was modified by providing that, where the judgment or decree did not exceed the sum of \$5,000, this court should have appellate jurisdiction upon the question of the jurisdiction of the circuit court, and upon that question only. Act of February 25, 1889, chap. 236, § 1; 25 Stat. at L. 693; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912.

As to cases of admiralty and maritime jurisdiction, including prize causes, the judiciary act of 1789, in § 9, vested the original jurisdiction in the district courts, without regard to the sum or value in controversy; and in § 21 permitted an appeal from them to the circuit courts where the matter in dispute exceeded the sum or value of \$300. 1 Stat. at L. 77, 83, chap. 20; *The Betsey*, 3 Dall. 6, 16, *sub nom.* *Glass v. The Betsey*, 1 L. ed. 485, 489; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *Stratton v. Jarvis*, 8 Pet. 4, 11, 8 L. ed. 846, 849. By the act of March 3, 1803, chap. 40, appeals to the circuit court were permitted from all final decrees of a district court where the matter in dispute exceeded the sum or value of \$50; and from the circuit courts to this court in all cases "of admiralty and maritime jurisdiction, and of prize or no prize" in which the matter in dispute exceeded the sum or value of \$2,000. 2 Stat. at L. 244; *Jenks v. Lewis*, 3 Mason, 503, Fed. Cas. No. 7,279; *Stratton v. Jarvis*, above cited; *The Admiral*, 3 Wall. 603, 612, *sub nom.* *The Admiral v. United States*, 18 L. ed. 58, 59. The acts of March 3, 1863, chap. 86, § 7, and June 30, 1864, chap. 174, § 13, provided that appeals from the district courts in prize causes should lie directly to this court, where the amount in controversy exceeded \$2,000, or "on the certificate of the district judge that the adjudication involves a question of difficulty and general importance." 12 Stat. at L. 760; 13 Stat. at L. 310. The provision of the act of 1803, omitting the words "and of prize or no prize," was re-enacted in § 692 of the Revised Statutes; and the provision of the act of 1864, concerning prize causes, was substantially re-enacted in § 695 of the Revised Statutes, already quoted.

But all this has been changed by the act of March 3, 1891, chap. 517, establishing the circuit courts of appeals, and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different cases, rather than upon the pecuniary amount involved. 26 Stat. at L. 826.

By that act, as this court has declared, the entire appellate jurisdiction from the circuit and district courts of the United States was distributed, "according to the scheme of the act," between this court and the circuit courts of appeals thereby established, "by designating the classes of cases"

of which each of these courts was to have final jurisdiction. *McLish v. Roff*, 141 U. S. 661, 666, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 118; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 382, 37 L. ed. 486, 490, 13 Sup. Ct. Rep. 758; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 179, 37 L. ed. 1041, 1043, 14 Sup. Ct. Rep. 63.

The intention of Congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the district and circuit courts, clearly appears upon examination of the leading provisions of the act.

[682] Section 4 provides that no appeal, whether by writ of error or otherwise, shall hereafter be taken from a district court *to a circuit court; but that all appeals, by writ of error or otherwise, from the district courts, "shall only be subject to review" in this court or in the circuit court of appeals "as is herein-after provided," and "the review by appeal, by writ of error, or otherwise" from the circuit courts, "shall be had only" in this court or in the circuit court of appeals, "according to the provisions of this act regulating the same."

Section 5 provides that "appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the Supreme Court, in the following cases:"

First. "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." This clause includes "any case," without regard to amount, in which the jurisdiction of the court below is in issue; and differs in this respect from the act of 1889, above cited.

Second. "From the final sentences and decrees in prize causes." This clause includes the whole class of "the final sentences and decrees in prize causes," and omits all provisions of former acts regarding amount in controversy, or certificate of a district judge.

Third. "In cases of conviction of a capital or otherwise infamous crime." This clause looks to the nature of the crime, and not to the extent of the punishment actually imposed. A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only. *Ex parte Wilson*, 114 U. S. 417, 426, 29 L. ed. 89, 92, 5 Sup. Ct. Rep. 935. Consequently, such a sentence for such a crime was subject to the appellate jurisdiction of this court, under this clause, until this jurisdiction, so far as regards crimes, not capital, was transferred to the circuit court of appeals by the act of January 20, 1897, chap. 68. 29 Stat. at L. 492.

Fourth. "In any case that involves the construction or application of the Constitution of the United States."

Fifth. "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty

made under its authority, is drawn in question."

*Sixth. "In any case in which the Consti- [683] tution or law of a state is claimed to be in contravention of the Constitution of the United States."

Each of these last three clauses, again, includes "any case" of the class mentioned. They all relate to what are commonly called Federal questions, and cannot reasonably be construed to have intended that the appellate jurisdiction of this court over such questions should be restricted by any pecuniary limit,—especially in their connection with the succeeding sentence of the same section: "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases." Writs of error from this court to review the judgments of the highest court of a state upon such questions have never been subject to any pecuniary limit. Act of September 24, 1789, chap. 20, § 25; 1 Stat. at L. 85; *Buel v. Van Ness*, 8 Wheat. 312, 5 L. ed. 624; Act of February 5, 1867, chap. 28, § 2; 14 Stat. at L. 386; Rev. Stat. § 709.

By § 6 of the act of 1891 this court is relieved of much of the appellate jurisdiction that it had before; the appellate jurisdiction from the district and circuit courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," is vested in the circuit court of appeals; and its decisions in admiralty cases, as well as in cases arising under the criminal laws, and in certain other classes of cases, are made final, except that that court may certify to this court questions of law, and that this court may order up the whole case by writ of certiorari. It is settled that the words "unless otherwise provided by law," in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. *Lau Ow Bew v. United States*, 144 U. S. 47, 57, 36 L. ed. 340, 343, 12 Sup. Ct. Rep. 517; *Hubbard v. Soby*, 146 U. S. 56, 36 L. ed. 886, 13 Sup. Ct. Rep. 13; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 383, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758.

The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the circuit court of appeals, from a district or circuit court of the United States. The only pecuniary limit imposed is one of \$1,000 *upon the ap- [684] peal to this court of a case which has been once decided on appeal in the circuit court of appeals, and in which the judgment of that court is not made final by § 6 of the act.

Section 14 of the act of 1891, after specifically repealing § 691 of the Revised Statutes and § 3 of the act of February 16, 1875, further provides that "all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding §§ 5 and 6 of this act, are hereby repealed." 26 Stat. at L. 829, 830. The object of the

specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. *McLish v. Roff*, 141 U. S. 661, 667, 35 L. ed. 893, 895, 12 Sup. Ct. Rep. 118. And, although neither § 692 nor § 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: "The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred, and must prevail." *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. ed. 1079, 1083, 12 Sup. Ct. Rep. 207.

The decision in this court in the recent case of *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983, affords an important, if not controlling, precedent. From the beginning of this century until the passage of the act of 1891, both in civil and in criminal cases, questions of law upon which two judges of the circuit court were divided in opinion might be certified by them to this court for decision. Acts of April 29, 1802, chap. 31, § 6; 2 Stat. at L. 159; June 1, 1872, chap. 255, § 1; 17 Stat. at L. 196; Rev. Stat. §§ 650-652, 693, 697; *New England M. Ins. Co. v. Dunham*, 11 Wall. 1, 21, 20 L. ed. 90, 96; *United States v. Sanges*, 144 U. S. 310, 320, 36 L. ed. 445, 449, 12 Sup. Ct. Rep. 609. But in *United States v. Rider* it was adjudged by this court that the act of 1891 had superseded and repealed the earlier acts authorizing questions of law to be certified from the circuit court to this court; and the grounds of that adjudication sufficiently appear by *the statement of the effect of the act of 1891 in two passages of the opinion: "Appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals, and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final as specified in § 6." "It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate." 163 U. S. 138-140, 41 L. ed. 104, 16 Sup. Ct. Rep. 986.

That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the circuit court of appeals, in all criminal cases, and in all civil cases "without regard to the amount in controversy;" second, that the act, by its terms, its scope, and its obvious purpose, "furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate."

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As was long ago said by Chief Justice Marshall, "the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." *Durousseau v. United States*, 6 Cranch, 307, 314, 3 L. ed. 232, 234. And it is a well-settled rule in the construction of statutes, often affirmed and applied by this court, that, "even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *United States v. Tynen*, 11 Wall. 88, 92, 20 L. ed. 153, 154; *King v. Cornell*, 106 U. S. 395, 396, 27 L. ed. 60, 1 Sup. Ct. Rep. 312; *Tracy v. Tuflly*, 134 U. S. 206, 223, 33 L. ed. 879, 884, 10 Sup. Ct. Rep. 527; *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. ed. 1079, 1083, 12 Sup. Ct. Rep. 207; *District of Columbia v. Hutton*, 143 U. S. 18, 27, 36 L. ed. 60, 62, 12 Sup. Ct. Rep. 369; *United States v. Healey*, 160 U. S. 136, 147, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247.

We are of opinion that the act of 1891, upon its face, read *in the light of settled [686] rules of statutory construction and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the district and circuit courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction, and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notable in 2 Ortolan, *Règles Internationales et Diplomatie de la Mer* (4th ed.) lib. 3, chap. 2, pp. 51-56; in 4 Calvo, *Droit International* (5th ed.) §§ 2367-2373; in De Boeck, *Propriété Privée Ennemie sous Pavillon Ennemi*, §§ 191-196; and in Hall,

International Law (4th ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

[687] The earliest acts of any government on the subject, mentioned *in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406 Henry IV. issued orders to his admirals and other officers, entitled "Concerning Safety for Fishermen—*De Securitate pro Piscatoribus*." By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise,—it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct and under his special protection, guardianship, and defense, all and singular the fishermen of France, Flanders, and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions, and territories, in regard to their fishery, while sailing, coming, and going, and, at their pleasure, freely and lawfully fishing, delaying, or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves well and properly, and should not, by color of these presents, do or attempt, or presume to do or attempt, anything that could prejudice the King, or his Kingdom of England, or his subjects. 8 Rymer's Foedera, 336, 451.

[688] The treaty made October 2, 1521, between the Emperor Charles V. and Francis I. of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either side, to the grave detriment and intolerable injury of the innocent *subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided,—*Quo fit, ut piscaturæ commoditas, ad pauperum levandam famem a cælesti numine concessa, cessare hoc anno omnino debeat, nisi aliter*

provideatur. And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack, depredation, molestation, trouble, or hindrance soever, safely and freely, everywhere in the sea, take herrings and every other kind of fish, the existing war by land and sea notwithstanding; and, further, that during the time aforesaid no subject of either sovereign should commit, or attempt or presume to commit, any depredation, force, violence, molestation, or vexation to or upon such fishermen or their vessels, supplies, equipments, nets, and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII. and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the treaty it is agreed that the said King and his said representative, "by whose means the treaty stands concluded, shall be conservators of the agreements therein, as if thereto by both parties elected and chosen." 4 Dumont, Corps Diplomatique, pt. 1, pp. 352, 353.

The herring fishery was permitted, in time of war, by French and Dutch edicts in 1536. Bynkershoek, *Quæstiones Juris Publicæ*, lib. 1, chap. 3; 1 Emerigon des Assurances, chap. 4, § 9; chap. 12, § 19, § 8.

France, from remote times, set the example of alleviating the evils of war in favor of all coast fishermen. In the compilation entitled "*Us et Coutumes de la Mer*," published by Cleirac in 1661, and in the third part thereof, containing "Maritime or Admiralty Jurisdiction,—*la Jurisdiction de la Marine ou d'Admirauté*—as well in time of [689] peace, as in time of war," article 80 is as follows: "The admiral may in time of war accord fishing truces—*trêves pescheresses*—to the enemy and to his subjects; provided that the enemy will likewise accord them to Frenchmen." Cleirac, 544. Under this article, reference is made to articles 49 and 79 respectively of the French ordinances concerning the admiralty in 1543 and 1584, of which it is but a reproduction. 4 Pardessus, *Collection de Lois Maritimes*, 319; 2 Ortolan, 51. And Cleirac adds, in a note, this quotation from Froissart's *Chronicles*: "Fishermen on the sea, whatever war there were in France and England, never did harm to one another; so they are friends, and help one another at need,—*Pescheurs sur mer, quelque guerre qui soit en France et Angleterre, jamais ne se firent mal l'un à l'autre; aincois sont amis, et s'aydent l'un à l'autre au besoin*."

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV. and the States General of Holland by mutual agreement granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing

along the coasts of France, Holland, and England. D'Hauterive et De Cussy, *Traites de Commerce*, pt. 1, vol. 2, p. 278. But by the ordinances of 1681 and 1692 the practice was discontinued, because, Valin says, of the faithless conduct of the enemies of France, who, abusing the good faith with which she had always observed the treaties, habitually carried off her fishermen, while their own fished in safety. 2 Valin sur l'Ordonnance de la Marine (1776) 689, 690; 2 Ortolan, 52; De Boeck, § 192.

The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.

[690] On June 5, 1779, Louis XVI., our ally in that war, addressed a letter to his admiral, informing him that the wish he had always had of alleviating, as far as he could, the hardships of war, had directed his attention to that class of his subjects *which devoted itself to the trade of fishing, and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen, nor to arrest their vessels laden with fresh fish, even if not caught by those vessels; provided they had no offensive arms, and were not proved to have made any signals creating a suspicion of intelligence with the enemy; and the admiral was directed to communicate the King's intentions to all officers under his control. By a royal order in council of November 6, 1780, the former orders were confirmed; and the capture and ransom, by a French cruiser, of the *John and Sarah*, an English vessel, coming from Holland, laden with fresh fish, were pronounced to be illegal. 2 Code des Prises (ed. 1784) 721, 901, 903.

Among the standing orders made by Sir James Marriott, Judge of the English High Court of Admiralty, was one of April 11, 1780, by which it was "ordered that all causes of prize of fishing boats or vessels taken from the enemy may be consolidated in one monition, and one sentence or interlocutory, if under 50 tons burthen, and not more than 6 in number." Marriott's Formulary, 4. But by the statements of his successor, and of both French and English writers, it appears that England, as well as France, during the American Revolutionary War, abstained from interfering with the coast fisheries. *The Young Jacob and Johanna*, 1 C. Rob. 20; 2 Ortolan, 53; Hall, § 148.

In the treaty of 1785 between the United States and Prussia, article 23 (which was proposed by the American Commissioners, John Adams, Benjamin Franklin, and Thomas Jefferson, and is said to have been drawn up by Franklin), provided that, if

war should arise between the contracting parties, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen,*un-[691] armed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price." 8 Stat. at L. 96; 1 Kent, Com. 91, note; Wheaton, *History of the Law of Nations*, 306, 308. Here was the clearest exemption from hostile molestation or seizure of the persons, occupations, houses, and goods of unarmed fishermen inhabiting unfortified places. The article was repeated in the later treaties between the United States and Prussia of 1799 and 1828. 8 Stat. at L. 174, 384. And Dana, in a note to his edition of Wheaton's *International Laws*, says: "In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war." Wheaton, *International Law* (8th ed.) § 345, note 168.

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the first years of those wars, England having authorized the capture of French fishermen, a decree of the French National Convention of October 2, 1793, directed the executive power "to protest against this conduct, theretofore without example; to reclaim the fishing boats seized; and, in case of refusal, to resort to reprisals." But in July, 1796, the Committee of Public Safety ordered the release of English fishermen seized under the former decree, "not considering them as prisoners of war." *La Nostra Signora de la Piedad* (1801) cited below; 2 De Cussy, *Droit Maritime*, 164, 165; 1 Massé, *Droit Commercial* (2d ed.) 266, 267.

*On January 24, 1798, the English govern-[692] ment by express order instructed the commanders of its ships to seize French and Dutch fishermen with their boats. 6 Martens, *Recueil des Traités* (2d ed.) 505; 6 Schoell, *Histoire des Traités*, 119; 2 Ortolan, 53. After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case the capture was in April, 1798, and the decree was made November 13, 1798. *The Young Jacob and Johanna*, 1 C. Rob. 20. In another case the decree

was made August 23, 1799. *The Noydt Gedacht*, 2 C. Rob. 137, note.

For the year 1800 the orders of the English and French governments and the correspondence between them may be found in books already referred to. 6 Martens, 503-512; 6 Schoell, 118-120; 2 Ortolan, 53, 54. The doings for that year may be summed up as follows: On March 27, 1800, the French government, unwilling to resort to reprisals, re-enacted the orders given by Louis XVI. in 1780, above mentioned, prohibiting any seizure by the French ships of English fishermen, unless armed or proved to have made signals to the enemy. On May 30, 1800, the English government, having received notice of that action of the French government, revoked its order of January 24, 1798. But soon afterward the English government complained that French fishing boats had been made into fireboats at Flushing, as well as that the French government had impressed and had sent to Brest, to serve in its flotilla, French fishermen and their boats, even those whom the English had released on condition of their not serving; and on January 21, 1801, summarily revoked its last order, and again put in force its order of January 24, 1798. On February 16, 1801, Napoleon Bonaparte, then First Consul, directed the French commissioner at London to return at once to France, first declaring to the English government that its conduct, "contrary to all the usages of civilized nations, and to the common law which governs them, even in time of war, gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war," [693] and "tended *only to exasperate the two nations, and to put off the term of peace;" and that the French government, having always made it "a maxim to alleviate as much as possible the evils of war, could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals."

On March 16, 1801, the Addington Ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that "the freedom of fishing was nowise founded upon an agreement, but upon a simple concession;" that "this concession would be always subordinate to the convenience of the moment," and that "it was never extended to the great fishery, or to commerce in oysters or in fish." And the freedom of the coast fisheries was again allowed on both sides. 6 Martens, 514; 6 Schoell, 121; 2 Ortolan, 54; Manning, Law of Nations (Amos's ed.) 206.

Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C. Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as "a small Dutch fishing vessel taken April, 1798, on her return from the Dogger bank to Holland;" and Lord Stowell, in delivering judgment, said: "In former wars it has not been usual to make captures

of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade." And he added: "It is a further satisfaction to me, in giving this judgment, to observe that the facts also bear strong marks of a false and fraudulent transaction."

*Both the capture and the condemnation [694] were within a year after the order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

But some expressions in his opinion have been given so much weight by English writers that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels; adding, however, "but this was a rule of comity only, and not of legal decision." Assuming the phrase "legal decision" to have been there used, in the sense in which courts are accustomed to use it, as equivalent to "judicial decision," it is true that, so far as appears, there had been no such decision on the point in England. The word "comity" was apparently used by Lord Stowell as synonymous with courtesy or goodwill. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: "In the present century a slow and silent, but very substantial, mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time it is raised from the rank of mere usage, and becomes part of the law of nations." Discourse on the Law of Nations, 38; 1 Miscellaneous Works, 360.

The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. In 1780, as already mentioned, an order in council of Louis XVI. had declared illegal the capture by a French cruiser of *The John and Sarah*, an English vessel coming from Holland, laden with fresh fish. And on May 17, 1801, where a Portuguese fishing vessel, with her cargo of fish, having no more crew than was needed for her management and for serving the nets, on a trip of several days, had been captured *in April, 1801, by a [695]

French cruiser, 3 leagues off the coast of Portugal, the Council of Prizes held that the capture was contrary to "the principles of humanity and the maxims of international law," and decreed that the vessel, with the fish on board, or the net proceeds of any that had been sold, should be restored to her master. *La Nostra Signora de la Piedad*, 25 Merlin, Jurisprudence, Prise Maritime, § 3, arts. 1, 3; *S. C. 1 Pistoye et Duverdy*, Prises Maritimes, 331; 2 De Cussy, Droit Maritime, 166.

The English government, soon afterwards, more than once unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish. On May 23, 1806, it was "ordered in council that all fishing vessels under Prussian and other colors, and engaged for the purpose of catching fish and conveying them fresh to market, with their crews, cargoes, and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, are to give the necessary directions herein as to them may respectively appertain." 5 C. Rob. 408. Again, in the order in council of May 2, 1810, which directed that "all vessels which shall have cleared out from any port so far under the control of France or her allies as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are returning, or destined to return either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured and condemned, together with their stores and cargoes, as prize to the captors," there were excepted "vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish." Edw. Adm. appx. L.

[696] Wheaton, in his Digest of the Law of Maritime Captures and Prizes, published in 1815, wrote: "It has been usual *in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it." Wheaton, Captures, chap. 2, § 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

During the wars of the French Empire, as 175 U. S.

both French and English writers agree, the coast fisheries were left in peace. 2 Ortolan, 54; De Boeck, § 193; Hall, § 148. De Boeck quaintly and truly adds, "and the incidents of 1800 and of 1801 had no morrow,—*n'eurent pas de lendemain*."

In the war with Mexico, in 1846, the United States recognized the exemption of coast fishing boats from capture. In proof of this, counsel have referred to records of the Navy Department, which this court is clearly authorized to consult upon such a question. *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Underhill v. Hernandez*, 168 U. S. 250, 253, 42 L. ed. 456, 457, 18 Sup. Ct. Rep. 83.

By those records it appears that Commodore Conner, commanding the Home Squadron blockading the east coast of Mexico, on May 14, 1846, wrote a letter from the ship Cumberland, off Brazos Santiago, near the southern point of Texas, to Mr. Bancroft, the Secretary of the Navy, inclosing a copy of the commodore's "instructions to the commanders of the vessels of the Home Squadron, showing the principles to be observed in the blockade of the Mexican ports," one of which was that "Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested;" and that on June 10, 1846, those instructions were approved by the Navy Department, of which Mr. Bancroft was still the head, and continued to be until he was appointed Minister to *England in September following.[697] Although Commodore Conner's instructions and the Department's approval thereof do not appear in any contemporary publication of the government, they evidently became generally known at the time, or soon after; for it is stated in several treatises on international law (beginning with Ortolan's second edition, published in 1853) that the United States in the Mexican war permitted the coast fishermen of the enemy to continue the free exercise of their industry. 2 Ortolan (2d ed.) 49, note; (4th ed.) 55; 4 Calvo (5th ed.) § 2372; De Boeck, § 194; Hall (4th ed.) § 148.

As qualifying the effect of those statements, the counsel for the United States relied on a proclamation of Commodore Stockton, commanding the Pacific Squadron, dated August 20, 1846, directing officers under his command to proceed immediately to blockade the ports of Mazatlan and San Blas, on the west coast of Mexico, and saying to them, "All neutral vessels that you may find there you will allow twenty days to depart; and you will make the blockade absolute against all vessels, except armed vessels of neutral nations. You will capture all vessels under the Mexican flag that you may be able to take." Navy Reports of 1846, pp. 673, 674. But there is nothing to show that Commodore Stockton intended, or that the government approved, the capture of coast fishing vessels.

On the contrary, General Halleck, in the preface to his work on International Law, or Rules Regulating the Intercourse of States in Peace and War, published in 1861,

says that he began that work, during the war between the United States and Mexico, "while serving on the staff of the commander of the Pacific Squadron" and "often required to give opinions on questions of international law growing out of the operations of the war." Had the practice of the blockading squadron on the west coast of Mexico during that war, in regard to fishing vessels, differed from that approved by the Navy Department on the east coast, General Halleck could hardly have failed to mention it, when stating the prevailing doctrine upon the subject as follows:

[698] "Fishing boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V. and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing boats were equipped as gunboats, and that some French fishermen who had been prisoners in England had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts; and after some angry discussions had taken place on the subject the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers." Halleck (1st ed.) chap. 20, § 23.

That edition was the only one sent out under the author's own auspices, except an abridgment, entitled "Elements of International Law and the Law of War," which he published in 1866, as he said in the preface, to supply a suitable text-book for instruction upon the subject, "not only in our colleges, but also in our two great national schools,—the Military and Naval Academies." In that abridgment the statement as to fishing boats was condensed as follows: "Fishing boats have also, as a general rule, been exempted from the effects of hostilities. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers." Halleck's Elements, chap. 20, § 21.

[699] In the treaty of peace between the United States and Mexico, *in 1848, were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses, or goods of fishermen. 9 Stat. at L. 939, 940.

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Law of the United States, published by authority of Congress in 1886 and 1887, embodies General Halleck's fuller statement, above quoted, and contains nothing else upon the subject. 3 Whart. Int. Law Dig. § 345, p. 315; 2 Halleck (Eng. eds. 1873 and 1878) p. 151.

France in the Crimean war in 1854, and in her wars with Austria in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Calvo, § 2372; Hall, § 143; 2 Ortolan (4th ed.) 449; 10 Revue de Droit International (1878) 399.

Calvo says that in the Crimean war, "notwithstanding her alliance with France and Italy, England did not follow the same line of conduct, and her cruisers in the Sea of Azof destroyed the fisheries, nets, fishing implements, provisions, boats, and even the cabins of the inhabitants of the coast." Calvo, § 2372. And a Russian writer on prize law remarks that those depredations, "having brought ruin on poor fishermen and inoffensive traders, could not but leave a painful impression on the minds of the population, without impairing in the least the resources of the Russian government." Katchenovsky (Pratt's ed.) 148. But the contemporaneous reports of the English naval officers put a different face on the matter, by stating that the destruction in question was part of a military measure, conducted with the co-operation of the French ships, and pursuant to instructions of the English admiral "to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighboring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea;" and that the property destroyed consisted of large fishing establishments and storehouses of the Russian government, numbers of heavy lannehes, and enormous quantities of nets and gear, salted fish, corn, *and other provisions intended for the supply [700] of the Russian army. United Service Journal of 1855, pt. 3, pp. 108-112.

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful industry has been denied by England or by any other nation. And the Empire of Japan (the last state admitted into the rank of civilized nations), by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention," including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy, or religious mission." Takahashi, International Law, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction

as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215, 40 L. ed. 95, 108, 125, 126, 16 Sup. Ct. Rep. 139.

[701] Wheaton places among the principal sources of international law "text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally *impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton, *International Law* (8th ed.), § 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law." 1 Kent, Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations.

"Enemy ships," say Pistoye and Duverdy, in their *Treatise on Maritime Prizes*, published in 1855, "are good prize. Not all, however; for it results from the unanimous accord of the maritime powers that an exception should be made in favor of coast fishermen. Such fishermen are respected by the enemy so long as they devote themselves exclusively to fishing." 1 Pistoye et Duverdy, tit. 6, chap. 1, p. 314.

De Cussy, in his work on the *Phases and Leading Cases of the Maritime Law of Nations*,—*Phases et Causes Célèbres du Droit Maritime des Nations*,—published in 1856, 175 U. S.

affirms in the clearest language the exemption from capture of fishing boats, saying, in lib. 1, tit. 3, § 36, that "in time of war the freedom of fishing is respected by belligerents; fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation;" and that in lib. 2, chap. 20, he will state "several facts and several decisions *which [702] prove that the perfect freedom and neutrality of fishing boats are not illusory." 1 De Cussy, p. 291. And in the chapter so referred to, entitled *De la Liberté et de la Neutralité Parfaite de la Pêche*, besides references to the edicts and decisions in France during the French Revolution, is this general statement: "If one consulted only positive international law,"—*le droit des gens positif*,—(by which is evidently meant international law expressed in treaties, decrees, or other public acts, as distinguished from what may be implied from custom or usage) "fishing boats would be subject, like all other trading vessels, to the law of prize. a sort of tacit agreement among all European nations frees them from it, and several official declarations have confirmed this privilege in favor of 'a class of men whose hard and ill-rewarded labor, commonly performed by feeble and aged hands, is so foreign to the operations of war.'" 2 De Cussy, 164, 165.

Ortolan, in the fourth edition of his *Règles Internationales et Diplomatie de la Mer*, published in 1864, after stating the general rule that the vessels and cargoes of subjects of the enemy are lawful prize, says: "Nevertheless, custom admits an exception in favor of boats engaged in the coast fishery; these boats, as well as their crews, are free from capture and exempt from all hostilities. The coast-fishing industry is, in truth, wholly pacific, and of much less importance in regard to the national wealth that it may produce than maritime commerce or the great fisheries. Peaceful and wholly inoffensive, those who carry it on, among whom women are often seen, may be called the harvesters of the territorial seas, since they confine themselves to gathering in the products thereof; they are for the most part poor families who seek in this calling hardly more than the means of gaining their livelihood." 2 Ortolan, 51. Again, after observing that there are very few solemn public treaties which make mention of the immunity of fishing boats in time of war, he says: "From another point of view the custom which sanctions this immunity is not so general that it can be considered as making an absolute international rule; but it has been so often put in practice, and, besides, it accords so well with the rule in use in wars on *land, in regard to peasants and [703] husbandmen, to whom coast fishermen may be likened, that it will doubtless continue to be followed in maritime wars to come." 2 Ortolan, 55.

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In

the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: "Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels." In the next section he adds: "This exception is perfectly justiciable,—*Cette exception est parfaitement justiciable*,"—that is to say, belonging to judicial jurisdiction or cognizance. Littré, *Dist. voc. Justiciable*; *Hans v. Louisiana*, 134 U. S. 1, 15, 33 L. ed. 842, 847, 10 Sup. Ct. Rep. 504. Calvo then quotes Ortolan's description, above cited, of the nature of the coast-fishing industry; and proceeds to refer, in detail, to some of the French precedents, to the acts of the French and English governments in the times of Louis XVI. and of the French Revolution, to the position of the United States in the war with Mexico, and of France in later wars, and to the action of British cruisers in the Crimean war. And he concludes his discussion of the subject, in § 2373, by affirming the exemption of the coast fishery, and pointing out the distinction in this regard between the coast fishery and *what he calls the great fishery, for cod, whales, or seals, as follows: "The privilege of exemption from capture, which is generally acquired by fishing vessels plying their industry near the coasts, is not extended in any country to ships employed on the high sea in what is called the great fishery, such as that for the cod, for the whale or the sperm whale, or for the seal or sea calf. These ships are, in effect, considered as devoted to operations which are at once commercial and industrial,—*Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles*." The distinction is generally recognized. 2 Ortolan, 54; De Boeck, § 196; Hall, § 148. See also *The Susa*, 2 C. Rob. 251; *The Johan*, Edw. Adm. 275, and appx. L.

The modern German books on international law, cited by the counsel for the appellants, treat the custom by which the vessels and implements of coast fishermen are exempt from seizure and capture as well established by the practice of nations. Heffter, § 137; 2 Kalternborn, § 237, p. 480; Bluntschli, § 667; Perels, § 37, p. 217.

De Boeck, in his work on Enemy Private

Property under Enemy Flag,—*De la Propriété Privée Ennemie sous Pavillon Ennemi*,—published in 1882, and the only continental treatise cited by the counsel for the United States, says in § 191: "A usage very ancient, if not universal, withdraws from the right of capture enemy vessels engaged in the coast fishery. The reason of this exception is evident; it would have been too hard to snatch from poor fishermen the means of earning their bread. . . . The exemption includes the boats, the fishing implements, and the cargo of fish." Again, in § 195: "It is to be observed that very few treatises sanction in due form this immunity of the coast fishery. . . . There is, then, only a custom. But what is its character? Is it so fixed and general that it can be raised to the rank of a positive and formal rule of international law?" After discussing the statements of other writers, he approves the opinion of Ortolan (as expressed in the last sentence above quoted from his work), and says that, at bottom, it differs by a shade only from that formulated by Calvo and by some of the German jurists, and that "it is more exact, *without ignoring the imperative character of the humane rule in question,—*elle est plus exacte, sans méconnaître le caractère impératif de la règle d'humanité dont il s'agit*." And in § 196 he defines the limits of the rule as follows: "But the immunity of the coast fishery must be limited by the reasons which justify it. The reasons of humanity and of harmlessness—*les raisons d'humanité et d'innocuité*—which militate in its favor do not exist in the great fishery, such as the cod fishery; ships engaged in that fishery devote themselves to truly commercial operations, which employ a large number of seamen. And these same reasons cease to be applicable to fishing vessels employed for a warlike purpose, to those which conceal arms, or which exchange signals of intelligence with ships of war; but only those taken in the fact can be rigorously treated; to allow seizure by way of prevention would open the door to every abuse, and would be equivalent to a suppression of the immunity."

Two recent English text-writers cited at the bar (influenced by what Lord Stowell said a century since) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels so long as they were peaceably pursuing their calling and there was no danger that they or their crews might be of military use to the enemy. Hall, in § 148 of the fourth edition of his *Treatise on International Law*, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican war, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the

[706] maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So, T. J. Lawrence, in § 206 of his *Principles of International Law*, says: "The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own state; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800."

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice.

Jan Helenus Ferguson, Netherlands Minister to China, and previously in the naval and in the colonial service of his country, in his *Manual of International Law for the Use of Navies, Colonies, and Consulates*, published in 1882, writes: "An exception to the usage of capturing enemy's private vessels at sea is the coast fishery. . . . This principle of immunity from capture of fishing boats is generally adopted by all maritime powers, and in actual warfare they are universally spared so long as they remain harmless." 2 Ferguson, § 212.

Ferdinand Attlmayr, captain in the Austrian Navy, in his *Manual for Naval Officers*, published at Vienna in 1872 under the auspices of Admiral Tegetthoff, says: "Regarding the capture of enemy property, an exception must be mentioned, which is a universal custom. Fishing vessels which belong to the adjacent coast, and whose business yields only a necessary livelihood, are, from considerations of humanity, universally excluded from capture." 1 Attlmayr, 61.

[707] Ignacio de Negrin, First Official of the Spanish Board of Admiralty, in his *Elementary Treatise on Maritime International Law*, adopted by royal order as a text-book in the naval schools of Spain, and published at Madrid in 1873, concludes his chapter "Of the lawfulness of prizes" with these words: "It remains to be added that the custom of all civilized peoples excludes from capture and from all kind of hostility the fishing vessels of the enemy's coasts, considering this industry as absolutely inoffensive, and deserving, from its hardships and usefulness, of this favorable exception. It has been thus expressed in very many international conventions, so that it can be deemed an incontestable principle of law, at least among enlightened nations." Negrin, tit. 3, chap. 1, § 310.

Carlos Testa, captain in the Portuguese Navy and professor in the naval school at Lisbon, in his work on *Public International Law*, published in French at Paris in 1886, when discussing the general right of capturing enemy ships, says: "Nevertheless, in this, customary law establishes an exception of immunity in favor of coast fishing vessels. Fishing is so peaceful an industry, and is generally carried on by so poor and so hard-working a class of men, that it is likened, in the territorial waters of the enemy's country, to the class of husbandmen who gather the fruits of the earth for their livelihood. The examples and practice generally followed establish this humane and beneficent exception as an international rule, and this rule may be considered as adopted by customary law and by all civilized nations." Testa, pt. 3, chap. 2, in 18 *Bibliothèque Internationale et Diplomatique*, pp. 152, 153.

No less clearly and decisively speaks the distinguished Italian jurist, Pasquale Fiore, in the enlarged edition of his exhaustive work on *Public International Law*, published at Paris in 1885-6, saying: "The vessels of fishermen have been generally declared exempt from confiscation, because of the eminently peaceful object of their humble industry, and of the principles of equity and humanity. The exemption includes the vessel, the implements of fishing, and the cargo resulting from the fishery. This usage, eminently humane, goes back to very ancient times; and although the immunity of the fishery along the coasts may not have been sanctioned by treaties, yet it is considered to-day as so definitely established that the inviolability of vessels devoted to that fishery is proclaimed by the publicists as a positive rule of international law, and is generally respected by the nations. Consequently we shall lay down the following rule: (a) Vessels belonging to citizens of the enemy state, and devoted to fishing along the coasts, cannot be subject to capture; (b) Such vessels, however, will lose all right of exemption, when employed for a warlike purpose; (c) there may, nevertheless, be subjected to capture vessels devoted to the great fishery in the ocean, such as those employed in the whale fishery, or in that for seals or sea calves." 3 Fiore, § 1421.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. [708]

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a

necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

[709] *By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent, Com. 91, note; Halleck, chap. 20, § 22; Calvo, § 2376; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel on her voyage from Italy to the United States was captured by an English ship, and brought into Halifax, in Nova Scotia, and, with her cargo, condemned as lawful prize by the court of vice admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia was granted by Dr. Croke, the judge of that court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered, not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." *The Marquis de Somerueles*, Stewart Adm. (Nova Scotia) 445, 482.

In 1861, during the war of the Rebellion, a similar decision was made in the district court of the United States for the eastern district of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal and restored to the agent of the university, said: "Though this claimant, as the resident of a

hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in *Nova Scotia*, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia*, 4 Phila. 417.

In *Brown v. United States*, 8 Cranch, 110, 3 L. ed. 504, there are expressions of Chief Justice Marshall which, taken by themselves, might seem inconsistent with the position above maintained, of the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations, as to the kind of property subject to capture. But the actual decision in that case, and the leading reasons on which it was based, appear to us rather to confirm our position. The principal question there was whether personal property of a British subject, found on land in the United States at the beginning of the last war with Great Britain, could lawfully be condemned as enemy's property, on a libel filed by the attorney of the United States, without a positive act of Congress. The conclusion of the court was "that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war." 8 Cranch, 129, 3 L. ed. 510, 511. In showing that the declaration of war did not, of itself, vest the Executive with authority to order such property to be confiscated, the Chief Justice relied on the modern usages of nations, saying: "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation," and again: "The modern rule, then, would seem to be that tangible property *belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property." 8 Cranch, 123, 125, 3 L. ed. 509. The decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, even by direction of the Executive, without express authority from Congress, appears to us to repel any inference that coast fishing vessels,

which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court, for want of a distinct exemption in a treaty or other public act of the government.

To this subject in more than one aspect are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: "Undoubtedly no single nation can change the law of the sea. The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation." "This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial [712] notice. Foreign municipal laws *must indeed be proved as facts, but it is not so with the law of nations." *The Scotia*, 14 Wall. 170, 187, 188, *sub nom. Sears v. The Scotia*, 20 L. ed. 822, 825, 826.

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to "immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west." Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22 the President issued a proclamation declaring that the United States had instituted and would maintain that blockade, "in pursuance of the laws of the United States, and the law of nations applicable to such cases." 30 Stat. at L. 1769. And by the act of Congress of April 25, 1898, chap. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. at L. 364.

On April 26, 1898, the President issued another proclamation which, after reciting the existence of the war as declared by Congress, contained this further recital: "It 175 U. S.

being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. at L. 1770. But the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

On April 28, 1898 (after the capture of the two fishing vessels now in question), Admiral Sampson telegraphed to the Secretary of the Navy as follows: "I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging*to the maritime inscription of Spain, [713] who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West." To that communication the Secretary of the Navy, on April 30, 1898, guardedly answered: "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained." Bureau of Navigation Report of 1898, appx. 178. The admiral's despatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy.

The Paquete Habana, as the record shows, was a fishing sloop of 25 tons burden, sailing under the Spanish flag, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba. Her crew consisted of but three men, including the master, and, according to a common usage in coast fisheries, had no interest in the vessel, but were entitled to two thirds of her catch, the other third belonging to her Spanish owner, who, as well as the crew, resided in Havana. On her last voyage, she sailed from Havana along the coast of Cuba, about 200 miles, and fished for twenty-five days off the cape at the west end of the island, within the territorial waters of Spain, and was going back to Havana, with her cargo of live fish, when she was captured by one of the blockading squadron, on April 25, 1898. She had no arms or ammunition on board; she had no knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; she made no attempt to run the blockade, and no resistance at the time of the capture; nor was there any evi-

[714] dence *whatever of likelihood that she or her crew would aid the enemy.

In the case of the *Lola*, the only differences in the facts were that she was a schooner of 35 tons burden, and had a crew of six men, including the master; that after leaving Havana, and proceeding some 200 miles along the coast of Cuba, she went on, about 100 miles farther, to the coast of Yucatan, and there fished for eight days; and that, on her return, when near Bahia Honda, on the coast of Cuba, she was captured, with her cargo of live fish, on April 27, 1898. These differences afford no ground for distinguishing the two cases.

Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan channel and fished on the coast of Yucatan, we cannot doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the district court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause; and it is therefore, in each case,—

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

[715] *Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan** and Mr. Justice **McKenna**, dissenting:

The district court held these vessels and their cargoes liable because not "satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure."

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation, or instruction granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the

ordinary exercise of discretion in the conduct of war.

It cannot be maintained "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." That position was disallowed in *Brown v. United States*, 8 Cranch, 110, 128, 3 L. ed. 510, and Chief Justice Marshall said: "This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary."

The question in that case related to the confiscation of the property of the enemy on land within our own territory, and it was held that property so situated could not be confiscated without an act of Congress. The Chief Justice continued: "Commercial nations in the situation of the United States have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, What shall be done with enemy property in our country?—is a *question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary."

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in terms, or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

The preamble to the proclamation stated, it is true, that it was desirable that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice," but the reference was to the intention of the government "not to resort to privateering, but to adhere to the rules of the Declaration of Paris;" and the proclamation spoke for itself. The language of the preamble did not carry the exemption in terms, and the real question is whether it must be allowed because not affirmatively withheld, or, in other words, because such captures were not in terms directed.

These records show that the Spanish sloop *Paquete Habana* "was captured as a prize of war by the U. S. S. *Castine*" on April 25, and "was delivered" by the *Castine's* commander

"to Rear Admiral Wm. T. Sampson (commanding the North Atlantic Squadron)," and thereupon "turned over" to a prize master with instructions to proceed to Key West.

And that the Spanish schooner *Lola* "was captured as a prize of war by the U. S. S. *Dolphin*," April 27, and "was delivered" by the *Dolphin's* commander "to Rear Admiral Wm. T. Sampson (commanding the North Atlantic Squadron)," and thereupon "turned over" to a prize master with instructions to proceed to Key West.

[717] *That the vessels were accordingly taken to Key West and there libeled, and that the decrees of condemnation were entered against them May 30.

It is impossible to concede that the Admiral ratified these captures in disregard of established international law and the proclamation, or that the President, if he had been of opinion that there was any infraction of law or proclamation, would not have intervened prior to condemnation.

The correspondence of April 28, 30, between the Admiral and the Secretary of the Navy, quoted from in the principal opinion, was entirely consistent with the validity of the captures.

The question put by the Admiral related to the detention as prisoners of war of the persons manning the fishing schooners "attempting to get into Havana." Noncombatants are not so detained except for special reasons. Sailors on board enemy's trading vessels are made prisoners because of their fitness for immediate use on ships of war. Therefore the Admiral pointed out the value of these fishing seamen to the enemy, and advised their detention. The Secretary replied that if the vessels referred to were "attempting to violate blockade" they were subject "with crew" to capture, and also that they might be detained if "considered likely to aid enemy." The point was whether these crews should be made prisoners of war. Of course they would be liable to be if involved in the guilt of blockade running, and the Secretary agreed that they might be on the other ground in the Admiral's discretion.

All this was in accordance with the rules and usages of international law, with which, whether in peace or war, the naval service has always been necessarily familiar.

I come then to examine the proposition "that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with [718] their implements and supplies, *cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in of fresh fish, are exempt from capture as prize of war."

This, it is said, is a rule "which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of treaty or other public act of their own government."

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At the same time it is admitted that the alleged exemption does not apply "to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way;" and, further, that the exemption has not "been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce."

It will be perceived that the exceptions reduce the supposed rule to very narrow limits, requiring a careful examination of the facts in order to ascertain its applicability; and the decision appears to me to go altogether too far in respect of dealing with captures directed or ratified by the officer in command.

But were these two vessels within the alleged exemption? They were of 25 and 35 tons burden respectively. They carried large tanks, in which the fish taken were kept alive. They were owned by citizens of Havana, and the owners and the masters and crew were to be compensated by shares of the catch. One of them had been 200 miles from Havana, off Cape San Antonio, for twenty-five days, and the other for eight days off the coast of Yucatan. They belonged, in short, to the class of fishing or coasting vessels of from 5 to 20 tons burden, and from 20 tons upwards, which, when licensed or enrolled as prescribed by the Revised Statutes, are declared to be vessels of the United States, and the shares of whose men, when the vessels are employed in fishing, are regulated by statute. They were engaged in what were substantially commercial ventures, and the mere fact that the fish were kept alive by contrivances *for that purpose—a practice [719] of considerable antiquity—did not render them any the less an article of trade than if they had been brought in cured.

I do not think that, under the circumstances, the considerations which have operated to mitigate the evils of war in respect of individual harvesters of the soil can properly be invoked on behalf of these hired vessels, as being the implements of like harvesters of the sea. Not only so as to the owners, but as to the masters and crews. The principle which exempts the husbandman and his instruments of labor exempts the industry in which he is engaged, and is not applicable in protection of the continuance of transactions of such character and extent as these.

In truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand.

It is, said Sir William Scott, "a rule of comity only, and not of legal decision."

The modern view is thus expressed by Mr. Hall: "England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to it."

self. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption."

In the Crimean war, 1854-55, none of the orders in council, in terms, either exempted or included fishing vessels, yet the allied squadrons swept the Sea of Azof of all craft capable of furnishing the means of transportation, and the English admiral in the Gulf of Finland directed the destruction of all Russian coasting vessels, not of sufficient value to be detained as prizes, except "boats or small craft which may be found empty at anchor, and not trafficking."

[720] It is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded. And I *am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.

In his Lectures on International Law at the Naval Law College the late Dr. Freeman Snow laid it down that the exemption could not be asserted as a rule of international law. These lectures were edited by Commodore Stockton and published under the direction of the Secretary of the Navy in 1895, and, by that department, in a second edition, in 1898, so that in addition to the well-known merits of their author they possess the weight to be attributed to the official imprimatur. Neither our treaties nor settled practice are opposed to that conclusion.

In view of the circumstances surrounding the breaking out of the Mexican war, Commodore Conner, commanding the Home Squadron, on May 14, 1846, directed his officers, in respect of blockade, not to molest "Mexican boats engaged exclusively in fishing on any part of the coast," presumably small boats in proximity to the shore; while on the Pacific coast Commodore Stockton in the succeeding August ordered the capture of "all vessels under the Mexican flag."

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The treaties with Prussia of 1785, 1799, and 1828, and of 1848 with Mexico, in exempting fishermen, "unarmed and inhabiting unfortified towns, villages, or places," did not exempt fishing vessels from seizure as prize; and these captures evidence the convictions entertained and acted on in the late war with Spain.

It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck, and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo, and others are to the contrary. Their lucubrations may be persuasive, but not authoritative.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.

*Exemptions may be designated in advance. [721] or granted according to circumstances, but carrying on war involves the infliction of the hardships of war, at least to the extent that the seizure or destruction of enemy's property on sea need not be specifically authorized in order to be accomplished.

Being of opinion that these vessels were not exempt as matter of law, I am constrained to dissent from the opinion and judgment of the court; and my brothers Harlan and McKenna concur in this dissent.

(January 29, 1900.)

The court, in each case, on motion of the Solicitor General in behalf of the United States, and after argument of counsel thereon, and to secure the carrying out of the opinion and decree of this court according to their true meaning and intent, ordered that the decree be so modified as to direct that the damages to be allowed shall be compensatory only, and not punitive.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[723]*MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, *Plaintiff in Error*, v. J. M. EVANS. [No. 78.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. James Hagerman and J. M. Bryson for plaintiff in error. Messrs. Rush Taggart and H. Chilton for defendant in error.

November 6, 1899. Dismissed with costs, on the authority of *Mason v. United States*, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; *Hardee v. Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; and *Sipperley v. Smith*, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15.

S. W. FORDYCE *et al.*, *Receivers, etc.*, *Plaintiffs in Error*, v. R. L. TRIGG. [No. 18.]

In Error to the Supreme Court of the State of Arkansas.

Mr. Samuel H. West for plaintiffs in error. Messrs. Oscar D. Scott and A. G. Saford for defendant in error.

December 11, 1899. Dismissed with costs, on the authority of *Hardee v. Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39, and cases cited.

EDWARD CLIFFORD, *Appellant*, v. CARL H. RUEMLER, Sheriff of Hudson County, N. J. [No. 351.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. John P. Stockton for appellant. Mr. James S. Erwin for appellee.

December 22, 1899. Order affirmed with costs, on the authority of *Brown v. New Jersey*, 175 U. S. 172, *ante*, 119, 20 Sup. Ct. Rep. 77; and *Clifford v. Heller*, 172 U. S. 641, 43 L. ed. 1181, 19 Sup. Ct. Rep. 874.

W. J. FLIPPIN, *Petitioner*, v. F. J. KIMBALL *et al.*, *Receivers, etc.* [No. 287.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Edgar Allen, Robert Stiles, and A. L. Holladay for petitioner. Messrs. R. M. Hughes and J. I. Doran for respondents.

October 16, 1899. Denied.

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ARTHUR S. LELAND *et al.*, *Petitioners*, v.*[724] NATIONAL CASH REGISTER COMPANY. [No. 326.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Frederick P. Fish for petitioners. Mr. Lysander Hill for respondent.

October 16, 1899. Denied.

M. BOLLES & CO., *Petitioners*, v. COUNTY OF PERRY. [No. 386.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. George A. Sanders for petitioners. Mr. S. P. Wheeler for respondent.

October 16, 1899. Denied.

L. BUCKI & SON LUMBER CO., *Petitioner*, v. ATLANTIC LUMBER COMPANY. [No. 415.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. H. Bisbee and J. E. Padgett for petitioner. Mr. R. H. Liggett for respondent.

October 16, 1899. Denied.

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, *Petitioner*, v. HENRY M. NARRAMORE. [No. 417.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Judson Harmon for petitioner. Mr. Charles M. Cist for respondent.

October 16, 1899. Denied.

PACIFIC COAST STEAMSHIP COMPANY, *Petitioner*, v. BANCROFT-WHITNEY COMPANY *et al.* [No. 394.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

October 16, 1899. Granted.

APPLETON WATER WORKS COMPANY *et al.*,
Petitioners, v. CENTRAL TRUST COMPANY
OF NEW YORK. [No. 270.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Seventh Circuit.

Messrs. Lyman E. Barnes, Elmer P. Howe,
William A. Sargent, and George H. Yeaman
for petitioners. Mr. B. K. Miller, Jr., for
respondent.

October 23, 1899. Denied.

L. J. BRYAN, as Marshal, etc., *Petitioner*, v.
LOUIS BERNHEIMER. [No. 297.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fifth Circuit.

October 23, 1899. Granted.

725] CLARENCE W. HOBBS *et al.*, *Petitioners*, v.
FRED H. BEACH. [No. 410.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the First Circuit.

October 23, 1899. Granted.

JAMES HOLLY, *Petitioner*, v. DOMESTIC &
FOREIGN MISSIONARY SOCIETY OF THE
PROTESTANT EPISCOPAL CHURCH OF THE
UNITED STATES *et al.* [No. 409.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

October 23, 1899. Granted.

JAMES S. ANGUS *et al.*, Executors, *Petition-
ers*, v. WILLIAM IRVINE. [No. 375.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Messrs. William M. Pierson and G. W.
McEnerney for petitioners. No opposition.

October 23, 1899. Denied.

FIDELITY TRUST & SAFETY VAULT COMPANY
OF LOUISVILLE, *Petitioner*, v. LAWRENCE
COUNTY, TENNESSEE. [No. 421.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Sixth Circuit.

Mr. J. M. Dickinson for petitioner. Mr.
Edward H. East for respondent.

October 23, 1899. Denied.

HENRY MINCH, *Petitioner*, v. STEAM TUG
"VICTORIA," ETC. [No. 423.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Robert D. Benedict for petitioner. Mr.
James J. Macklin for respondent.

October 23, 1899. Denied.

FREDERICK ZORN *et al.*, *Petitioners*, v. STEAM
TUG "VICTORIA," ETC. [No. 424.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Robert D. Benedict for petitioners.
Mr. James J. Macklin for respondent.

October 23, 1899. Denied.

PATRICK HINES, *Petitioner*, v. STEAM TUG
"VICTORIA," ETC. [No. 425.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Robert D. Benedict for petitioner.
Mr. James J. Macklin for respondent.

October 23, 1899. Denied.

EMMA S. FAYERWEATHER *et al.*, *Petitioners*,
v. TRUSTEES OF AMHERST COLLEGE *et al.*
[No. 420.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Messrs. Roger M. Sherman and William
Blaikie for petitioners. Messrs. James L.
Bishop, John E. Parsons, and C. N. Bovee,
Jr., for respondents.

October 30, 1899. Denied. Announced by Mr.
Justice Harlan. (THE CHIEF JUSTICE took
no part in the decision upon this petition.)

SINGER MANUFACTURING COMPANY, *Petition-
er*, v. HERMAN CRAMER. [No. 331.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Messrs. C. K. Offield, C. O. Sinthicum, and
M. A. Wheaton for petitioner. Mr. John
H. Miller for respondent.

October 30, 1899. Denied.

ELIZA W. PATRICK, *Petitioner*, v. FRANK L. [726]
UNDERWOOD. [No. 403.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Eighth Circuit.

Mr. Charles I. Greene and Ralph W. Breck-
enridge for petitioner. Messrs. Charles H.
Toll and D. V. Burns for respondent.

October 30, 1899. Denied.

FRANK R. CHANDLER, Trustee and Executor,
etc., *et al.*, *Petitioners*, v. JOSEPHINE POM-
EROY *et al.* [No. 407.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Mr. C. C. Bonney for petitioners. Messrs.
John G. Johnson and George Baldwin Newell
for respondents.

October 30, 1899. Denied.

KNIGHTS TEMPLARS & MASONS' LIFE INDEM-
NITY COMPANY, *Petitioner*, v. CARRIE E.
CONVERSE. [No. 413.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Seventh Circuit.

Mr. Charles H. Aldrich for petitioner.
Mr. John S. Cooper for respondent.

October 30, 1899. Denied.

LIZZIE STEARNS BLEECKER *et al.*, *Petitioners*,
v. STEAMSHIP KENSINGTON, ETC. [No.
414.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

October 30, 1899. Granted.

HUGULEY MANUFACTURING COMPANY et al., *Petitioners, v. GALETON COTTON MILLS et al.* [No. 430.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, and J. M. Chilton for petitioners. No opposition.

October 30, 1899. Denied.

JAMES H. BACON, Petitioner, v. UNITED STATES. [No. 431.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. George Sutherland, Jacob R. Custer, and Lester O. Goddard for petitioner. No opposition.

November 6, 1899. Denied.

JAMES H. MILLS, Receiver, Petitioner, v. CITY OF HELENA. [No. 334.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Thomas H. Carter and John B. Clayberg for petitioner. No opposition.

November 6, 1899. Denied.

CENTRAL THOMPSON-HOUSTON COMPANY, Petitioner, v. KENTUCKY & INDIANA BRIDGE COMPANY et al. [No. 433.]

[727] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. James P. Helm and Helm Bruce for petitioner. *Messrs. Alex. Pope Humphrey and George M. Davie* for respondents.

November 6, 1899. Denied.

EASTERN OREGON LAND COMPANY, Petitioner, v. T. J. COLE et al. [No. 389.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. James K. Kelly for petitioner. No opposition.

November 13, 1899. Denied.

MONONGAHELA COAL COMPANY, Petitioner, v. FIDELITY & DEPOSIT COMPANY OF MARYLAND. [No. 346.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. W. S. Benedict for petitioner. No opposition.

November 13, 1899. Denied.

CARNEGIE STEEL COMPANY (LIMITED), Petitioner, v. CAMBRIA IRON COMPANY. [No. 427.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

November 20, 1899. Granted.

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JOHN O. BRISCOE et al., Petitioners, v. MINAH CONSOLIDATED MINING COMPANY (LIMITED) et al. [No. 405.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. W. F. Sanders for petitioners. *Messrs. R. C. Garland and W. W. Wright, Jr.,* for respondents.

November 20, 1899. Denied.

GEORGE W. HORTON, Petitioner, v. UNITED STATES. [No. 441.]

Petition for a Writ of Certiorari to the Court of Appeals of the District Court of Columbia.

Messrs. Tracy L. Jeffords and Robert W. Wells for petitioner. *Solicitor General Richards and Ashley M. Gould* for respondent.

November 20, 1899. Denied.

JOSEPH WILKINS, Petitioner, v. UNITED STATES. [No. 447.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. J. M. Wilson, Henry E. Davis, and A. A. Hoehling, Jr., for petitioner. *Solicitor General Richards* for respondent.

November 20, 1899. Denied. (Mr. Justice **McKenna** took no part in the consideration and decision of this petition.)

HOWARD BUTLER, Petitioner, v. UNITED STATES. [No. 448.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. J. M. Wilson, Henry E. Davis, and A. A. Hoehling, Jr., for petitioner. *Solicitor General Richards* for respondent.

November 20, 1899. Denied. (Mr. Justice **McKenna** took no part in the consideration and decision of this petition.)

ELMER E. POPE et al., Petitioners, v. MARTHA E. HOOPES, Executrix, etc., et al. [No. 446.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. V. B. Archer for petitioners. *Mr. D. J. Pancoast* for respondents.

December 4, 1899. Denied.

UNITED STATES RUBBER COMPANY et al., Petitioners, v. AMERICAN OAK LEATHER COMPANY et al. [No. 436.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

December 11, 1899. Granted.

BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF OURAY, *Petitioner*, v. ROBERT
C. GEER. [No. 465.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Eighth Circuit.

*Messrs. Thomas C. Brown and Lyman I.
Henry* for petitioner. *Mr. Albert E. Patti-
son* for respondent.

December 11, 1899. Denied.

BRITISH-AMERICAN ASSURANCE COMPANY, OF
TORONTO, CANADA, *Petitioner*, v. JAMES
F. McELROY. [No. 460.]

Petition for a Writ of Certiorari to the

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United States Circuit Court of Appeals for
the Ninth Circuit.

Messrs. James B. Howe and T. C. Van Ness
for petitioner. *Messrs. Henry P. Blair and
Harold Preston* for respondent.

December 22, 1899. Denied.

EDWARD HAIN, Claimant, etc., *Petitioner*, v.
SAMUEL E. WELTUS *et al.* [No. 473.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fifth Circuit.

Mr. Wilhelmus Mynderse for petitioner.
Mr. Harrington Putnam for respondents.

December 22, 1899. Denied.

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SUPREME COURT

OF THE

UNITED STATES

AT

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OF THE

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[1] *STATE OF LOUISIANA
 v.
STATE OF TEXAS *et al.*

Controversies between states—original jurisdiction of Supreme Court—suit against state by citizens of other state—political questions.

1. A controversy between two states, of which the Supreme Court of the United States can take original jurisdiction under the Constitution, art. 3, § 2, is not created by the enforcement of rules and regulations established by a health officer, which the state has not authorized or confirmed, but which the governor permits to be executed, although he has power to modify or change them, whereby an embargo is put on interstate commerce from another state, with a view to benefit the former state, and one city thereof in particular, at the expense of the other state, and especially of a certain city therein.
 2. A mere maladministration of the laws of a state, to the injury of the citizens of another state, does not constitute a controversy between states, which is justiciable in the Supreme Court of the United States.
 3. A controversy between a state and citizens of another state, within the meaning of the Constitution, art. 3, § 2, is not created by the enforcement of quarantine regulations by the health officer of one state, acting under valid laws, to the damage of the citizens of another state.
 4. The original jurisdiction of the Supreme Court of the United States over controversies between states does not embrace the determination of political questions.
 5. An original bill by one state against another cannot be maintained as against a health officer of the latter state alone, on the theory that his conduct is in violation or in excess of a valid law of the state, when there is no
- 176 U. S.

[No. 6, Original.]

Submitted October 24, 1899. Decided January 15, 1900.

BILL of complaint filed by the State of Louisiana by her governor against the State of Texas, her governor, and her health officer. Demurrer to the bill sustained and *bill dismissed*.

Statement by Mr. Chief Justice Fuller:

*The state of Louisiana by her governor applied to this court for leave to file a bill of complaint against the state of Texas, her governor, and her health officer. Argument was had on objections to granting leave, but, it appearing to the court the better course in this instance, leave was granted and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.

The bill alleged: "That the city of New Orleans, one of the great commercial cities of this Republic, and the second export city of this continent, containing about 275,000 inhabitants, many of whom are largely engaged in interstate commerce with the inhabitants of the state of Texas, is situated within the territory of your orator; that said city contains nearly one fourth of all the inhabitants of your orator, and the assessed values of her property are more than one half the assessed values of the whole state, and she contributes by taxes and licenses more than five eighths of your orator's revenue.

*"That two lines of railroad, the Southern [3]
Pacific and the Texas & Pacific, run directly
from the city of New Orleans through the
states of Louisiana and Texas, and into the

states and territories of the United States and of Mexico, beyond the state of Texas, with the inhabitants of which states and territories the citizens of New Orleans are also engaged in interstate and foreign commerce, such commerce largely following the lines of said railroads and their many connections.

"That the state of Texas, by her Revised Civil Statutes, adopted at the regular session of the Twenty-fourth Legislature, held in the year 1895, being Title XCII. thereof, has granted to her governor and her health officer extensive powers over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules and regulations for the detention of vessels, persons, and property coming into the state from places infected, or deemed to be infected, with such diseases.

"That Joseph D. Sayers, a citizen of the state of Texas, is now, and has been for some time past, governor of said state.

"That William F. Blunt, a citizen of the state of Texas, is now, and has been for some time past, the state health officer of the state of Texas.

"That the ports of said state, situated on the Gulf coast, are engaged in commerce with the ports of Mexico, Central and South America, and Cuba, known to be permanently infected with yellow fever; said commerce being largely competitive with similar commerce coming to the port of New Orleans.

"That on the 1st day of March, 1899, Joseph D. Sayers, governor of the state of Texas, under the provisions of the said laws, issued his proclamation establishing quarantine on the Gulf coast and Rio Grande border against all places, persons, or things coming from places infected by yellow fever, etc., a copy of which proclamation is hereto annexed and made part of this bill and marked Exhibit 'A.'

"That the rules and regulations established in said quarantine proclamation permit trade and commerce between such infected ports and the state of Texas, and provide for the *fumigation and reasonable detention of ships and cargoes from infected ports.

"That on or about the 31st day of August, 1899, a case of yellow fever was officially declared to exist in the city of New Orleans, in a part of the city several miles away from the commercial part thereof, and from that time to this several other sporadic cases have been reported in similar parts of the city.

"That as soon as said first case was reported the said William F. Blunt, health officer of the state of Texas, claiming to act under the provisions of article 4324 of the Revised Civil Statutes, under the pretense of establishing a quarantine, placed an embargo on all interstate commerce between the city of New Orleans and the state of Texas, absolutely prohibiting all common carriers entering the state of Texas from bringing into the state any freight or passengers, or even the mails of the United States, coming from the city of New Orleans;

and to enforce these orders he immediately placed, and now maintains, armed guards, acting under the authority of the state of Texas, on all the lines of travel from the state of Louisiana into the state of Texas, with instructions to enforce the embargo declared by him *vi et armis*, which instructions these armed guards are carrying out to the letter; that about six days later he modified his order so as to permit the government of the United States to carry and deliver the mails, and also modified his order so as to permit persons and their baggage to enter the state of Texas, after ten days' detention at the quarantine detention camps established by him, and after fumigation of their baggage; but that he now maintains, and announces his intention to maintain indefinitely, his absolute prohibition of all interstate commerce between the city of New Orleans and the state of Texas; that he has refused to permit the introduction of sulphuric acid in iron drums, unpacked hardware, machinery, and other articles coming from localities in the city of New Orleans far removed from the places where the sporadic cases of fever have occurred, and which by their nature are concededly incapable of conveying infection; that he had established *no system [5] of classification or inspection of the articles of interstate commerce coming from the city of New Orleans, to determine whether they are or may be infected, or whether they are capable, or not, of conveying infection, no period of detention for such articles, no place or method of disinfection thereof; his only method being absolute and unconditional prohibition of such interstate commerce; that it is a notorious fact, and well known to said Blunt, that all of the interstate commerce between New Orleans and Texas is carried on by railroads, and none by water communication between the port of New Orleans and the Texas ports, and that the effect of his orders is to destroy all such commerce, to take away the trade of the merchants and business men of the city of New Orleans, and to transfer that trade to rival business cities in the state of Texas.

"That while Joseph D. Sayers, governor of the state of Texas, has issued no formal proclamation of quarantine, as provided by law, to wit, article 4324 of the Revised Civil Statutes, defining the rules and regulations of such quarantine so declared by said Blunt, your orator charges that the rules and regulations established by said Blunt have the full force of law until modified or changed by the proclamation of the governor, and that the governor knows all these facts, and approves and adopts the same, and permits these rules and regulations to stand and to be executed in full force and effect as established by said Blunt.

"Now, your orator recognizes the right and power of the state of Texas and the public officials thereof, to take prudent and reasonable measures to protect the people of said state from infection, to establish quarantine and reasonable inspection laws, but your orator denies that said state, or its officials acting under its laws, under the cov-

er of exercising its police powers, can prohibit or so burden interstate commerce as to make such commerce impossible.

[6] "Your orator avers that it is a recognized and acknowledged fact by all the sanitarians and health officials of the various states exposed to infection by yellow fever, and by the health officials of the United States, and by all scientific *students of infection and sanitation, that commerce can be conducted between infected and noninfected points, with small inconvenience and without any danger of infection, by classifying the articles of commerce, and by pursuing certain well-recognized rules and precautions with reference to the articles and vehicles of commerce.

"That after the yellow fever outbreak of 1897 a quarantine convention was held in Mobile, Ala., and, on the advice of that convention, a conference of the health officials of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Missouri, and the United States Marine Hospital Service met at Atlanta, Ga., and formulated such regulations, which were adopted by the boards of health of all said states, and, as subsequently revised, are now in full force and effect between the said states; that additional experience having been gained by the reappearance of yellow fever in the fall of 1898, a revising conference was held in the city of New Orleans on February 9, 1899, at which conference the Atlanta regulations were in some respects modified. A copy of the said regulations, original and as modified, are hereto annexed, and made part of this bill, and marked Exhibit 'B.'

"Your orator avers that said William F. Blunt, or his predecessor in office, was health officer of the state of Texas at the time these conferences were held, that he and his predecessor in office refused or neglected to attend them in person or by representative, and he has continually refused to adopt the Atlanta regulations, or any of them, or any regulations similar to them, and insists, as his predecessor in office insisted, upon being a law to himself, and upon using no means of dealing with yellow fever infection in the city of New Orleans, or elsewhere in the state of Louisiana, real or imaginary, except an absolute embargo upon interstate commerce, to be established at his pleasure and to last as long as he chooses to maintain it.

[7] "That in pursuance of this policy, in the year 1897, his predecessor in office established a similar embargo on interstate commerce between New Orleans and other points in Louisiana, supposed by him to be infected, and the state of *Texas, on the 10th day of September; and refused to remove or to modify said embargo until the — day of December, 1897, during which period he even refused to permit railroad cars that had been in the city of New Orleans to enter or even pass through the state of Texas, on their way to the countries, states, and territories beyond.

"That in pursuance of the same policy, in the year 1898, the said William F. Blunt, 176 U. S.

health officer, and the governor of the state of Texas, established a similar embargo on all interstate commerce between the state of Louisiana and the state of Texas, on the 18th day of September, and refused to remove or modify the same until the 1st day of November.

"That in pursuance of the same policy, the said William F. Blunt, because a single case of yellow fever was declared in the city of New Orleans, did on May 30, 1899, establish a similar embargo on interstate commerce between the city of New Orleans and the state of Texas, which he refused to modify or to remove until June 9, 1899, and then only under great pressure, although he was advised on June 2d, 1899, by the representatives of the health authorities of the states of Alabama and Mississippi, of the United States Marine Hospital Service, and of the Louisiana state board of health, who had been for some days in the city of New Orleans, making a personal inspection of her sanitary and health conditions, that they deemed it 'unnecessary and unwise for any state or city to quarantine against New Orleans under present conditions.'

"Your orator avers that the state of Texas, her governor, and her health officer, as shown by the rules and regulations established by them in the proclamation aforesaid for the quarantine on the Gulf coast, admit the truthfulness of the claim of your orator that commerce can be carried on with infected places and ports, under reasonable rules and regulations as to inspection, fumigation, and detention, and admit that there are articles of commerce incapable of conveying infection, and actually permit such commerce in all articles to be so carried on to the advantage and benefit of the commerce of the ports of Texas and her merchants engaged in commerce in said ports.

[8] "Your orator avers that the effect of the embargoes imposed by the state of Texas upon the commerce of the city of New Orleans with Texas is to build up and benefit the commerce of the city of Galveston, in Texas, and the commerce of other cities in Texas, all of which are commercial rivals of the city of New Orleans for the large commerce of the state of Texas and the adjoining states and territories.

"That prior to the embargoes aforesaid of the years 1897 and 1898 the city of New Orleans was the greatest cotton exporting port of the United States, and a very large portion of the cotton grown in Texas was exported through the port of New Orleans; for instance, for the season of 1894-5 more than 31 per cent thereof; for the season 1895-6 more than 30 per cent thereof; for the season 1896-7, 25 per cent thereof.

"That as consequence of the two trade embargoes aforesaid the percentage of the Texas cotton crop exported through the port of New Orleans for the season of 1897-8 was only 19 per cent; and for the season of 1898-9 was only 15 per cent; and for the season of 1898-9, ending September 1, 1899, the city of Galveston handled more export cotton than the city of New Orleans.

"That the effect of said embargoes is all the more disastrous to the commerce of your orator and of her cities and towns, because declared and made operative during the months of September, October, November, and the early part of December, the period of the greatest activity and the largest movement of commerce among the states of the south, and between the state of Louisiana, the city of New Orleans, and the state of Texas.

[9] "Now your orator avers that in view of the unreasonable, harsh, prohibitive, and discriminating character of the pretended quarantines declared and maintained by the state of Texas and her health officer against the city of New Orleans and other localities in the state of Louisiana, is nothing less than a commercial war declared against your orator, her ports, cities, and citizens; not for the bona fide purpose of protecting the health of the state of Texas, but for the purpose of increasing *the trade and commerce of the state of Texas and of her ports, cities, and citizens, to the great damage and injury of your orator and her citizens; that such embargoes on interstate commerce injure and impoverish your orator's citizens, reduce the value of her taxable property, diminish her revenues, retard immigration, reduce the value of her public lands, and deprive her citizens of their rights and privileges as citizens of the United States.

"Your orator avers that the embargo upon interstate commerce between the city of New Orleans, in the state of Louisiana, and the state of Texas, established by said Blunt on or about the 1st day of September, 1899, and now maintained by him and the other officials of the state of Texas, will be continued by them for an indefinite period, to the great damage and injury of your orator's ports, commerce, and revenues, and to the commerce of her citizens and to the rights of her citizens under the Constitution of the United States, unless they be enjoined and restrained by order of this court.

"Your orator avers that, from the past conduct of the state of Texas, and of her governors and health officers, your orator is justified in averring and charging, and does aver and charge, that it is the fixed purpose and intention of the said state, and of her governors and health officers, whenever in the future any case of yellow fever, or other infectious disease, occurs in any parish, city, or town within your orator's borders, to immediately declare, set up, and maintain an absolute prohibition of interstate commerce between said supposed infected parish, city, or town, and the state of Texas, and to keep the same in force during the pleasure of such officials, or to make and establish discriminative rules and regulations covering quarantines on such interstate commerce, different from and more burdensome than the rules and regulations concerning quarantines on interstate commerce with other states and foreign commerce with countries also infected with yellow fever, or other infectious diseases, and thereby to injure and oppress your orator and her citizens.

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"Now, your orator avers that the absolute prohibition *against the movement and operation of interstate commerce between the city of New Orleans and the inhabitants thereof and the state of Texas and the inhabitants thereof, established by said William F. Blunt, health officer of the state of Texas, and now maintained and enforced by him, the governor, and the other officials of the state of Texas, is in direct contravention of the provisions of the Constitution of the United States, and particularly of that clause thereof which grants to the Congress power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and is null, void, and of no effect, and the continuance thereof ought to be restrained by the order of this honorable court.

"Your orator further avers that the various cities, counties, and towns in the state of Texas have authority, under the statutes aforesaid, to establish quarantines, but all such quarantines are by statute subordinate to, subject to, and regulated by the rules and regulations prescribed by the governor and the state health officer, and that therefore all such quarantines are dirigible and controllable by the governor and the health officer of Texas.

"Your orator is informed and believes, and so charges, that it is the intention of certain counties, cities, and towns along the lines of the railroads aforesaid, in case your honors should restrain the operation of the embargo established as aforesaid by William F. Blunt, state health officer, to severally establish the same embargo on their own account, and to prevent the passage of trains on said railroads carrying interstate commerce from the city of New Orleans through them to other parts of the state of Texas and to other states, and to so hinder, obstruct, and delay the transportation of said commerce along the lines of railroad running through their limits as to render its conduct impossible; that in case it should be considered that the public authorities of such counties, towns, and cities are not personally bound by any order your honors may issue in this cause, and in case they should attempt to carry out any such illegal plan, your orator reserves the right hereafter to make such officials parties to this bill, so as to subject them to the control of the court."

*The bill then prayed for answers under [11] oath; that the court decree "that neither the state of Texas, nor her governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce between the state of Louisiana, or any part thereof, and the state of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare, and enforce against places infected with yellow fever, or other infectious diseases, in the state of Louisiana, discriminative quarantine rules and regulations affecting interstate commerce between the state of Louisiana, or any part thereof, and the state of Texas, different from and more burdensome than the quarantine rules

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and regulations affecting interstate or foreign commerce between the state of Texas and other states and countries infected with yellow fever, or other infectious diseases, and that the embargo and prohibition upon interstate commerce between the city of New Orleans and the state of Texas, declared by William F. Blunt, health officer of the state of Texas, on or about the 1st day of September, 1899, and now maintained and enforced by the state of Texas under the guise of a quarantine against yellow fever, is contrary to the Constitution of the United States, null, void, and of no effect and validity;" that a preliminary injunction be issued "prohibiting, enjoining, and restraining the state of Texas and all of her officers and public officials, and prohibiting, enjoining, and restraining Joseph D. Sayers, governor of the state of Texas, and William F. Blunt, health officer of the state of Texas, their successors in office, and all of their subordinates, assistants, agents, and employees, from establishing, maintaining, and enforcing, or attempting to establish, maintain, and enforce, under the guise of a quarantine against yellow fever, any embargo or absolute prohibition upon interstate commerce between the state of Louisiana, or any part thereof, and the state of Texas, or from establishing, maintaining, and enforcing, or attempting to establish, maintain, and enforce against interstate commerce between the state of Louisiana, or any part thereof, and the state of Texas, discriminative and [12] burdensome quarantine *regulations other and different from the regulations established by such authorities against foreign and interstate commerce between the state of Texas and other countries and states infected with yellow fever, or other infectious diseases, and particularly enjoining, prohibiting, and restraining them, and each of them, from maintaining or enforcing, directly or indirectly, the prohibitory embargo on interstate commerce established against the city of New Orleans on or about the 1st day of September, 1899, under the guise and pretense of a quarantine regulation;" and that such injunction be made perpetual on final hearing; for costs; and for general relief.

The demurrer assigned the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the states of Louisiana and Texas.

"Second. Because the allegations of said bill show that the only issues presented by said bill arise between the state of Texas, or her officers, and certain persons in the city of New Orleans, in the state of Louisiana, who are engaged in interstate commerce, and which do not in any manner concern the state of Louisiana as a corporate body or state.

"Third. Because said bill shows upon its 176 U. S.

face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the state of Louisiana, said state is in effect loaning its name to said individuals, and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans, who are engaged in interstate commerce.

"Fourth. Because it appears from the face of said bill that the state of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said state possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose.

"Fifth. Because it appears from the face [13] of said bill that no property right of the state of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

Messrs. Milton J. Cunningham, Edgar H. Farrar, Benjamin F. Jonas, Ernest B. Kruttschnitt, and E. Howard McCaleb submitted the cause for complainant:

The original jurisdiction of the Supreme Court of the United States in a controversy between two states is as broad as that given to Congress under the articles of Confederation.

Rhode Island v. Massachusetts, 12 Pet. 719, 9 L. ed. 1258.

The words "controversies between two or more states," used in the Constitution, cover every right of persons and property of a civil nature that can be made the subject of judicial cognizance.

Osborn v. Bank of United States, 9 Wheat. 738, 821, 6 L. ed. 204, 224; *Rhode Island v. Massachusetts*, 12 Pet. 721, 9 L. ed. 1259.

The extent of the judicial power is as broad as all the other powers granted in the Constitution.

Cohen v. Virginia, 6 Wheat. 384, 5 L. ed. 286; *The Federalist*, No. 80.

Equally broad and untrammelled is the grant of judicial power over "all cases in law and equity" arising under the Constitution and the laws and treaties of the United States, whoever may be the parties thereto.

Cohen v. Virginia, 6 Wheat. 382, 5 L. ed. 285.

The power of the Federal government to enforce the Constitution and protect interstate commerce from all forms of unlawful obstruction resides in the judicial, as well as in the executive and in the legislative branches.

Re Debs, 158 U. S. 581, 39 L. ed. 1101, 15 Sup. Ct. Rep. 900.

So far as concerns the right of a state to sue in this court for an injunction to prevent an obstruction or interference with a highway of interstate commerce tending to

injure her revenues, ports, and commerce, it is settled by authority.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Wisconsin v. Duluth*, 96 U. S. 381, 24 L. ed. 669.

If the state of Louisiana were an absolutely independent foreign sovereign, she would have the right to sue in the courts of the United States to restrain the unlawful act of persons which, if not prevented, would damage the trade and property of her citizens.

Emperor of Austria v. Day, 3 DeG. F. & J. 217; *The Sapphire*, 11 Wall. 167, sub nom. *The Sapphire v. Napoleon, III.* 20 L. ed. 130.

The state of Louisiana has not surrendered so much of her sovereignty as would prevent her, at least in a court of the United States, from suing to protect the trade rights and property rights of the mass of her citizens against the unlawful acts of another state.

Rhode Island v. Massachusetts, 12 Pet. 719, 9 L. ed. 1258.

In every respect, except in so far as she has surrendered her sovereignty to the national sovereign, the state of Louisiana is a sovereign state.

Martin v. Hunter, 1 Wheat. 325, 4 L. ed. 102; *Buckner v. Finley*, 2 Pet. 590, 7 L. ed. 528; *Rhode Island v. Massachusetts*, 12 Pet. 719, 9 L. ed. 1258; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 428, 14 L. ed. 1002; *Doyle v. Continental Ins. Co.* 94 U. S. 541, 24 L. ed. 151; *Pennoyer v. Neff*, 95 U. S. 722, 24 L. ed. 568.

Messrs. **Thomas S. Smith** and **Robert H. Ward** submitted the cause for defendants:

A state is not sovereign as to its citizens or as to another state, and is under no obligation to collect the debts of its citizens or to otherwise redress their private wrongs; the state cannot loan its name to its citizens or sue in their behalf.

New Hampshire v. Louisiana, 108 U. S. 91, 27 L. ed. 662, 2 Sup. Ct. Rep. 176.

Notwithstanding the comprehensive words of the Constitution, the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens.

Wisconsin v. Pelican Ins. Co. 127 U. S. 287, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370.

No state can be sued either in its own courts or those of any other state or nation without its consent, and states can only be sued in proper cases in this court by reason of their agreement in the Constitution that the judicial power of the United States shall extend to all cases arising under the Constitution and laws.

United States v. Texas, 143 U. S. 646, 36 L. ed. 293, 12 Sup. Ct. Rep. 488.

The controversies existing at the time of the adoption of the Constitution were the cause and origin of extending the judicial power of the United States to controversies between the states, and the only purpose of such constitutional provision was to provide a tribunal for settlement of such controver-

sies as to boundaries and other like controversies.

United States v. Texas, 143 U. S. 639, 36 L. ed. 291, 12 Sup. Ct. Rep. 488.

It was not the intention of the states in adopting the Constitution to give their consent to be sued whenever a dispute arises between citizens of different states in regard to commerce or any property right affecting such citizens.

Hans v. Louisiana, 134 U. S. 15, 33 L. ed. 847, 10 Sup. Ct. Rep. 504.

*Mr. Chief Justice **Fuller** delivered the [13] opinion of the court:

The 9th of the Articles of Confederation of 1778 provided that the Congress should be "the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever;" the authority to be exercised through a tribunal to be created by the Congress as prescribed, and whose judgment should be final and conclusive; and also that "all controversies concerning the private right of soil claimed under different grants of two or more states" should be determined in the same manner.

In the Constitutional Convention, the committee of detail, composed of Rutledge, Randolph, Gorham, Ellsworth, and Wilson, to which the resolutions arrived at by the Convention and sundry propositions had been referred, reported on the 6th of August, A. D. 1787, a draft of a constitution, consisting of twenty-three articles.

The 2d section of the 9th article provided that as to "all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory," the Senate should have power to designate a special tribunal to finally determine the same by its judgment; and by the 3d section, "all controversies concerning lands claimed under different grants of two or more states" were to be similarly determined.

*The 3d section of the proposed 11th article provided, among other things, that the jurisdiction of the Supreme Court should extend "to controversies between two or more states, except such as shall regard territory or jurisdiction; between a state and citizens of another state; between citizens of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects." [14]

On the 25th of August Mr. Rutledge said in respect to sections 2 and 3 of article 9: "This provision for deciding controversies between the states was necessary under the Confederation, but will be rendered unnecessary by the national judiciary now to be established;" and on his motion the sections were stricken out.

The words "between citizens of the same state claiming lands under grants of different states" were subsequently inserted in the 3d section of the 11th article, and the words "except such as shall regard territory or jurisdiction" omitted 1 Elliot, 223, 224, 176 U. S.

261, 262, 267, 270; 5 Elliot, 471; Meigs, Growth of the Constitution, 244, 249.

Clauses 1 and 2 of the 2d section of article 3 of the Constitution as finally adopted read:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

[15] *The reference we have made to the derivation of the words "controversies between two or more states" manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over "territory or jurisdiction," for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

Undoubtedly, as remarked by Mr. Justice Bradley in *Hans v. Louisiana*, 134 U. S. 1, 15, 33 L. ed. 842, 847, 10 Sup. Ct. Rep. 507, the Constitution made some things "justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. Of other controversies between a state and another state or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 288, 289, 32 L. ed. 239, 242, 243, 8 Sup. Ct. Rep. 1370, and cases there cited."

By the judiciary act of 1789 the judicial system was organized and the powers of the different courts defined. Its 13th section, carried forward as § 687 of the Revised Statutes, provided that "the Supreme Court 176 U. S. U. S., Book 44.

shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

The language of the 2d clause of the 2d section of article 3, "in all cases in which a state shall be party," means in all the enumerated cases in which a state shall be a party, and this is stated expressly when the clause speaks *of the other cases where ap- [16] appellate jurisdiction is to be exercised. This 2d clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only. *California v. Southern P. R. Co.* 157 U. S. 229, 259, 39 L. ed. 683, 694, 15 Sup. Ct. Rep. 591; *United States v. Texas*, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488. And by the Constitution and according to the statute, the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state.

On the 8th of January, 1798, the Eleventh Amendment was ratified, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Referring to this amendment, Mr. Chief Justice Waite, in *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, 91, 27 L. ed. 656, 662, 2 Sup. Ct. Rep. 176, 184, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other states to its citizens."

In order, then, to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals.

By the Constitution the states are forbidden to "enter into any treaty, alliance, or confederation; grant letters of marque and reprisal;" or, without the consent of Congress, "keep troops or ships of war in time of peace, enter into any agreement *or com- [17] pact with another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay." Art. 1, § 10.

Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement. As pointed out by Mr. Justice Field in *Virginia v. Tennessee*, 148 U. S. 503, 519, 37 L. ed. 537, 543, 13 Sup. Ct. Rep. 728, 734, there are many matters on which the different states may agree that can in no respect concern the United States, while there are other compacts or agreements to which the prohibition of the Constitution applies. And as to this he quotes from Mr. Justice Story as follows: "Story, in his Commentaries (§ 1403), referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*), to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges; and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in lands situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'" But it was also there ruled that where the consent of Congress was requisite, it might be given subsequently or might be *implied from subsequent action of Congress itself towards the two states.

[18]

In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.

As might be expected in view of the nature

of the jurisdiction, the cases are few in which the aid of the court has been sought in "controversies between two or more states." They are cited in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, and are chiefly controversies as to boundaries.

In *South Carolina v. Georgia*, 93 U. S. 4, 14, 23 L. ed. 782, 785, a bill was filed for an injunction against the state of Georgia, the Secretary of War, and others from "obstructing or interrupting" the navigation of the Savannah river in violation of the compact entered into between the states of South Carolina and Georgia on the 24th day of April, 1787. The bill was dismissed because no unlawful obstruction of navigation was proved, but the question was expressly reserved whether "a state, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court."

So in *Wisconsin v. Duluth*, 96 U. S. 379, 382, 24 L. ed. 668, 670, the contention that the court could "take cognizance of no question which concerns alone the rights of a state in her political or sovereign character, that to sustain the suit she must have some proprietary interest which is affected by the defendant," was not passed upon.

*In *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249, the court treated the suit as brought to protect the property of the state of Pennsylvania. [19]

But in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, involving a case in the circuit court in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the state of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens.

She does this from the point of view that the state of Texas is intentionally absolutely interdicting interstate commerce as respects the state of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of

the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained.

[20] *By Title XCII. of the Revised Statutes of the State of Texas of 1895, "The governor is empowered to issue his proclamation declaring quarantine on the coast, or elsewhere within this state, whenever in his judgment quarantine may become necessary, and such quarantine may continue for any length of time as in the judgment of the governor the safety and security of the people may require." Art. 4321. It is made the governor's duty "to select and appoint, by and with the advice and consent of the senate, from the most skilful physicians of the state of Texas, one physician, who shall be known as health officer of the state, and shall from previous and active practice be familiar with yellow fever and pledged to the importance of both quarantine and sanitation." Art. 4322. It was also provided that "whenever the governor has reason to believe that the state of Texas is threatened at any point or place on the coast, border, or elsewhere within the state with the introduction or dissemination of yellow fever contagion, or any other infectious and contagious disease that can and should, in the opinion of the state health officer, be guarded against by state quarantine, he shall, by proclamation, immediately declare such quarantine against any and all such places, and direct the state health officer to promptly establish and enforce the restrictions and conditions proposed and indicated by said quarantine proclamation, and when from any cause the governor cannot act, and the exigencies of the threatened danger require immediate action, the state health officer is empowered to declare quarantine as prescribed in this article, and maintain the same until the governor shall officially take such action as he may see proper." Art. 4324. And, further, that the laws in regard to state quarantine should remain and be in full force and operation on the coast or elsewhere in the state as the governor or health officer might direct, and be enforced as heretofore, "with such additional changes in station and general management as the governor may think proper." Art. 4325. Differences and disputes in regard to local quarantine were to be determined by the governor, and all county and municipal quarantine was made subordinate to such rules and regulations as might be prescribed by the governor or state health officer. It

[21] *was made the duty of any county, town, or city authority on the coast or elsewhere in the state, on the promulgation of the govern-

nor's proclamation declaring quarantine, to provide suitable stations and employ competent physicians as health officers subject to the approval of the governor; and in the case of the failure of the authorities to do so, the governor was empowered to act. Provision was made for the detention of persons and vessels, and for the disinfection of vessels and their cargoes and passengers arriving at the ports of Texas from any infected port or district, and for rules and regulations in regard thereto, "the object of such rules and regulations being to provide safety for the public health of the state without unnecessary restrictions upon commerce and travel." Art. 4342.

It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government.

In *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, this was so held; and Mr. Justice Miller, delivering the opinion of the court, said: "The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi river, 100 miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." Hence, even if Congress had remained silent on the subject, it would not have followed that the exercise of the police power of the state in this regard, although necessarily operating on interstate* commerce, would be therefore in- [22] valid. Although from the nature and subjects of the power of regulating commerce it must be ordinarily exercised by the national government exclusively, this has not been held to be so where in relation to the particular subject-matter different rules might be suitable in different localities. At the same time, Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation.

The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the state of Louisiana and the state of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify

or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the state of Texas, and the city of Galveston in particular, at the expense of the state of Louisiana, and especially of the city of New Orleans.

But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

[23] In our judgment this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or *from which it necessarily follows that the two states are in controversy within the meaning of the Constitution.

Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy "between a state and citizens of another state."

Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states, and such a controversy, as we have said, is not presented.

Demurrer sustained and bill dismissed.

Mr. Justice **White** concurred in the result.

Mr. Justice **Harlan** concurring:

Taking the allegations of the bill to be true—as upon demurrer must be done—this suit cannot be regarded as one relating only to local regulations that incidentally affect interstate commerce and which the state may adopt and maintain in the absence of national regulations on the subject. On the contrary, if the allegations of the bill be true,

the Texas authorities have gone beyond the necessities of the situation, and established a quarantine system that is absolutely subversive of all commerce between Texas and Louisiana, particularly commerce between Texas and New Orleans. This court has often declared that the states have the power to protect the health of their people by police regulations directed to that *end, and that regulations of that character are not to be disregarded because they may indirectly or incidentally affect interstate commerce. But when that principle has been announced it has always been said that the police power of a state cannot be so exerted as to obstruct foreign or interstate commerce beyond the necessity for its exercise, and that the courts must guard vigilantly against needless intrusion upon the field committed to Congress. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470-473, 24 L. ed. 527, 529-531; *Hennington v. Georgia*, 163 U. S. 299, 313, 318, 41 L. ed. 166, 172, 174, 16 Sup. Ct. Rep. 1086; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 628, 630, 42 L. ed. 878, 883, 884, 18 Sup. Ct. Rep. 488. The present suit proceeds distinctly on the ground that the regulations established by the authorities of Texas under its statute go beyond what is necessary to protect the people of that state against the introduction of infectious diseases, and destroys the possibility of any commerce between New Orleans and Texas. Now, if Texas has no right, by its officers, to establish regulations that unreasonably or unnecessarily burden commerce between that state and Louisiana, and if the state of Louisiana is entitled, under the Constitution, to have the validity of such regulations tested in a judicial tribunal, then this court should put the defendants to their answer, and the cause should proceed to a final decree upon its merits.

But I am of opinion that the state of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that state. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this court jurisdiction of controversies between states, it did not thereby authorize a state to bring another state to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining state in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word "controversies" in the clauses extending the judicial *powers of the United States to controversies [25] "between two or more states," and to controversies "between a state and citizens of another state," and the word "party" in the clause declaring that this court shall have original jurisdiction of all cases "in which a state shall be a party," refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies

or cases that do not involve either the property or powers of the state which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another state. The citizens of the complaining state may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another state; but their state cannot, even with their consent, make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176, in which case it was held that one state could not, by taking charge of demands or debts held by its citizens against another state, acquire the right to bring a suit in its name in this court against the debtor state.

I must express my inability to concur in that part of the opinion of the court relating to the clause of the Constitution extending the judicial power of the United States to controversies "between a state and citizens of another state." In reference to a controversy of that sort the court says that, where none exist between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter confided to his discretion and judgment. But how can the governor of a state be said to have an executive function to disregard the Constitution of the United States? How can his state authorize him to do that? It is one thing to compel the governor of a state, by judicial order, to take affirmative action upon a designated subject. It is quite a different thing to say that, being directly charged with the execution of a statute, he may not be restrained by judicial orders from taking such action as he deems proper, even if what he is doing and proposes to do *is forbidden by the supreme law of the land. His official character gives him no immunity from judicial authority exerted for the protection of the constitutional rights of others against his illegal action. He cannot be invested by his state with any discretion or judgment to violate the Constitution of the United States.

The court also says that it cannot accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would lie with the state authorities, and no refusal to fulfil their duty in that regard is set up; and that it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states. But the important question presented in this case—if the state of Louisiana in its sovereign capacity can sue at all in respect of the matters set out in the bill—is whether the regulations being enforced by the health officer are in violation of the Constitution of the United States. The opinion of the court will be construed as meaning that even if Louisiana be entitled, in her sovereign ca-

capacity, to complain of those regulations as repugnant to the Constitution of the United States, it could not proceed in this court against the defendant health officer, and that its only remedy is to appeal to the authorities of Texas, that is, to the governor of that state, who has power to control his codefendant, the health officer, and who has approved the regulations in question. I am not aware of any decision supporting this view. If the regulations in question are in violation of the Constitution of the United States, the defendant health officer, I submit, may, without any previous appeal to the governor of Texas, be restrained from enforcing them, either at the suit of individuals injuriously affected by their being enforced, or at the suit of Louisiana in its corporate capacity, provided that state could sue at all in respect of such matters.

Although unable to assent to the grounds upon which the court rests its opinion, I concur in the judgment dismissing *the suit solely upon the ground that the state of Louisiana in its sovereign or corporate capacity cannot sue on account of the matters set out in the bill. [27]

Mr. Justice **Brown** concurring in the result:

I am not prepared to say that if the state of Texas had placed an embargo upon the entire commerce between Louisiana and Texas the state of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill.

In view of the solicitude which from time immemorial states have manifested for the interest of their own citizens; of the fact that wars are frequently waged by states in vindication of individual rights, of which the last war with England, the opium war of 1840 between Great Britain and China, and the war which is now being carried on in South Africa between Great Britain and the Transvaal Republic, are all notable examples; of the further fact that treaties are entered into for the protection of individual rights, that international tribunals are constantly being established for the settlement of rights of private parties,—it would seem a strange anomaly if a state of this union, which is prohibited by the Constitution from levying war upon another state, could not invoke the authority of this court by suit to raise an embargo which had been established by another state against its citizens and their property.

An embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*. The case made by the bill is the extreme one of a total stoppage of all commerce between the most important city in Louisiana and the entire state of Texas; and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals, where a state has assumed to prohibit all kinds of commerce with the chief city of another state, I think

her motive for doing so is the proper subject of judicial inquiry.

[28] *It is true that individual citizens whose rights are seriously affected by a system of nonintercourse might, perhaps, maintain a bill of this kind; but to make the remedy effective it would be necessary to institute a multiplicity of suits, to carry on a litigation practically against a state in the courts of that state, and to assume the entire pecuniary burden of such litigation, when all the inhabitants of the complaining state are more or less interested in the result.

But the objection to the present bill is that it does not allege the stoppage of all commerce between the two states, but between the city of New Orleans and the state of Texas. The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the state is not the proper party complainant.

UNITED STATES, *Appt.*,

v.

OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans.

(See S. C. Reporter's ed. 28-51.)

Railroad land grant—effect of filing map of general route—subsequent grant of same lands.

1. The grant of public lands made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, was in the nature of a float, and excluded all lands that had been reserved, sold, or otherwise appropriated before the filing of a map showing the definite location of the line of the road.
2. The filing of a map of the general route of the Northern Pacific Railroad did not, prior to the filing of the map of definite location, constitute such a disposal of lands within the exterior lines of that route as to preclude a subsequent grant of the lands to another company.

[No. 9.]

Argued April 14, 1899. Decided January 8, 1900.

APPPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit reversing a decree of the Circuit Court canceling a grant of public lands to a railroad company and certain deeds executed by the company. *Affirmed.*

See same case below, 48 U. S. App. 1, 77 Fed. Rep. 67, 23 C. C. A. 15.

The facts are stated in the opinion.

Solicitor General John K. Richards argued the cause and filed a brief for appellant:

In construing public grants, nothing can be taken against the government by infer-

ence. What is not given expressly or by necessary implication is withheld.

Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

In construing a railroad land grant the thing to be ascertained is the intent of Congress. The act is a law as well as a conveyance, and must be so construed as to carry out the legislative will.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020.

The words "*via the valley of the Columbia river to a point at or near Portland, in the state of Oregon,*" used in the act of July 2, 1864, locate the so-called branch line with sufficient certainty to identify the lands granted in aid of its construction and thus preclude the junior grant in 1866 to the Oregon & California from attaching.

United States v. Northern P. R. Co. 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

To effectuate the intention of the grantor, grants more indefinite than the land grant along the branch *via the valley of the Columbia* have been sustained.

Newsom v. Pryor, 7 Wheat. 7, 5 L. ed. 382; *United States v. Arredondo*, 13 Pet. 133, 10 L. ed. 93; *Johnson v. Pannel*, 2 Wheat. 206, 4 L. ed. 221.

If, on account of engineering difficulties, it became necessary, upon actual construction, to deviate from the route shown upon the map of location, such deviation, provided the road kept within the limits of the grant, would not affect rights acquired under the grant by reason of such location laid down in the charter, and the company had a right to do so without filing a map.

Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Rogers v. A. & P. R. Co.* 6 U. S. Land Dec. 565; *Chicago, etc., R. Co.* 6 U. S. Land Dec. 209; *Iowa Railroad Land Grant*, 16 Ops. Atty. Gen. 457.

A map of general route need not show a line definitely located upon the ground with all the accuracy of a final survey.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100.

It was not necessary that the map should be good for the whole road. If good on the branch "*via the valley of the Columbia river to a point at or near Portland,*" the filing of it worked a withdrawal of the lands opposite to that portion.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152.

An undetermined claim or a reservation of land severs it from the mass of public land so that it will not pass under railroad aid grants.

NOTE.—As to land grants to railroads, see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

Wilcox v. Jackson ex dem. McConnel, 13 Pet. 498, 10 L. ed. 264; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 740, 23 L. ed. 637; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; *Barndon v. Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; *Cameron v. United States*, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; *Whitney v. Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

When a proper map of general route is filed the law operates to withdraw the lands within the limits of the grant, and this withdrawal takes effect whether it is expressly ordered by the Secretary of the Interior or not.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Walden v. Knevals*, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 333, 7 Sup. Ct. Rep. 100; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020.

It was not the purpose of Congress in using the word "granted" in the clause defining the exceptions to the land grant of July 2, 1864, to except from the operation of that grant any portion of the designated lands for the purpose of aiding in the construction of other roads under the subsequent grants.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The rule is settled that within common granted or primary limits priority of grant, not priority of location, determines the question of ownership as between railroad companies claiming the same lands under different grants.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598; **176 U. S.**

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The forfeiture of the Northern Pacific grant was not for the benefit of the Oregon & California, but for the benefit of the government. If these lands were in any way reserved or set aside for the benefit of the Northern Pacific, the act of forfeiture restored them to the public domain.

Van Wyck v. Knevals, 106 U. S. 362, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

The forfeiture declared by the act of September 29, 1890, in any event must be held to apply to such of the lands in suit as are within the secondary or indemnity belt of the Oregon & California grant.

Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341.

Mr. Lewis E. Payson argued the cause and, with Messrs. Joseph H. Choate and Charles H. Tweed, filed a brief for appellees:

Nothing short of an actual, final, and definite location, binding upon the company, not to be departed from except with the consent of Congress, can attach the grant to any specified lands, and then only to the lands measured off from the line as definitely located.

Iowa Land Grants, 8 Ops. Atty. Gen. 246; *Iowa Railroad Claims*, 8 Ops. Atty. Gen. 395; *Menotti v. Dillon*, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *Burlington & M. River R. Co. v. Fremont County*, 9 Wall. 89, 19 L. ed. 563; *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. 95, 19 L. ed. 599; *Iowa Railroad Land Co. v. Courtright*, 21 Wall. 310, sub nom. *Cedar Rapids & M. River R. Co. v. Courtright*, 22 L. ed. 582; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095; *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305; *Platt v. Union P. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438; *Wisconsin C. R. Co. v. Price County*, 133 U.

S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Descart Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

The determination of the general route of the road and filing a map thereof in the Department of the Interior has also been treated as a prerequisite to any withdrawal under this Northern Pacific act and similar acts.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 636, 28 L. ed. 1124, 5 Sup. Ct. Rep. 566; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The Perham map was ineffectual for any purpose whatever. It did not conform to the act and was utterly vague and indefinite.

United States v. Northern P. R. Co. 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

The Interior Department has always condemned it as worthless and inoperative under the act and as utterly void for indefiniteness.

Miller Case, 7 U. S. Land Dec. 100, 104.

It violates the first rules which the court has insisted upon as to clearness of determination of route by a map of general route.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100.

[30] *Mr. Justice Harlan delivered the opinion of the court:

This suit involves the title to a large body of lands in the state of Oregon, covered by patents issued by the United States to the Oregon & California Railroad Company, a corporation organized under the laws of Oregon. Its object is to obtain a decree canceling those patents as well as certain conveyances made by the company.

The suit was brought by the Attorney General in 1893, under the authority of the act of March 3, 1887, entitled "An Act to Provide for the Adjustment of Land Grants Made by Congress To Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes." By that act the Secretary of the Interior was directed to adjust, in accordance with the decisions of this court, each of the railroad land grants made by Congress to aid in the construction of railroads and theretofore unadjusted. Its 2d section provided that "if it shall appear, upon the completion of such adjustments respectfully [respectively], or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it shall be the duty of the Secretary

[31] of the Interior to thereupon *demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney Gen-

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eral to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands and to restore the title thereof to the United States." 24 Stat. at L. 556, chap. 376.

The defendants demurred to the bill for want of equity, but the demurrer was overruled. 57 Fed. Rep. 890. They then filed a joint and several answer, and proofs were taken by the parties. By the decree of the circuit court, patents of May 9th, 1871, July 12th, 1871, June 22d, 1871, and June 18th, 1877, purporting to convey to the Oregon & California Railroad Company the lands in dispute (which are fully described by metes and bounds in the decree), were canceled as being null and void. By the same decree a warranty deed of February 26th, 1880, to the defendant John A. Hurlburt, a deed of November 5th, 1879, to Jacob Goldstrap,—each of which deeds were executed by the railroad company,—a deed by Goldstrap to Sylvester Evans, and a deed from the latter to Thomas L. Evans of July 13th, 1883, were also canceled as null and void. 69 Fed. Rep. 899. The case was then carried to the circuit court of appeals, where the decree of the circuit court was reversed, with directions to dismiss the bill. 48 U. S. App. 1, 77 Fed. Rep. 67, 23 C. C. A. 15.

The facts necessary to a clear understanding of the questions raised by the pleadings are as follows:

By an act approved July 25th, 1866, Congress authorized the California & Oregon Railroad Company, a California corporation, and such company as the legislature of Oregon should thereafter designate, to lay out, locate, construct, finish, and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California; the Oregon company to construct that part of the line in Oregon, beginning at Portland and running thence southerly through the Willamette, Umpqua, and Rogue river valleys to the *southern boundary of [32] Oregon, where it was to connect with the part constructed in California by the California corporation. 14 Stat. at L. 239, 240, 241, chap. 242.

For the purpose of aiding in the construction of such railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of the railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of the railroad line, were granted to those companies, their successors and assigns. If the alternate sections or parts of sections so granted were found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of" other lands, designated as aforesaid, were to be selected by the companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, nearest to and not more than 10 miles beyond the limits of the first-named alternate sections. It was made the duty of the Secretary of the

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Interior, as soon as the companies, or either of them, filed in his office a map of the survey of the railroad or any portion thereof, not less than 60 continuous miles from either terminus, to withdraw from sale the lands granted on either side of the railroad as far as located and within the limits specified. § 2.

Whenever the companies, or either of them, had 20 or more consecutive miles of any portion of the railroad and telegraph line ready for service, it became the duty of the President to appoint three commissioners to examine the same, and when it appeared that 20 consecutive miles of railroad and telegraph had been completed and equipped in all respects as required, the commissioners were to report the fact under oath to the President, whereupon patents were to issue for the lands granted, to the extent of and continuous with the completed section of the railroad and telegraph line; and from time to time whenever 20 or more consecutive miles of road and telegraph were completed and equipped, patents were to be issued upon the report of the commissioners, and so on until the entire railroad and telegraph authorized were constructed. § 4.

[33] *The companies were required to file their assent to the act in the Department of the Interior within one year after its passage, and complete the first section of 20 miles of the railroad and telegraph within two years, and at least 20 miles in each year thereafter, and the whole on or before the 1st day of July, 1875; the railroad to be of the same gauge as the Central Pacific Railroad of California, and connect therewith. § 6.

In case the companies failed to comply with the terms and conditions required by not filing their assent thereto as provided in § 6 of the act, or by not completing the same as provided in that section, the act was to be null and void, and all the lands not conveyed by patent to the company or companies, as the case might be, at the date of such failure, should revert to the United States; and if the road and telegraph line were not kept in repair and fit for use after the same were completed, Congress could pass an act to put them in repair and use and direct the income therefrom to be devoted to the United States to repay all expenditures caused by the default or neglect of the companies or either of them, or fix pecuniary responsibility not exceeding the value of the lands granted by the act. § 8.

It appears from the bill filed by the United States that, by joint resolution of October 20th, 1868, the legislature of Oregon designated the Oregon Central Railroad Company to receive the privileges and franchises and to perform the duties mentioned in the act of July 25th, 1866; that on the 29th day of October, 1869, that company, having previously accepted the grant contained in that act, filed with the Secretary of the Interior its map of "definite location" opposite to the lands in suit; that this map was accepted by the Secretary on January 29th, 1870; 176 U. S

that in February, 1870, the lands in dispute were all withdrawn in pursuance of orders issued by that officer; that on or about April 4th, 1870, the Oregon & California Railroad Company, a corporation of Oregon, became the successor and assignee of the Oregon Central Railroad Company; that the road of that company was duly constructed opposite the lands in dispute within the time limited *by law for the completion of that portion; and that two sections of 20 miles each were examined by commissioners appointed by the President, and, their report having been accepted by him, patents for the lands continuous with those sections were ordered to be and were issued. [34]

The bill contained these averments: "Your orator shows that all the lands hereinbefore described are *within the limits of the grant as prescribed in said act of July 25th, 1866, whether place or indemnity*. And your orator shows that *the entire line of railroad of the said Oregon & California Railroad Company has been fully constructed and been duly accepted by the President of the United States after due reports by commissioners on the several sections thereof, and has been continuously, and still is, operated by said company*; but a portion of said road, to wit, 163 miles, was constructed after July 1st, 1880."

Referring to the conveyances made by the railroad company to the individual defendants, the bill admits that the purchasers went into actual possession, made valuable and permanent improvements, and remained thereafter in possession. It then alleges that "John A. Hurlburt and Thomas L. Evans each claim the title to said lands respectively in fee simple, and your orator concedes that they were severally purchased and granted from the said Oregon & California Railroad Company in good faith for value, relying on the apparent title to said lands under said patent from orator to said railroad company, and without actual notice of any defect in the title of said company to said lands, as set forth in this bill. But orator insists that they were chargeable with constructive notice of the several acts of Congress, and that under the said acts of Congress and the acts and doings of the said railroad company no title could pass to said Hurlburt and Evans, and that said patent should be canceled as to them, as well as to the grantee therein, the said Oregon & California Railroad Company."

In view of these facts, if the case depended alone on the act of July 25th, 1866, the title of the defendants to these lands, as against the United States, could not be questioned.

The government, however, has insisted in its bill that the *issuing of the patents to the Oregon & California Railroad Company was without authority of law. This contention rests upon the assumption that the lands so patented—although within the limits of the grant contained in the act of July 25th, 1866, and within the line of the Oregon Company as definitely located—were excluded from that grant because included [35]

in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat. at L. 365, chap. 217); in which case it is insisted that they were forfeited to the United States by the act of September 29th, 1890, and should be so adjudged. 26 Stat. at L. 496, chap. 1040.

By the last-named act it was among other things provided: "§ 1. That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and continuous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted." "§ 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any state or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any state, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line." 26 Stat. at L. 496, chap. 1040.

[36] The contention of the government renders it necessary to ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2d, 1864.

By that act the Northern Pacific Railroad Company was created a corporation, with authority to build a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota, westerly by the most eligible route, as should be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget's sound, "with a branch *via* the valley of the Columbia river to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus." The grant to that company was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, *not* reserved, sold,

granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections."

By other sections of the act it was provided: § 6. "That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the *general route* shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, *except by said company, as provided [37] in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act To Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty-eight hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale." § 8. "That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six." By § 20 it was declared that "Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act." 13 Stat. at L. 365, chap. 217.

On the 6th day of March, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, addressed to Mr. Usher, then Secretary of the Interior, the following communication: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the state of Wisconsin, to a point on Puget sound, in Washington territory, *via* the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found

[38] necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company* may be marked and withdrawn from sale in conformity to law."

Under date of March 9th, 1865, Secretary Usher wrote to the Commissioner of the General Land Office as follows: "Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the 6th instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3d and 6th sections of the act of Congress, approved July 2d, 1864, should you perceive no objection, I think that the odd-numbered sections along the line for 10 miles in width on each side in Minnesota and Wisconsin, and for 20 miles in width on each side along that part of the line extending through the territories westward to Puget sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress."

No immediate reply seems to have been made to the letter of Secretary Usher. But on June 22d, 1865, Mr. Wilson, Commissioner of the General Land Office, addressed to Mr. Harlan, then Secretary of the Interior, a communication in which he referred to the above letter of Secretary Usher, and in which he assigned many reasons why the Perham map was wholly inadequate for the purposes intended to be accomplished by it; namely, the withdrawal for the benefit of the Northern Pacific Railroad Company of all the public lands within the exterior lines indicated by that map. Among other things Mr. Wilson said in his communication: "Of course, no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington territory, because over that territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced and survey *of railroad established, in like manner as indicated under first head. A general withdrawal upon conjectural or uncertain basis might result in shutting out from settlement large bodies of land which an actual survey would show not within the grant, while lands would be omitted from the withdrawals which the survey might require to be included. Then, it is not sound policy nor is there any warrant in our land legislation for doing any act the tendency of which would give preference to satisfy a grant on such a stupendous scale as this, while individual claims under our general system of land laws, homestead,

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pre-emption, and sales would be unaided by any such preliminary discriminating proceeding. The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation; would be a prejudice to the interest of the railroad grant itself in excluding settlers and immigrants, whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all the different acts of land legislation may be at the same time in full operation, giving precedence to no one law over another, unless where the term of the law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law. For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connection of said portions with the lines of the public surveys, yet respectfully submits the foregoing considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office."

*On the 10th day of April, 1869, Congress [40] passed a joint resolution granting a right of way for the construction of a railroad from a point at or near Portland, Oregon, to a point west of the Cascade mountains in Washington territory. That resolution provided: "That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget sound, to be determined by said company, and also to connect the same with its main line west of the Cascade mountains, in the territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof; *Provided*, That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided, further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed." 16 Stat. at L. 57. No action was taken under that resolution because

it contained no grant of lands; and it is not contended that it has any material bearing on this case. It is referred to merely as part of the history of the grant to the Northern Pacific Railroad.

After the map of the definite location of the Oregon Company had been filed and accepted,—namely, on the 31st of May, 1870,—Congress passed a joint resolution authorizing the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road, “and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; . . . and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main *road to some point on Puget sound, *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the state of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points.” 16 Stat. at L. 378. As said by Mr. Justice Lamar, when Secretary of the Interior: “By this resolution the designation of the lines of the road was changed; that which by the granting act [July 2d 1864] was known as the branch line (*via* the valley of the Columbia river to a point at or near Portland, in the state of Oregon) was changed to main road or main line, and that which had been designated as main line (crossing the Cascade mountains to Puget sound) was changed to branch line.” 6 U. S. Land Dec. 400; *United States v. Northern P. R. Co.* 152 U. S. 284, 299, 38 L. ed. 443, 449, 14 Sup. Ct. Rep. 598.

On the 4th day of August, 1870, two maps constituting a map of general route of the Northern Pacific Railroad Company were

presented to the Secretary of the Interior. The bill alleged that those maps designated a route following the *Columbia river from [42] Wallula, Washington territory, to a point on the north side of that river opposite Portland, Oregon, and that the Secretary of the Interior on the 13th day of August, 1870, in due form accepted them and directed the withdrawal of lands opposite that line. Withdrawals were accordingly made August 13th, 1870, and October 27th, 1870, and they embraced the lands here in controversy. The bill referred to these maps as maps of “general route,” but in an amended bill the government reserved the right to insist, if it should be thereafter advised to do so, that the map filed August 4th, 1870, and the one filed March 6th, 1865, “were maps of definite location of said Northern Pacific Railroad of its line from Wallula Junction to Portland, Oregon.”

There never was any withdrawal of indemnity lands on the proposed line between Wallula and Portland, nor any *definite location or construction* of the road of the Northern Pacific Railroad Company *opposite to the lands in suit*.

Proceeding to the consideration of the case upon its merits, we observe that many questions of difficulty and importance have been discussed by learned counsel both at the bar and in their printed arguments, which we do not deem it necessary to determine. In our judgment the case is within a very narrow compass.

What was the extent of the grant of public lands made to the Northern Pacific Railroad Company by the act of July 2d, 1864? That grant did not embrace all the odd-numbered sections within the exterior lines of any general route that might have been adopted by the company, nor all within the 40 miles in width that might have been surveyed under the order of the President (§ 6) on each side of the entire line of the road after such general route had been designated. It was in the nature of a “float,” no right or title to any particular sections becoming certain until a definite location of route. *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 742, 26 L. ed. 456, 457; *Van Wyck v. Knevals*, 106 U. S. 360, 366, 27 L. ed. 201, 203, 1 Sup. Ct. Rep. 336; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 634, 28 L. ed. 1122, 1123, 5 Sup. Ct. Rep. 566; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Desert *Salt Co. v. Tarpey*, 142 U. S. [43] 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 38, 36 L. ed. 64, 65, 12 Sup. Ct. Rep. 362; *United States v. Southern P. R. Co.* 146 U. S. 570, 594, 36 L. ed. 1091, 1097, 13 Sup. Ct. Rep. 152; *Menotti v. Dillon*, 167 U. S. 703, 719, 42 L. ed. 333, 338, 17 Sup. Ct. Rep. 945; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

In *Buttz v. Northern P. R. Co.* 119 U. S. 55, 71, 72, 30 L. ed. 330, 336, 7 Sup. Ct. Rep. 107, 108, this court, speaking by Mr. Justice Field, referred to the act of 1864, and said

that it contemplated "the filing by the company, in the office of the Commissioner of the General Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights. . . . Nor is there anything inconsistent with this view of the 6th section as to the general route, in the clause in the 3d section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed."

In *United States v. Northern P. R. Co.* 152 U. S. 284, 296, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 603, it was held that "the act of 1864 granted to the Northern Pacific Railroad Company only public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time its line of road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office." Subsequently in *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 629, 41 L. ed. 1139, 1142, 17 Sup. Ct. Rep. 674, it was said that "the act of July 2d, 1864, under which the railroad company claims title, excluded from the grant made by it all lands that were not, at the time the line of the road was definitely fixed, free from pre-emption 'or other claims or rights.'"

[44] If, therefore, the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of "general route,"—and nothing more can possibly be claimed for it,—these lands could not be regarded as having *been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line.

There are some general expressions in *Buttz v. Northern P. R. Co.*, above cited, which, counsel insists, indicate a different view. In that case Mr. Justice Field said that when the general route of the Northern Pacific Railroad was fixed and information thereof given to the Land Department by filing the map of such route, "the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." This language was too broad if it is construed to express the thought that public lands when within the exterior lines of a "general route" are "appropriated" from the time the map of such route is filed, so as to prevent them from be-

ing granted by Congress to, and from being earned by, another railroad corporation prior to the filing of a map of definite location by the company designating such general route. In *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 635, 636, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 676, 677, this court, referring to the act of July 2d, 1864, said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper. Provision for the indemnification of the company in such an emergency was made by a clause in the act of 1864, providing that wherever, prior to the date of definite location, 'any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall *be selected [45] by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of such alternate sections.' 13 Stat. at L. 368, chap. 217. Hence it was said in *Barden v. Northern P. R. Co.* 154 U. S. 288, 320, 38 L. ed. 992, 999, 14 Sup. Ct. Rep. 1030, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time." In the same case it was also observed: "Much was said at the bar as to the decision of this court in *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100. On one side it is said that that case construes the 6th section of the act of 1864 as excluding the possibility of any right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side it is contended that the only point necessary to be determined and the only one judicially determined in that case was that the defendant could not initiate a pre-emption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the *Buttz Case* involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form prior to the definite location of its road to purchase lands as mineral lands that were within the exterior lines of its general route. Mr. Justice Field delivered the opinion in the *Buttz Case*, and, speaking for the court in *Barden v. Northern P. R. Co.*, above cited, stated that the grant in that act excepted the privilege of exploring for mineral lands. For the reasons stated we adjudge that the lands in question were excluded from the grant of 1864 by reason of the pendency of record, at

the time of the definite location of the plaintiff's road, of application to purchase them as mineral lands, such applications being in the form prescribed by the acts of Congress that related to such lands and undetermined when the company filed its map of definite location."

[46] *We take it, then, to be indisputable that even if the Perham map of 1865 were regarded as a sufficient map of the "general route" of the Northern Pacific Railroad, and not, to use the language of Judge Ross in this case, a mere sketch or diagram unauthenticated by any engineer or officer charged with the duty of designating such a route, nothing stood in the way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such map was filed in the Land Department and before a definite location of the Northern Pacific Railroad. Such a statute was that of July 25th, 1866, granting lands to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon. That the lands here in dispute—even if within the general route of the Northern Pacific Railroad as defined by the Perham map of 1865—are within the exterior limits of the grant to the Oregon Company, contained in the subsequent act of 1866, is expressly averred in the bill filed by the United States.

Upon the question whether it was within the power of Congress to have granted to the Oregon Company in 1866 lands embraced within the exterior lines of the general route as defined by the Perham map of 1865, reference need only be made to *United States v. Union P. R. Co.* 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190, and *Menotti v. Dillon*, 167 U. S. 703, 719, 720, 42 L. ed. 333, 338, 17 Sup. Ct. Rep. 945.

In *Menotti v. Dillon* the principal question was as to the rights acquired by a railroad company in virtue of its having filed its map of general route and the withdrawal by executive order of certain lands within the exterior lines of that route from pre-emption, private entry, and sale,—all before the passage of a subsequent act under which one of the parties claimed title to the land in dispute, the other claiming under the railroad company. This court said: "It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that these lands having been withdrawn from pre-emption, private entry, and sale by the executive order of January 30th, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of

[47] the 1st section distinctly indicates *certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act in express words confirmed to the state, 'in all cases,' lands which the state had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption,

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private entry, and sale pursuant to the filing by the railroad company of its map of general route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the state lands which, at the time, were simply withdrawn from pre-emption, private entry, or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30th, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend, or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of 'a float,' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion and prior to the definite location of its line, sell, reserve, or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 639, 644, 28 L. ed. 1122, 1125, 1127, 5 Sup. Ct. Rep. 566; *United States v. Southern P. R. Co.* 146 U. S. 570, 593, 36 L. ed. 1091, 1097, 13 Sup. Ct. Rep. 152. In *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 676, we said: 'The company acquired, by fixing its general route, only an inchoate right to the odd-numbered *sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.'

Again, in the same case: "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale lands within the general route of a railroad, is to preserve the lands unencumbered until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, 'not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving, or

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otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true where the grant is made subject to the reserved power of Congress to add to, alter, amend, or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired in virtue of the act making the grant, and of the accepted map of its general route, was to earn such of the lands within the exterior lines of that route as were *not* sold, reserved, or disposed of, or to which no pre-emption or homestead claim had attached at the time of the definite location of its road. That act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress, at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes [49] stated in its provisions, and to *that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard v. Des Moines & Ft. D. R. Co.* 122 U. S. 167, 174, 30 L. ed. 1123, 1125, 7 Sup. Ct. Rep. 1149. That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road. We cannot doubt that the act of 1866 was a legal exertion of the power of Congress over the public domain."

As the grant contained in the act of July 2d, 1864, did not include any lands that had been reserved, sold, granted, or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25th, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870, the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as, prior to the forfeiture act of September 29th, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute,— there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it. Of course, if the route of

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the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented.

In opposition to the views we have expressed it may be said that the clause in the act of July 25th, 1866, providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon Company in lieu of any that should "be found to have been granted, sold, reserved, occupied by *homestead settlers, pre-empted, or otherwise disposed of," shows that Congress did not intend to include in, but intended to exclude from, the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25th, 1866, and had not, *at that time*, or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed. It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific Railroad not having been definitely located prior to the passage of the forfeiture act of 1890) the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location.

Touching the joint resolution of May 31st, 1870, it is clear that, whatever may be its scope, no previously vested right of the Oregon Company was affected or was intended to be affected by that resolution. On the contrary, the resolution on its face indicates that some of the lands which the Northern Pacific Railroad Company may have been entitled to earn had been or might have been granted or otherwise disposed of "subsequent to the passage of the act of July 2d, 1864," and in lieu thereof that company was authorized under the direction *of the Secretary of the Interior to receive other lands. [51] The only effect, therefore, of the joint resolution, as between the Northern Pacific Railroad Company and the Oregon Company, was to confer upon the former company the right to receive other lands in lieu of those ap-

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propriated by the latter company under the authority of the act of 1866.

Passing by, as unnecessary to be determined, other questions discussed by counsel, we adjudge that the circuit court erred in canceling the patents referred to in the bill, and that the reversal by the circuit court of appeals of the decree of the circuit court, and the remanding of the cause with directions to dismiss the bill, was right.

The decree of the Circuit Court of Appeals is affirmed.

Mr. Justice **McKenna** did not participate in the decision of this case.

JOHN D. WILCOX, *Appt.*,
v.

EASTERN OREGON LAND COMPANY.

(See S. C. Reporter's ed. 51-57.)

Public lands—grant to Pacific Railroad Company—effect of filing map of general route.

Land within the exterior lines of the general route of the Northern Pacific Railroad was not reserved, sold granted, or otherwise appropriated by the grant to that company made by the act of Congress of July 2, 1864, so as to prevent Congress from otherwise disposing of it at any time before the map of definite location was filed.

[No. 23.]

Submitted November 15, 1897. Decided January 8, 1900.

A PPEAL from a decision of the United States Circuit Court of Appeals for the Ninth Circuit reversing a decree of the Circuit Court dismissing a bill for the cancellation of a patent for lands. *Affirmed.*

See same case below, 48 U. S. App. 330, 79 Fed. Rep. 719, 25 C. C. A. 164.

The facts are stated in the opinion.

Mr. **John M. Gearin** submitted the cause for appellant.

Mr. **James K. Kelly** submitted the cause for appellee. Messrs. **Nixon & Dolph** were with him on the brief.

Contentions of counsel are in substance the same as in *United States v. Oregon & C. R. Co.* ante, p. 358.

[51] *Mr. Justice **Harlan** delivered the opinion of the court:

This case depends in part upon the construction of the act of Congress of July 2d, 1864 (13 Stat. at L. 365, chap. 217), in aid of

[52] the *construction of the Northern Pacific Railroad. The provisions of that act, so far as they are material to the present controversy, are fully set forth in the opinion in *United States v. Oregon & C. R. Co.*, just decided, 176 U. S. 28, 20 Sup. Ct. Rep. 261, ante, p. 358.

By an act of February 25th, 1867, Congress, in aid of the construction of a military wagon road in Oregon from Dalles City

on the Columbia river, by way of Camp Watson, Canyon City, and Mormon or Humboldt basin, to a point on Snake river opposite Fort Boise in Idaho territory, granted to the state of Oregon "alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided, That . . . any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are, hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: And provided further, That the grant hereby made shall not embrace any mineral lands of the United States.*" 14 Stat. at L. 409, chap. 77.

Other sections of that act are as follows: "§ 2. That the lands hereby granted to said state shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States." "§ 4. That the state of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act. § 5. That lands hereby granted to said state shall be disposed of only in the following manner, that is to say: when the governor of said state shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the *land hereby granted, [53] not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States. § 6. That the United States surveyor general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said state shall have enacted the necessary legislation to carry this act into effect."

Subsequently, by an act approved October 20th, 1868, the state of Oregon granted to the Dalles Military Road Company all the lands, right of way, rights, privileges, and immunities granted or pledged by the above act of February 25th, 1867, "for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress, upon the conditions and limitations therein prescribed." The state also, by the same act, granted and pledged to that company "all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this state to aid in the con-

struction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road," and authorized it to locate the lands mentioned in the 4th section of the act of Congress, subject to the approval of the governor. Sess. Laws 1868, p. 3.

The material facts out of which the present suit arises are alleged in the bill, and are substantially admitted in the answer. They are as follows:

Prior to June 23d, 1869, the Dalles Military Road Company had duly surveyed and *definitely located* its line of road between the points designated by Congress and the state; had fully constructed and completed its road, and had filed in the office of the governor a plat or map upon which was traced and shown the definite location of the road from Dalles City to its terminus on Snake river, as well as the limits of the place and indemnity lands embraced by the act of Congress.

[54] On the 23d day of June, 1869, the governor certified that "such plat or map had been duly filed in his office, and that it showed the route upon which the road was constructed in accordance with the above acts of Congress and of the legislature of Oregon; also, that he had made a careful examination of the road since its completion, and that the same had been built in all respects as required by those acts, and had been accepted.

The above map and the certificate of the governor were filed by the company in the office of the Secretary of the Interior, and on December 18th, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company the odd-numbered sections within 3 miles from each side of the wagon road, as delineated and shown on the maps so filed.

By an act of Congress approved June 18th, 1874, it was provided that "in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to which the state is already entitled." 18 Stat. at L. 80, chap. 305.

On the 31st day of May, 1876, Edward Martin, in good faith and for a valuable consideration, \$125,000, purchased from the Military Road Company all the lands em-

braced in the grant to it, except such as it had previously sold, and received a conveyance therefor. Bad faith is not imputed to Martin, and it is only claimed that when he purchased those lands he was chargeable with constructive notice of the acts of Congress, and that no title could pass to the Military Road Company *consistently with the above act of July 2d, 1864, granting lands to the Northern Pacific Railroad Company. [55]

By different mesne conveyances, beginning with a deed from Edward Martin dated January 31st, 1877, and ending with a conveyance to it of date August 11th, 1884, the Eastern Oregon Land Company, a California corporation, became the owner—if the original sale by the Military Road Company passed any title—of all the lands purchased by Martin in 1876.

Among the lands in place that had been selected by the Military Road Company were the northeast quarter and the southeast quarter of section 15 in township 5 south of range 17 east of the Willamette meridian, which was situated in Sherman county, and within the limits of the grant of land in place to the state by the above act of February 25th, 1867. That particular body of land was on the south side of the line of "general route" of the Northern Pacific Railroad as delineated on a map filed by that company on the 13th day of August, 1870, and more than 20 and less than 40 miles from that line. There never was any definite location of the line of that road opposite this land.

The above tract of land was opened for settlement and sale by the Secretary of the Interior,—that officer, the bill alleged, being of opinion that it was excepted from the grant to the state of Oregon in the act of February 25th, 1867, and was embraced by the act of July 2d, 1864, and by the map of general route filed by the Northern Pacific Railroad Company on the 13th day of August, 1870. In opening this land to settlement and sale the Secretary proceeded, as he supposed, by authority of the forfeiture act of September 29th, 1890, by which the United States resumed title to and restored to the public domain all lands theretofore granted in aid of the construction of railroads, and which were opposite to and conterminous with the portion of the railroad not then completed and in operation, for the construction or benefit of which such lands were granted. 26 Stat. at L. 496, chap. 1040.

Thereupon John D. Wilcox settled upon the particular land above described, and made application to purchase the same under the act of Congress of April 24th, 1820, making further *provision for the sale of public lands. 3 Stat. at L. 566, chap. 51. Such proceedings were thereafter had on his application that the President on the 28th of September, 1884, issued a patent to him for that tract. Of the application of Wilcox for the purchase of the land, the Eastern Oregon Land Company had no notice, and therefore, even if its title were not good, it could not have availed itself of the privilege given by the act of Congress of March 3d, 1887 (24 [56]

Stat. at L. 556, chap. 378) to purchase the land.

The present suit was brought against Wilcox by the Eastern Oregon Land Company in the circuit court of the United States for the district of Oregon. The bill alleged that a patent having been issued to Wilcox, the Interior Department had no longer jurisdiction to give to it a patent as required by the above act of June 18th, 1874, until the patent to the defendant has been canceled and set aside. As the patent to Wilcox was therefore a cloud upon its title, the plaintiff sought a decree setting it aside, declaring the company to be the owner of the land in Wilcox's possession, and ordering the defendant to convey the land to it. The circuit court dismissed the bill. Upon appeal to the circuit court of appeals that decree was reversed, and a decree ordered to be entered in favor of the land company. Thereupon Wilcox appealed to this court.

We adjudge, as in *United States v. Oregon & C. R. Co.*, just decided, 175 U. S. 28, 20 Sup. Ct. Rep. 261, *ante*, 358, that the act of July 2d, 1864, relating to the construction of the Northern Pacific Railroad, only granted lands that were *not* reserved, sold, granted, or otherwise *appropriated*, and free from pre-emption or other claim or rights, at the time the line of that road was *definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of the *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of "definite location," and that such lands, if not otherwise identified at the date of the passage of the later act than by a plat or map of "general *route," were not excluded from the operation of such an act as lands previously "reserved, sold, granted, or otherwise appropriated," by the act of 1864.

As the lands here in dispute are embraced by the granting clause of the act of February 25th, 1867, giving lands to the state of Oregon, and are within the lines of the definite location of the Dalles Military Road as shown by its map filed in the Land Department and approved by that Department December 18th, 1869, and as the route of the Northern Pacific Railroad Company was not then and was not thereafter definitely fixed opposite the lands in dispute, they were earned and appropriated by the Military Road Company under the act of February 25th, 1867, and cannot be regarded as embraced by the act of July 2d, 1864, for the benefit of the Northern Pacific Railroad Company, which could take under its grant *only* such lands as had *not* been appropriated under the authority of Congress when its line was definitely fixed.

This conclusion is inevitable, unless it be adjudged that it was beyond the power of Congress to appropriate for the Dalles Military Road lands within the general route, but not within any line of definite location established by the Northern Pacific railroad.

For the reasons stated in *United States v. Oregon & C. R. Co.* we cannot so adjudge.

Upon the authority of that case the *decree of the Circuit Court of Appeals* in this case, reversing the decree of the Circuit Court with instructions to enter a decree in favor of the plaintiff, the Eastern Oregon Land Company, is *affirmed*.

Mr. Justice McKenna did not participate in the decision of this case.

E. I. MESSINGER, *Appt.*,

[58]

v.

EASTERN OREGON LAND COMPANY.

(See 8 C. Reporter's ed. 58, 59.)

Public lands—grant to Pacific Railroad Company—effect of filing map of general route.

Land within the exterior lines of the general route of the Northern Pacific Railroad was not reserved, sold, granted, or otherwise appropriated by the grant to that company made by the act of Congress of July 2, 1864, so as to prevent Congress from otherwise disposing of it at any time before the map of definite location was filed.

[No. 24.]

Submitted November 15, 1897. Decided January 8, 1900.

A PPEAL from a decision of the United States Circuit Court of Appeals for the Ninth Circuit reversing a decree of the Circuit Court dismissing a bill for the cancellation of a patent for lands. *Affirmed*.

See same case below, 48 U. S. App. 330, 79 Fed. Rep. 719, 25 C. C. A. 164.

The facts are stated in the opinion.

Mr. John M. Gearin submitted the cause for appellant.

Mr. James M. Kelly submitted the cause for appellee. Messrs. Nixon & Dolph were with him on the brief.

Contentions of counsel are in substance the same as in *United States v. Oregon & C. R. Co. ante*, p. 358.

*Mr. Justice Harlan delivered the opinion [58] of the court:

The parties in this case and in *Wilcox v. Eastern Oregon Land Co.* stipulated that the bills, answers, decrees, assignments of error, and all other papers and proceedings in both causes were exactly alike, with the exception that in this case it is alleged that the land patented to the defendant, Messinger, was patented under the provisions of the act of Congress approved May 20th, 1862, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain" (12 Stat. at L. 392, chap. 75), and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots 3 and 4 of section 3, township 2 south, of range 16 east of the Willamette meridian, in Oregon, and were situated within 20 miles of the line of the

general route of the Northern Pacific Railroad Company's road as designated on its map of August 17th, 1870, and that the patent was dated the 17th day of August, 1894.

[59] It is also stipulated by the parties to the two suits, by their respective attorneys, that, unless this court otherwise ordered, only the record in the Wilcox suit should be printed, and that the appeal in this case might be heard and submitted without printing the record thereof.

Upon the authority of *United States v. Oregon & C. R. Co.* 175 U. S. 28, 20 Sup. Ct. Rep. 261, *ante*, 358, and *Wilcox v. Eastern Oregon Land Co.*, just decided, 175 U. S. 51, 20 Sup. Ct. Rep. 269, *ante*, 368, the decree of the Circuit Court of Appeals, reversing the judgment of the Circuit Court and directing a decree in favor of the plaintiff, the Eastern Oregon Land Company, is affirmed.

Mr. Justice McKenna did not participate in the decision of this case.

C. G. BLAKE and Rogers, Brown, & Company, *Plffs. in Err.*,
v.

CALVIN M. McCLUNG, William P. Smith, William B. Keener, Franklin H. McClung, Jr., and Charles J. McClung, Jr., Partners as C. M. McClung & Company, *et al.*

(See S. C. Reporter's ed. 59-68.)

Constitutional law—equal privileges and immunities of citizens—discrimination in favor of resident as against nonresident creditors of insolvent corporation.

Giving priority to creditors residing in the state over those who reside out of the state, in distributing the assets of an insolvent corporation, is in violation of U. S. Const. art. 4, providing for equal privileges and immunities of citizens in the several states.

[No. 466.]

Submitted December 18, 1899. Decided January 8, 1900.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree with respect to its conformity to a mandate on former writ of error in the same case. Reversed.

See same case below, 52 S. W. 1001.

The facts are stated in the opinion.

Messrs. Heber J. May and Tully R. Cornick submitted the cause for plaintiffs in error.

Mr. John W. Green submitted the cause for defendant in error. Mr. S. C. Williams was with him on the brief.

Contentions of counsel sufficiently appear in the opinion.

[60] *Mr. Justice Harlan delivered the opinion of the court:

This case has been heretofore in this court

NOTE.—As to constitutional equality of privileges, immunities, and protection, see *Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and *note*.
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upon writ of error brought to review a final decree of the supreme court of Tennessee. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

That decree was rendered in a suit instituted by C. M. McClung & Co. for the administration of the property and affairs of the Embreeville Freehold, Land, Iron, & Railway Company, Limited,—an insolvent British mining and manufacturing company doing business in Tennessee. Among the creditors who filed intervening petitions in the suit were C. G. Blake, a citizen of Ohio; Rogers, Brown, & Company, the members of which firm were also citizens of Ohio; and the Hull Coal & Coke Company, a corporation of Virginia.

It was adjudged by the supreme court of Tennessee that all the creditors of the British corporation who resided in Tennessee were entitled to priority of payment out of its assets, real and personal, over all other creditors who did not reside in Tennessee, whether they were residents of other states of the United States or of the Kingdom of Great Britain; and that all creditors residing out of Tennessee, whether in other states of the Union or in the Kingdom of Great Britain, had the right and must share equally and ratably in the distribution of the assets of the company after the residents of Tennessee should have been first paid in full.

The decree so rendered was in conformity with a statute of Tennessee passed March 19, 1877, the 5th section of which provided: "That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities, and engagements of the said corporations, to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts. Nevertheless, creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple-contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts [61] which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this state, and the property of its citizens is or may be liable to taxation, but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may be hereafter granted to citizens or corporations for

the purpose of encouraging manufacturers in this state, or otherwise." Acts of Tennessee 1877, chap. 31, p. 44.

The validity of that statute was drawn in question by Blake and Rogers, Brown, & Company, as well as the Hull Coal & Coke Company, who specially claimed that the judgment based upon the statute had denied to them respectively rights secured by the 2d section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," as well as by the 1st section of the Fourteenth Amendment, declaring that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The supreme court of the state sustained the constitutionality of the statute, and from its final judgment Blake, and Rogers, Brown, & Company, and the Hull Coal & Coke Company prosecuted a writ of error to this court.

The general question presented for determination by this court was thus stated in its opinion: "Beyond question, a state may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it [62] exclude *citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other states, and not citizens of the state in which such administration occurs?"

Upon a review of prior decisions this court said: "The foundation upon which the above cases rest cannot, however, stand if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such

terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should *first be applied to meet [63] its obligations to residents of that state, although liability for its debts and engagements was 'to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts.' But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors, citizens of other states, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other states as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in states other than the one in which it is located?"

Referring to the established rule that the property of a corporation was a trust fund for the payments of its debts in the sense that when it is lawfully dissolved and its affairs closed, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders, this court further said: "These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that state, without making any distinction *between them*. Yet the courts of that state are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other states to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that state. We hold such discrimination against citizens of other states to be repugnant to the 2d section of the Fourth Article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe *the conditions upon which [64] foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or

impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

Again: "The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the state a fixed amount to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other states. It permitted that corporation to contract with citizens of other states, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other states should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid—not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the state, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but out of whatever assets of any kind the corporation might have in that state when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other states, those citizens cannot share in its general assets upon terms of equality with citizens of that state. If such legislation does not deny to citizens of other states, in respect of matters growing out of ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result. We adjudge that when the general property and assets of a private [65] *corporation, lawfully doing business in a state, are in the course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

In relation to the Hull Coal & Coke Company this court held that it was not a citizen of the United States within the meaning of the 2d section of the Fourth Article of the

Constitution; and, although a "person" within the meaning of the Fourteenth Amendment, that company was not deprived of its property without the due process of law guaranteed by that Amendment, and not being within the jurisdiction of Tennessee it could not invoke the protection of the clause forbidding the denial by a state of the equal protection of the laws to persons within its jurisdiction.

By the final order of this court the judgment of the state court was affirmed as to the Hull Coal & Coke Company, upon the ground that no right, privilege, or immunity secured to it by the Constitution of the United States had been denied. As to the other plaintiffs in error—Blake and Rogers, Brown, & Company—the judgment was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

After the decision here, the cause was again heard in the supreme court of Tennessee on the motion of Blake and Rogers, Brown, & Company for a decree in conformity with the opinion and mandate of this court.

That court adjudged: "1. That the effect and purpose of *the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown, & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown, & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron, & Railway Company, Limited, upon the basis of a broad distribution of the assets of said corporation among all of its creditors, without preference or priority, as though the act of 1877, chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class, wherever residing, and that there shall be paid to the said C. G. Blake and the said Rogers, Brown, & Company the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained. 2. It is further adjudged and decreed, that after thus setting apart to the said C. G. Blake and Rogers, Brown, & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron, and Railway Company, Limited, is applicable *first* to the payment of the indebtedness due to the creditors of said corporation *residing within the state of Tennessee*, as provided in § 5 of chap. 31 of the Acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied *pro rata* to the payment of the debts of the alien and nonresident creditors of said corporation, other than the said C. G. Blake and Rogers, Brown, & Company." The cause was remanded to the court of original jurisdiction for the collection and distribution of the fund then in that court, and for the making of such further orders as might be found necessary to the final settlement of the cause.

Mr. Justice Beard dissented upon grounds stated in his opinion, which is published in 52 S. W. Rep. 1001.

[67] Blake and Rogers, Brown, & Company excepted to the action of the state court "in determining that creditors residing in Tennessee were entitled, under the act of 1877, chap. 31, § 5, to any priority or preference, by way of increased *percentages in distribution," over them, on the ground that such priority and preference was in violation of § 2 of Article Four of the Constitution of the United States, and was not consistent with the opinion and mandate of this court. The present writ of error was brought to review the last judgment.

We are constrained to hold that the judgment of the supreme court of Tennessee is not in conformity with the opinion and mandate of this court. The thought expressed in our former opinion was that Blake and Rogers, Brown, & Company, citizens of Ohio and general creditors of the Embreeville Freehold, Land, Iron, & Railway Company, were entitled, in the distribution in Tennessee of the assets of that insolvent corporation, to stand upon the same plane with citizens of Tennessee who were also general creditors of the same corporation; and that the judgment of the state court heretofore under review (172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165) so far as it gave priority to citizens of Tennessee over citizens of other states, was inconsistent with the 2d section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

By the judgment now under review certain creditors, solely because of their being citizens of Tennessee, are accorded advantages in the distribution of the assets in question which are denied to other creditors solely because of their being citizens of another state than Tennessee. That judgment gives to the plaintiffs in error respectively their percentage of the entire assets of the insolvent corporation upon the basis of equality among all the creditors, *wherever residing*, and, that being done, the court in effect directs the idea of equality among all creditors to be abandoned, and "all the rest and residue of the estate" of the insolvent corporation to be applied *first* to the payment of the debts due to citizens of Tennessee. Thus the decree gave a decided advantage to Tennessee creditors over Ohio creditors, when, as Mr. Justice Beard correctly said, the cause was remanded by this court substantially with direction that the state court [68] should see *to it that no advantage accrued to Tennessee creditors over the Ohio creditors.

It is not within the province of this court to prescribe the form of a decree to be entered for the distribution of the assets in question. But it is both its province and duty to adjudge, in accordance with the supreme law of the land, as we now do, that the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the

assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee. No decree giving to the latter privileges or advantages that are denied to the former is, as we have heretofore adjudged, consistent with the Constitution of the United States. In the distribution of what is called in the decree "all the rest and residue of the estate of the Embreeville Freehold, Land, Iron, & Railway Company," or in the proceeds thereof, the plaintiffs in error should be placed upon the same plane of equality with Tennessee creditors. The plaintiffs in error cannot be denied participation in any of the assets of the insolvent corporation that are taken into account when ascertaining the rights of the Tennessee creditors and the amounts to be paid to them on their respective demands. Whatever rule is applied for the benefit of the latter must be applied in behalf of the Ohio creditors.

The judgment is reversed, and the cause remanded for such further proceedings as may be consistent with this opinion.

Reversed.

STERLING R. HOLT, Joel A. Baker, Thomas Taggart, George Wolf, William A. Bell, and Charles A. Stuckmeyer, *Appts.*,

v.

INDIANA MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 68-73.)

Courts—Federal—jurisdiction of suits to restrain taxes on patent rights.

1. A suit to enjoin state taxes as illegal because levied in effect on patents or patent rights is not one "arising under the patent laws," of which the circuit court of the United States can take jurisdiction under U. S. Rev. Stat. § 629, cl. 9.
2. The rights for the deprivation of which suits may be brought in a circuit court of the United States under U. S. Rev. Stat. §

NOTE.—State taxation of patent rights.

In Pennsylvania the capital stock of a corporation which is issued for patent rights merely, and not for any tangible property or goods manufactured under such patents, is held not taxable by the state. *Com. v. Philadelphia Co.* 157 Pa. 527, 27 Atl. 378; *Com. v. Edison Electric Light Co.* 157 Pa. 529, 27 Atl. 379.

That a state cannot tax the capital stock of a corporation which is invested in patent rights, whether originally issued or merely assigned to the company, was also decided in *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111, and *Com. v. Westinghouse Air Brake Co.* 151 Pa. 276, 24 Atl. 1111, 1113.

But a subordinate or subsidiary corporation which merely leases telephones from the parent company, which is a foreign corporation, is not exempt from taxation on its capital stock on the ground that it is invested in patent rights, nor even on stock issued to the foreign company as consideration for the leases. *Com. v. Central Dist. & Printing Teleg. Co.* 145 Pa. 121, 22 Atl. 841.

The same is held in respect to stock issued to a nonresident for the license of a patented apparatus used by a gas company. *Com. v. Philadelphia Co.* 145 Pa. 142, 22 Atl. 843.

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629, cl. 16, for the protection of rights secured by the Constitution of the United States or by any law providing for equal rights of citizens, include civil rights only, as the provisions of that section were brought forward from the act of Congress of April 20, 1871, to enforce the provisions of the 14th Amendment.

8. A suit to restrain the collection of taxes not exceeding \$2,000 in amount, though arising under the Constitution or laws of the United States, is not within the jurisdiction of a circuit court of the United States under the act of Congress of August 13, 1888, § 1; and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

[No. 30.]

Argued December 19, 20, 1899. Decided January 15, 1900.

APPEAL from a decision of the Circuit Court of the United States for the District of Indiana, enjoining the collection of taxes on capital stock the value of which was derived from patent rights. *Reversed.*

Statement by Mr. Chief Justice **Fuller**:

- [69] *This suit was brought in the circuit court of the United States for the district of Indiana by the Indiana Manufacturing Company, a corporation organized and existing under the laws of the state of Indiana,

The same is held as to a tax on the stock of an electric-light company issued for the use of patented appliances. *Com. v. Brush Electric Light Co.* 145 Pa. 147, 22 Atl. 844; *Com. v. Edison Electric Light Co.* 145 Pa. 131, 22 Atl. 841, 845; *Com. v. Chester Electric Light & P. Co.* 145 Pa. 139, 22 Atl. 846.

In New York, also, patent rights granted by the United States for inventions are not subject to assessment under the taxing power of the state. *People ex rel. Edison Electric Illuminating Co. v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269.

And the amount invested by a corporation in United States patent rights must be deducted from an assessment upon its personal property. *People ex rel. New York & N. J. Teleph. Co. v. Neff*, 15 App. Div. 8, 44 N. Y. Supp. 46.

Although some of the prior New York cases seem on their face to be in conflict with these decisions, they are not really so. Thus it has been held in New York that although the capital stock of a corporation or a part of it is invested in patents, no part of the corporate franchise or business is exempt from taxation on that account. This was decided in *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 61 Hun, 53, 15 N. Y. Supp. 711, although this case was reversed on other grounds in 129 N. Y. 664, 29 N. E. 812.

And the court of appeals rendered a decision to the same effect in *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370.

In this case, although a portion of the capital stock was invested in patents, the court did not discuss the power of the state to impose taxes thereon, but it did declare that it was not error to include the patents in the capital of the company estimated for taxation. The question discussed in the opinion is, Where were the patent rights employed? and the court held that

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against Sterling R. Holt and others, taxing officers of Marion county, Indiana, and of a township in said county, and some others, constituting the board of review of that county, all of whom were citizens of Indiana, to enjoin the collection of certain personal taxes for the years 1892, 1893, 1894, and 1895, assessed upon the capital stock and tangible property of the company. The bill alleged that the larger part of the assessment made by the taxing authorities was for the supposed value of certain rights under letters patent from the United States owned by the company, and which the company insisted were not subject to taxation by the state authorities; that the capital stock, aside from the tangible property, represented solely the supposed value of the letters patent; and that the taxes in respect of the tangible property had been paid by the company. Complainant charged that the assessment was illegal, unconstitutional, and void, and averred that the suit was instituted "to redress the deprivation, under color of a law of the state of Indiana, of a right secured by the laws of the United States, and, further, that it is a suit arising under the patent laws of the United States."

*The circuit court entered a decree, in accordance with the prayer of the bill, perpetually enjoining the collection of the taxes claimed to be due in respect of the capital [70]

they were employed within the state and consequently taxable there.

The fact that stocks and bonds of a corporation were received as proceeds of the sale of patents was also held not to exempt them from taxation, in *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun, 530, 34 N. Y. Supp. 713; *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370.

But the New York statute imposes a tax on the "corporate business or franchise," although the amount of it is determined by reference to the capital stock, and under this statute a tax was upheld by the Supreme Court of the United States in *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, notwithstanding the fact that part of the capital stock was invested in United States bonds which were themselves not taxable by the state. This clearly distinguishes the New York tax from that of Pennsylvania, and the question of a tax on patent rights was left undecided by these New York cases.

The decision of the Supreme Court of the United States in *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, denying the power of a state to tax a corporate franchise granted by Congress unless Congress consents, is cited by McPherson, J., in rendering the opinion of the court of common pleas in the Pennsylvania case of *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111, as showing the invalidity of a state tax on patent rights. His position was approved by the Pennsylvania supreme court, as appears above. Up to this time the only decisions on the question are those of the Pennsylvania and New York courts, but the same reasons which operate to require a denial of state taxes on franchises granted to corporations by Federal authority seem equally applicable against state taxes on patent rights.

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stock, in so far as the value thereof was derived from patent rights or letters patent owned by complainant. An appeal was taken to the circuit court of appeals for the seventh circuit, and dismissed by that court for want of jurisdiction. 46 U. S. App. 717, 80 Fed. Rep. 1, 25 C. C. A. 301.

The circuit court of appeals held that the suit was not one arising under the patent laws of the United States, and that, as the jurisdiction of the circuit court could rest only on the ground that the constitutional rights of complainant were infringed by the laws of the state of Indiana which were repugnant to and in contravention of the Constitution of the United States, an appeal would not lie to that court, and could only be taken directly to this court under § 5 of the judiciary act of March 3, 1891.

Thereupon this appeal was taken.

Messrs. William L. Taylor and John K. Richards argued the cause and, with **Messrs. Merrill Moores and Cassius C. Hadley**, filed a brief for appellants on the question of jurisdiction:

The 16th clause of U. S. Rev. Stat. § 629, has no application to this suit. It relates only to certain civil rights.

Illinois v. Chicago & A. R. Co. 6 Biss. 107, Fed. Cas. No. 7,006.

Whatever be the ground upon which it is sought to enjoin a collection of the tax levied by the state, it must be shown that the amount of the tax in controversy is sufficient to give the court jurisdiction.

Linchan R. Transfer Co. v. Pendergrass, 36 U. S. App. 48, 70 Fed. Rep. 1, 16 C. C. A. 585; *Fishback v. Western U. Teleg. Co.* 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

This is not a suit arising under the patent laws of the United States.

Brown v. Shannon, 20 How. 55, 15 L. ed. 826; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *Albright v. Teas*, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *Marsh v. Nichols, S. & Co.* 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425. See also *United States v. American Bell Teleph. Co.* 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69.

Messrs. William A. Ketcham and Alford R. Hovey filed a brief for appellants on motion to dismiss.

Mr. Chester Bradford argued the cause and, with **Mr. Alonzo G. Smith**, filed a brief for appellee.

[70] ***Mr. Chief Justice Fuller** delivered the opinion of the court:

The decree of the circuit court was entered in March, 1896, and the appeal to this court was not taken until somewhat over one year and six months, though within two years, thereafter. In January, 1898, a motion to dismiss was made on the ground that § 1008

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of the Revised Statutes, giving two years for the bringing of a writ of error or the taking of an appeal to review the judgments or decrees of the circuit or district courts, was repealed by the judiciary act of March 3, 1891. We did not concur in that view, and the motion was denied, though without an opinion. But in *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518, the *reasons will be found for our conclusion [71] that the limit of two years remained unchanged.

In this, as in all cases, if it appears that the circuit court had no jurisdiction, it is the duty of this court to so declare and enter judgment accordingly.

Complainant rested the jurisdiction on clauses 9 and 16 of § 629 of the Revised Statutes.

(1) Section 629 provides that "the circuit courts shall have original jurisdiction as follows: . . . Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

The complaint that the assessment of these taxes was illegal because in effect levied on patents or patent rights did not involve the construction, or the validity, or the infringement of the patents referred to, or any other question under the patent laws. This was not, therefore, a suit "arising under the patent laws," and the circuit court had no jurisdiction on that ground. *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; *Walter A. Wood Moving & Reaping Mach. Co. v. Skinner*, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

(2) The 16th clause of § 629 reads thus: "Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Similar jurisdiction is conferred upon district courts by the 12th clause of § 563 of the Revised Statutes.

Section 1979 of the Revised Statutes provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

*All these provisions were brought forward [72] from the act of April 20, 1871, entitled "An Act To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. at L. 13, chap. 22.

Assuming that they are still in force, it is

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sufficient to say that they refer to civil rights only, and are inapplicable here.

If state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect of the statutes of Indiana, remedies are found in the 1st section of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States; and in § 709 of the Revised Statutes, which gives a review on writ of error to the judgments of the state courts whenever they sustain the validity of a state statute or of an authority exercised under a state, alleged to be repugnant to the Constitution or laws of the United States. *Carter v. Greenhow*, 114 U. S. 317, 29 L. ed. 202, 5 Sup. Ct. Rep. 928, 962; *Pleasants v. Greenhow*, 114 U. S. 323, 29 L. ed. 204, 5 Sup. Ct. Rep. 931, 962.

(3) Treating this bill as setting up a case arising under the Constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over \$2,000 applied, and the taxes in question did not reach that amount. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute. *New England Mortg. Security Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Clay Center v. Farmers' Loan & T. Co.* 145 U. S. 224, 36 L. ed. 685, 12 Sup. Ct. Rep. 817; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

[73] The language of the 1st section of the act of March 3, 1887, as corrected by the act of August 13, 1888, is: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, *of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." 25 Stat. at L. 433, 434, chap. 866. This was carefully considered in *United States v. Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371, and it was held that the sum or value named was jurisdictional, and that the circuit court could not, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded \$2,000. That decision was reaffirmed in *Fishback v. Western U. Teleg. Co.* 161 U. S. 96, 99, 40 L. ed. 630, 631, 16 Sup. Ct. Rep. 506. And the conclusion reached is not affected by the fact that the operation of the act of March 176 U. S.

3, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit courts to this court. *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. Rep. 290, ante, 320.

We are therefore constrained to hold that the circuit court had no jurisdiction.

Decree reversed, with costs, and cause remanded to the Circuit Court with a direction to dismiss the bill.

WILLIAM J. CRUICKSHANK, Montague Hope Rowe Harris, Russell Bleecker, and Mark Bagalley, *Appts.*,
v.

GEORGE R. BIDWELL, Collector of Customs for the Port of New York.

(See S. C. Reporter's ed. 73-82.)

Injunction against enforcement of act of Congress—unconstitutionality of act—adequacy of legal remedy.

A suit to restrain the collector of customs for a port from enforcing the provisions of the act of Congress of March 2, 1897, to prevent the importation of impure and unwholesome tea, on the ground that the act is unconstitutional, cannot be maintained where the sole ground of equity jurisdiction put forward is the inadequacy of the remedy at law, while the matter in dispute is averred to be the value of teas in the collector's hands, which is known, and the right to import teas, since a judgment against the collector would be enforceable, and there is no dispute as to the right to import any teas except those which are below the standard fixed by the law.

[No. 232.]

Argued November 10, 13, 1899. Decided January 15, 1900.

APPEAL from a decision of the Circuit Court of the United States for the Southern District of New York denying an injunction against the collector of customs. *Affirmed*

See same case below, 86 Fed. Rep. 7.

Statement by Mr. Chief Justice Fuller:

*This is an appeal from a decree of the circuit court of the United States for the southern district of New York dismissing on demurrer a bill in equity brought by Cruickshank and others, copartners doing business in the city of New York, against George R. Bidwell, collector of customs for the port of New York. [74]

The bill averred that complainants were engaged in importing teas from Japan into the United States; that during the month of November, 1897, they imported into the United States and entered at the custom house in the port of New York several invoices of tea of the aggregate value of something over \$4,100; that they applied to defendant as collector of customs for per-

NOTE.—As to when an injunction to restrain acts of public officers will be granted, see note to *Mississippi v. Johnson*, 18 L. ed. U. S. 437.

mission to take possession of the goods, and the collector refused to permit them to do so, but retained the same in his own possession, claiming that he was thereunto authorized by the provisions of an act of Congress approved March 2, 1897, entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea." This act is printed in the margin.†

- [75] *That defendant pretends that he is entitled "so to refuse to permit your orators to take possession of said teas and to dispose of the same, on the ground that samples of said
- [76] teas, of *each of said several invoices hereinafter set forth, have been taken by examiners appointed under the alleged authority of the said act of Congress, and compared with certain other samples of other teas selected
- [77] by the Secretary of the Treasury *of the United States, and set up as standard samples of teas under the alleged authority of the said act of Congress, and that the samples so taken from the said teas hereinafter set forth were inferior in some or all of the

respects designated in said act of Congress, either as to purity, quality, or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States."

That defendant claims the right to retain the teas for six months, and then cause them to be destroyed, and demands that complainants shall give security satisfactory to him that *if said teas shall be released to them [78] they will forthwith export said teas out of the limits of the United States, and will submit the invoices and various papers relating to said teas to be marked by defendant as teas "condemned under the laws of the United States."

The bill then specifically enumerated the entries of the teas, the warehouses in which they were, and their value respectively, and charged that said act of Congress was in all respects null and void and of no effect, because contrary to the provisions of the Constitution of the United States, in that the act "purports to delegate to the Secretary of

†That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

Sec. 2. That immediately after the passage of this act and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the person so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

Sec. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Sec. 4. That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the im-

porter or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice, and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however,* That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

Sec. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no re-examination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom house, unless on a re-examination called for by the importer or consignee the find-

the Treasury power and authority to legislate as to the quality, purity, and fitness for consumption of the teas imported by your orators, and to authorize the defendant to seize, hold, and destroy said teas, and deprive your orators of their property in the same without due process of law, and that in this suit the matter in dispute, to wit, the value of the said teas, and the right to import teas, exclusive of interest and costs, exceeds the sum or value of \$2,000 and the suit arises under the Constitution and laws of the United States."

It was further alleged that by reason of the matters set forth and the insistence of defendant that he is entitled to hold possession and control of the goods under authority of the act of Congress, "for the reason that the said examiners, after examination made pursuant to said statute, have declared the said teas to be inferior in the respects set forth in the said act of Congress, or some of them, to the standards fixed and selected by the Secretary of the Treasury, your ora-

tors will suffer irreparable damage; that the insistence of the defendant of his right to stamp the invoices and papers relating to the importation of said teas as condemned under the laws of the United States renders the said teas worthless for export and entry or sale in the markets of other countries; and that the said claim of the defendant that the said teas cannot be lawfully taken from the said warehouses renders the said teas unsalable and worthless in the market, for the reason that dealers will not purchase or handle the said goods under the cloud or threat of illegality regarding the same *cre- [79] ated by such insistence and claim on the part of the defendant."

The bill continued: "Your orators further show that your orators purpose and intend to import from time to time other invoices of teas into the United States, and that the said defendant threatens and intends to seize and hold such teas, and take possession and control of the same, and refuse your orators possession of the same, in the same manner

ing of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six.

Sec. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final re-examination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final re-examination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

Sec. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established; and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry; and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or re-examination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Sec. 8. That in cases of re-examination of teas, or merchandise described as teas, by a
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board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

Sec. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

Sec. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

Sec. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An Act To Prevent the Importation of Adulterated and Spurious Teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

Sec. 12. That the act entitled "An Act To Prevent the Importation of Adulterated and Spurious Teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect. 29 Stat. at L. 604, chap. 358.

and under the same claim of authority of said act of Congress as the said defendant has heretofore made and set up with regard to the teas hereinbefore set forth, and that your orators' right to import and deal in teas is thereby destroyed and taken away."

That complainants "do not set up or allege as ground for denying the right of the defendant so to hold and deal with said teas, as hereinbefore set forth, any defect, omission, or irregularity in the proceedings by the examiners and appraisers with regard to said teas, but solely on the ground that the act of Congress hereinbefore referred to . . . is unconstitutional and void, and confers no authority upon the defendant, and creates no right in the defendant to refuse to permit your orators to take possession of the said teas and introduce them into, and sell them in, the United States." And, further, that complainants had complied in all respects with the requirements of law as to the entry of the teas in the custom house at the port of New York; that there was no further act required by law of complainants to entitle them to take possession and dispose of the same; and that complainants "are without any adequate remedy at law."

[80] The bill prayed for injunction restraining defendant "from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to take possession of the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words, 'Condemned under the laws of the United States,' or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession, or authority *relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress;" and for general relief.

Mr. John S. Davenport argued the cause and filed a brief for appellants:

The fact that the defendant is a United States customs officer does not prevent the circuit court from taking cognizance of an action to enjoin acts illegal because of the unconstitutionality and voidness of the statute.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Kirwan v. Murphy*, 49 U. S. App. 659, 83 Fed. Rep. 275, 28 C. C. A. 348.

If we cannot have this remedy we are without remedy and are deprived of due process of law. We have no remedy by mandamus to compel him to release the teas, because a United States officer cannot be mandamusd to do even a ministerial act, by the circuit courts.

Kendall v. United States ex rel. Stokes, 12 Pet. 524, 9 L. ed. 1181.

Even if there were a remedy at law, it has been held by this court that such remedy is not adequate for this case, and that an injunction in analogous cases was proper.

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Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

The reasons for refusing to entertain a bill against the President, as set forth in *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437, do not exist in any sense as to a bill to restrain a purely ministerial act on the part of a collector.

Mr. Edward B. Whitney argued the cause and, with *Solicitor General John K. Richards*, filed a brief for appellee:

The constitutionality of a Federal statute will not be considered upon an application for an injunction against its enforcement.

Mississippi v. Johnson, 4 Wall. 475, 500, 18 L. ed. 437, 441.

Process of this kind enforceable only by contempt proceedings has never issued simply because of a difference of opinion as to the true construction of the Federal statute. Process issues only when the question is too plain for argument.

Decatur v. Paulding, 14 Pet. 497, 515, 521, 10 L. ed. 559, 568, 571, and see dissenting opinions at pp. 599, 606, L. ed. pp. 609, 613.

The rule has been since applied in a series of familiar cases of which we may cite as examples among recent mandamus cases:

United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *Scymour v. United States ex rel. South Carolina*, 2 App. D. C. 240, and cases cited; *Carlisle v. United States ex rel. Waters*, 7 App. D. C. 517.

Among injunction cases we may cite:

Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; *Litchfield v. Register & Receiver*, 9 Wall. 575, sub nom. *Litchfield v. Richards*, 19 L. ed. 681.

The complainants had no vested right to support an application for an injunction against a Federal executive officer.

If this statute be unconstitutional, its provisions and the regulations of the Secretary of the Treasury thereunder would be no defense to an action for damages for tort.

Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

Nor would the fact that the defendant was a public officer in any way affect the right of action of the injured party.

Little v. Barreme, 2 Cranch, 170, 2 L. ed. 243; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418.

If this statute be unconstitutional, the acts of the collector in withholding and destroying the property are as tortious as those of the South Carolina state constable under the dispensary act, discussed in *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

An injunction is granted only in the equitable discretion of the court.

Truly v. Wanzer, 5 How. 142, 12 L. ed. 88; *O'Reilly v. New York Elev. R. Co.* 148 N. Y. 347, 31 L. R. A. 407, 42 N. E. 1063; *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524.

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Mr. James L. Bishop filed a brief on behalf of certain persons interested in the importation of teas.

[80] **Mr. Chief Justice Fuller* delivered the opinion of the court:

Complainants sought by this bill to enjoin an officer of the United States from the discharge of duties expressly imposed upon him by an act of Congress on the ground of its unconstitutionality. We are clear that its averments did not justify such an interference with executive action.

In *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, the jurisdiction was sustained; but the government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened, and it appeared that the only remedy was through equity interposition. *New Orleans v. Paine*, 147 U. S. 261, 264, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303. But we are unwilling to extend that precedent.

It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction. *Shelton v. Platt*, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Pittsburgh, C. C. & St. L. R. Co. v. West Virginia Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; *Arkansas Bldg. & L. Assn. v. Madden*, 175 U. S. 269, 20 Sup. Ct. Rep. 119, *ante*, 159. As remarked [81] *by *Mr. Justice Bradley* in *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 214, 27 L. ed. 484, 487, 2 Sup. Ct. Rep. 286, 287, the 16th section of the judiciary act of 1789, now § 723 of the Revised Statutes, declaring "that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law," "certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule and to impress it upon the attention of the courts."

Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury. The one head is well illustrated by *Union P. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601, and *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418, and the other by *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580.—cited by counsel.

But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.

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The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The matter in dispute was averred to be "the value of the said teas, and the right to import teas."

Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. The official character of the collector, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof would not constitute a defense if the act were unconstitutional. There was no intimation that the collector would be unable to respond in judgment, and, moreover, § 989 of the Revised Statutes provides that when a recovery is had in any suit or proceeding against a collector *for any act done by him, [82] probable cause being certified, "the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." *The Conqueror*, 166 U. S. 110, 124, 41 L. ed. 937, 944, 17 Sup. Ct. Rep. 516.

Nor was there any averment of injury by reason of the condemnation of these teas other than the loss of the teas themselves.

The allegations in respect of apprehended deprivation of the right to import and deal in teas were that complainants intended to import from time to time other invoices of teas, and that the collector threatened to take possession of and hold them, in the exercise of authority under the act of Congress, in the same manner as the particular teas in question. This was in effect to assert a vested right to import and deal in teas which might be impure and unwholesome, and which were, at all events, inferior to the uniform standards "of purity, quality, and fitness for consumption" fixed by the Secretary. The law does not prohibit the importation of teas coming up to the standards, and it is difficult to perceive the elements of irreparable injury in the denial of permission to import inferior teas.

Manifestly the seizure of importations of teas purchased after the approval of the act and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law.

As no tenable basis for equity interposition was shown, the decree of the circuit court dismissing the bill was rightly entered.

Decree affirmed.

[83]

HENRY BOLLN, *Plff. in Err.*,
v.

STATE OF NEBRASKA.

(See S. C. Reporter's ed. 83-92.)

Due process of law by information for felony—adoption of Constitution of United States as condition of admission of state—failure to raise Federal question in state court.

1. A proceeding by information for a felony is not insufficient to constitute due process of law under U. S. Const. 14th Amend.
2. The admission into the Union of the state of Nebraska "upon an equal footing with the original states in all respects whatsoever," by the act of Congress of February 9, 1867, though made subject to the condition that the people adopt the Constitution of the United States, did not make the Fifth Amendment of that Constitution, requiring an indictment of a grand jury for a felony case, applicable to procedure in the courts of that state.
3. The right of trial by jury upon the question of waiver of preliminary examination is not claimed as a Federal right in a state court by a plea in abatement alleging that the prosecution is in contravention of the 14th Amendment, where this evidently referred to prior paragraphs which dealt only with the necessity of an indictment to constitute due process of law.

[No. 393.]

Argued December 4, 5, 1899. Decided January 15, 1900.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment affirming a conviction for the crime of embezzlement. *Affirmed.*

Same case below, 51 Neb. 581, 71 N. W. 444.

Statement by Mr. Justice **Brown**:

This is a writ of error to review a judgment of the supreme court of Nebraska, affirming a conviction of the plaintiff in error by the district court of Douglas county, for the crime of embezzlement.

The proceedings in the case, so far as they are disclosed by the record before us, which was agreed upon under subdivision 9 of rule 10 of this court, are as follows:

On April 2, 1896, an information was filed by the county attorney for the county of Douglas against the plaintiff in error, both as city treasurer of the city of Omaha and as treasurer of the board of education, for embezzling moneys belonging to the city, as well as moneys belonging to the school district.

On April 4 a motion to quash was filed upon four grounds: (1) That there was no authority of law to file an information for a felony; (2 and 3) because the prosecution was in contravention of the Constitution of

the state; and (4) because it was in contravention of Article Fourteen of the Constitution of the United States, and was without due process of law.

On the same day a paper was filed, entitled a plea in abatement, which prayed judgment that the information might be quashed for the same reasons, and in precisely the words of the motion to quash.

On the same day, a demurrer was filed to the "eighteen paragraphs" of the plea in abatement, upon the ground that these paragraphs did not state facts sufficient to constitute a defense or to raise an issue upon the plea.

*Upon the same day, an order was entered [84] overruling the motion to quash, to which the defendant excepted.

On April 6 another order was entered, sustaining the demurrer as to the eighteen "reasons therein set forth," except the ninth; and "the court doth overrule the said demurrer as to the ninth reason therein set forth, with leave to the state to reply instanter." The state duly excepted to the ruling as to the ninth reason.

On the same day a "reply to the ninth paragraph of the defendant's plea in abatement" was filed by the state, admitting that the defendant had had "no preliminary examination for said crime referred to in said ninth paragraph," but alleging that he waived such preliminary examination and his right thereto, as shown by the records of the court.

On April 8, 1896, a demurrer was filed to the information, and upon the same day both parties appeared in court, and announced their readiness to proceed to trial upon the ninth paragraph in defendant's plea in abatement. Thereupon the defendant demanded a trial by jury, and the court, on consideration, overruled the demand, to which ruling the defendant duly excepted. After introduction of evidence, pro and con, and upon due consideration, the court found that the defendant had waived a preliminary examination, and therefore found against him, and overruled the ninth paragraph of the plea in abatement. By the same order the demurrer was also overruled. The defendant being arraigned, refused to plead, whereupon the court entered a plea of not guilty, and the trial proceeded, and resulted in a verdict finding the defendant guilty upon the fourth count of embezzling \$2,500, upon the ninth count of embezzling \$3,000, and upon the eleventh count of embezzling \$100,000.

Motion for a new trial being overruled, defendant was sentenced to fine and imprisonment upon the fourth, ninth, and eleventh counts.

*The case was carried to the supreme court [85] of Nebraska and the judgment affirmed. The court delivered an opinion, in which it stated that "a plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea and sustained as to the other seventeen grounds therein set

NOTE.—As to what constitutes due process of law, see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

forth." The petition in error, it was stated, contained 279 assignments, the only ones of which could be said to involve a Federal question being, first, that the state had no authority to prosecute by information, and second, the refusal of the court to call a jury to pass upon the issue tendered by the ninth paragraph of the plea in abatement, that the defendant waived a preliminary examination before the magistrate. This opinion was filed May 18, 1897. 51 Neb. 581, 71 N. W. 444.

On September 20, 1897, plaintiff in error filed in the supreme court of the state assignments of error which appear to have been intended for this court, and on September 18, 1899, served upon the attorney general a petition to this court for the allowance of a writ of error upon the ground, first, that the plaintiff was convicted upon an information, and, second, because he had been denied a jury trial upon the issue tendered by special plea, that he had had no preliminary examination and had not waived the same.

Mr. Joel W. West argued the cause and filed a brief for plaintiffs in error.

Mr. Constantine J. Smyth argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[85] ***Mr. Justice Brown** delivered the opinion of the court:

Two questions were raised in the briefs and argument of the plaintiff in error: First, that a proceeding by information for a felony was not, so far as the state of Nebraska is concerned, due process of law, under the Fourteenth Amendment to the Constitution of the United States. Second, that the trial by the court without a jury, of the issue raised by the ninth plea in abatement, whether the defendant had waived a preliminary examination, was not due process of law.

[86] *1. The first question, so far as it applies to states in general, was settled adversely to the insistence of the plaintiff in error, in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292, in which it was held that a prosecution for murder did not necessarily require an indictment by a grand jury, where the Constitution of the state authorized prosecutions for felonies by information. Subsequent cases have done nothing to weaken or qualify the force of this decision. Its principle was applied in *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, to a law of New York providing for the punishment of death by electricity; in *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, to a statute subjecting physicians to punishment who practised medicine without a certificate as to their competency; in *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224, to a statutory indictment for murder under the laws of Texas; and in *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105, to a state

statute conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court. It was also cited with approval in *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Holden v. Hardy*, 169 U. S. 383, 42 L. ed. 788, 18 Sup. Ct. Rep. 383, and in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

It is insisted, however, that under the act of Congress of April 19, 1864 (13 Stat. at L. 47, chap. 59), enabling the people of Nebraska to form a Constitution and a state government for admission into the Union, the power given to that state is restricted in that particular. After authorizing the inhabitants to form for themselves a Constitution and state government, and providing for a constitutional convention, the 4th section of the act required "that the members of the convention . . . shall declare, on behalf of the people of said territory, that they adopt the Constitution of the United States; whereupon the said convention shall be, and it is hereby, authorized to form a Constitution and state government." We are informed, however, as a matter of history, in *Brittle v. People*, 2 Neb. 198, that the people of the territory being at that time opposed to becoming a state, the convention adjourned *sine die* without taking action beyond its own organization.

Subsequently, however, the territorial legislature, without *calling a convention, [87] framed a Constitution which was submitted to and adopted by the people at an election held June 21, 1866. This Constitution contained the following provision (schedule, § 6): "This Constitution is formed, and the state of Nebraska asks to be admitted into the Union on an equal footing with the original states, on the condition and faith of the terms of the proposition stated and specified in an act of Congress approved April 19th, 1864, authorizing the people of the territory to form a Constitution and state government; the people of the state of Nebraska hereby accepting the conditions in said act specified."

At its following session and on February 9, 1867 (14 Stat. at L. 391, chap. 36), Congress passed another act admitting the state of Nebraska into the Union "upon an equal footing with the original states in all respects whatsoever," though the 2d section of this act declared "that the said state of Nebraska shall be, and is hereby declared to be, entitled to all the rights, privileges, grants, and immunities, and to be subject to all the conditions and restrictions, of an act entitled 'An Act to Enable the People of Nebraska to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States.'"

The argument of the plaintiff in error in this connection is that, by these acts, the people of Nebraska adopted the Constitution of the United States, and thereby the first eight

amendments containing the Bill of Rights became incorporated in the Constitution of the state, and that the right to proceed for felonies, other than by an indictment of a grand jury (as required by the Fifth Amendment), was taken away from such state.

But conceding all that can be claimed in this connection, and that the state of Nebraska did enter the Union under the condition of the enabling act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the state acknowledged, as every other state has done, the supremacy of the Federal Constitution. The 1st section of the act of 1867, admitting the state into the Union, declared "that it is hereby admitted [88] *into the Union upon an equal footing with the original states in all respects whatsoever." It is impossible to suppose that, by such indefinite language as was used in the enabling act, Congress intended to differentiate Nebraska from her sister states, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her Constitution from that given to the constitutions of other states. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such territory has become a state of the Union. Upon the admission of a state it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original states, and, in the language of the act of 1867 admitting the state of Nebraska, it stands "upon an equal footing with the original states in all respects whatsoever." *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Willamette Iron Bridge Co. v. Hulch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 224, 16 Sup. Ct. Rep. 1076. Indeed, the legislation of Congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375, and the conclusion reached that upon its admission into the Union the citizens of what had been the territory became citizens of the United States and of the state.

This court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that state that would forever preclude amendments inconsistent with the Bill of Rights of the Federal Constitution, and which this court has held to be applicable only to Federal courts. As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the

states to so amend their laws as to make them conform to the wishes of their citizens, to *changed views of administration, or to [89] the exigencies of their social life. It may be readily supposed that the inhabitants of each state understand perfectly their own local needs and interests, and, with the facilities with which the constitutions of the several states may be amended, it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed. Not only did Congress in the act of 1867 declare that Nebraska was admitted upon an equal footing with the original states, but the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution. The idea that one state is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had power to make such discrimination. We are therefore of opinion that the provision of the Constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States.

2. We do not find it necessary to consider the question whether the court denied to the defendant due process of law, in refusing a jury trial upon the question whether he had waived a preliminary examination before the magistrate. The statute of Nebraska (Consol. Stat. § 6220), providing for the prosecution of offenses by information, requires that "no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, . . . unless such person shall waive his right to such examination." A plea in abatement is said to have been filed upon that ground; but the only plea in abatement which appears in the transcript of the record before us sets forth but four grounds: First, that there was no authority of law for the filing of an information charging the defendant with a felony; second, because the defendant, under the state Constitution, was granted immunity from answering to a criminal charge, except upon presentment or indictment by a grand jury; third, because this prosecution is in contravention of the state Constitution,*guaranteeing that no person shall be [90] deprived of life or liberty without due process of law; fourth, because this prosecution is in contravention of the Fourteenth Amendment of the Constitution of the United States. It is true that, in the demurrer to this plea and in the order sustaining such demurrer it would appear that there were eighteen grounds for the plea in abatement, and that as to the ninth ground, the demurrer was overruled, with leave to the state to reply instant. From the reply to the plea in abatement it would appear that the ninth paragraph of the plea set up the fact that the defendant did not have a preliminary examination as required by law, the re-

ply alleging that he waived it; but nowhere in the plea in abatement does it appear what this ninth paragraph was, although the judgment of the court was "that the defendant waived a preliminary examination before the examining magistrate, and therefore finds against the defendant, and overrules the said ninth paragraph of the said plea in abatement." As the opinion of the Supreme Court also discusses the ruling of the court below denying to the defendant a jury trial upon this ninth paragraph, we may, perhaps, be at liberty to take notice of it; although in subdivision 9 of rule 10, under which this record was printed, it is said that the court will consider nothing but those parts of the record designated by the parties, and the errors so stated.

But, without expressing a decided opinion upon this point, we are confronted by another difficulty in the fact that it is nowhere alleged in the record that a denial to the defendant of a jury trial of this issue was violative of the Constitution of the United States. It is true that in the fourth paragraph of the plea in abatement it is said that "this prosecution is in the contravention" of the Fourteenth Amendment, but this evidently refers to the prior paragraphs, which deal only with a prosecution by indictment. In the opinion of the court discussing this question, no allusion is made to the denial of this jury trial being in conflict with the Fourteenth Amendment, and it is only in the assignments of error filed in the supreme court of the state four months after its judgment of affirmance, that the defendant sets it up as the denial [91] *of a Federal right. Indeed, it nowhere appears in the record or in the opinion of the supreme court that the denial of a jury trial of this issue was claimed to be in contravention even of the state Constitution. The question is discussed by the court as one of general law, and it is only the prosecution by information that the court discusses as a constitutional question.

On November 10, 1899, the chief justice of the supreme court of Nebraska certifies that the only reference made by the plaintiff in error to the Constitution of the United States is set forth in certain language quoted from his brief. From this brief it would appear that the denial of the right of trial by jury upon the question of waiver of preliminary examination was set up as a violation of the constitutional provision of Nebraska that "the right of a trial by jury shall remain inviolate;" but it nowhere appears that it was claimed to be in violation of any other provision of the Constitution, or of the Fourteenth Amendment to the Constitution of the United States.

Upon this state of the record we are unable to say that the decision of the court below was against a title, right, privilege, or immunity specially set up or claimed by either party under the Constitution of the United States.

We have repeatedly decided that an appeal to the jurisdiction of this court must

not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the 1st or 2d clauses of § 709, and have involved the validity of a treaty, statute, or authority exercised under the United States, or the validity of a statute or authority exercised under a state,* where such statute or authority is alleged to be repugnant to the Constitution or the laws of the United States. (*Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.) In the case under consideration the right to a trial by jury is claimed under the Constitution of the United States; but, as it was never set up or claimed prior to the decision of the supreme court of the state, it is too late to raise the question here.

The fact that the defendant did set up in his plea in abatement his immunity from prosecution upon an information of the county attorney clearly appears, but we are not at liberty to consider other constitutional questions which might have been involved if they had been properly set up and claimed. The observations of this court in *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, are conclusive against our consideration of this question.

The judgment of the Supreme Court of the State of Nebraska is therefore affirmed.

Mr. Justice Harlan dissented.

CITY OF NEW ORLEANS

v.

JOHN G. WARNER.

(See S. C. Reporter's ed. 92-97.)

Decree vacated and new decree entered nunc pro tunc.

A decree *nunc pro tunc* is properly entered on rehearing in lieu of the former decree, which is set aside because a fact was overlooked, when the petitioner has died in the meantime.

[No. 172.]

Leave granted to file petition for rehearing December 11, 1899. Decree of affirmance entered nunc pro tunc January 15, 1900.

ON MOTION for a rehearing upon briefs filed and upon an affidavit of death of the petitioner, John G. Warner, on March 25

21, 1899. Decree set aside and new decree entered *nunc pro tunc*.

See same case below, 59 U. S. App. 131, 87 Fed. Rep. 829, 31 C. C. A. 238.

This case was decided in 175 U. S. 120, ante, 96, 20 Sup. Ct. Rep. 280, on writ of certiorari to the United States circuit court of appeals for the fifth circuit. The decision sustained a recovery of interest on drainage warrants, but limited that recovery to interest accruing after the suit was commenced, on the ground that there had been no presentation of the warrants for payment, as the statute and warrants required in order to make them bear interest. For that reason the conclusion of the court was that the decree of the court of appeals allowing interest on the warrants from June 6, 1876, should be modified so as to allow interest only from November 26, 1894, which was the date of filing the bill and issuing the subpoena. But a petition was filed for a limited rehearing, pointing out that the warrants were in fact presented for payment and offering the warrants in evidence with an indorsement thereon showing the fact of such presentation, and affidavit was made showing the death of the petitioner on March 21, 1899.

Messrs. **Richard DeGray, J. D. Rouse, William Grant, and Wheeler H. Peckham** filed a brief supporting the petition.

Messrs. **Samuel L. Gilmore and Branch K. Miller** on behalf of the city, in opposition thereto.

[97] *Mr. Justice **Brown** delivered the opinion of the court:

It appearing in this case that the court overlooked the fact that the drainage warrants which formed the basis of this suit were duly presented for payment on June 6, 1876, it is ordered that the decree heretofore entered in this case be, and is hereby, vacated and set aside, and that a new decree be entered *nunc pro tunc* as of March 13, 1899, affirming the decree of the Circuit Court of Appeals in all respects.

THE NEWFOUNDLAND.

Prize—order for further proof because of suspicion—sufficiency of evidence to justify forfeiture—attempt to run blockade.

(See S. C. Reporter's ed. 97-114.)

1. An order for further proof in case of the libel of a vessel as a prize for trying to violate a blockade is not an abuse of discretion, where the circumstances created a suspicion of an intention to enter the blockaded port.
2. The forfeiture of a vessel as a prize for attempting to run a blockade should not be made on evidence which consists of suspicious circumstances merely, although they make probable cause for the capture of the ship and justification of her captors.

[No. 156.]

Argued November 3, 6, 1899. Decided January 15, 1900.

APPEAL from a decree of the District Court of the United States for the District of South Carolina condemning and forfeiting a ship and cargo as prizes of war. *Reversed*.

See same case below, 89 Fed. Rep. 99 and 510.

The facts are stated in the opinion.

Mr. **Theodore G. Barker** argued the cause and, with Mr. **G. A. R. Rowlings**, filed a brief for appellants:

In the absence of all evidence to condemn, an opportunity should not be given to captors to hunt up evidence or to make a case *de novo* against a claimant.

The Liverpool Packet, 1 Gall. 525. Fed. Cas. No. 8,406; 12 Browne, Civ. & Adm. Law, pp. 452, 453; *The George*, 1 Wheat. 408, 4 L. ed. 123; *The Ann Green*, 1 Gall. 274, Fed. Cas. No. 414; *The Sarah*, 1 C. Rob. 313, note; *The Pizarro*, 2 Wheat. 227, 4 L. ed. 226; *The Springbok*, 5 Wall. 1, sub nom. *The Springbok v. United States*, 18 L. ed. 480.

The rule is to take the original evidence of the claimant as conclusive, if not impeached.

The Haabet, 6 C. Rob. 54.

Suspicion of intention cannot take the place of proof of acts.

The Wren, 6 Wall. 582, sub nom. *The Wren v. United States*, 18 L. ed. 876; *The Flying Scud*, 6 Wall. 265, sub nom. *The Flying Scud v. United States*, 18 L. ed. 756; *The Sea Witch*, 6 Wall. 243, sub nom. *United States v. The Sea Witch*, 18 L. ed. 786; *Malcy v. Shattuck*, 3 Cranch. 488, 2 L. ed. 597; *The John Gilpin*, Blatchf. Prize Cas. 661, Fed. Cas. No. 7,344; *Fitzsimons v. Newport Ins. Co.* 4 Cranch. 185, 2 L. ed. 591; *The Nereide*, 9 Cranch. 388, 3 L. ed. 769; *The Columbia*, 1 C. Rob. 154; *Olivera v. Union Ins. Co.* 3 Wheat. 197, 4 L. ed. 368; *The Empress*, Blatchf. Prize Cas. 175, Fed. Cas. No. 4,477.

Assistant Attorney General **Hoyt** argued the cause and, with Messrs. **Joseph K. McCammon** and **James H. Hayden**, filed a brief for the United States and the captors:

The allowance of further proof rests in the sound discretion of the prize court.

The Sir William Peel, 5 Wall. 534, sub nom. *United States v. The Sir William Peel*, 18 L. ed. 699.

*Mr. Justice **McKenna** delivered the [98] opinion of the court:

The *Newfoundland*, a British steamship, was seized off the coast of Cuba on 19th July, 1898, by the United States ship of war *Mayflower*, on the ground that she was trying to violate the blockade of Havana. She was sent to Charleston, South Carolina, and there libeled with her cargo as prize of war. Testimony was taken *in preparatorio*, and the court determined it to be insufficient for condemnation, and on motion of the attorney for the United States ordered further proof.

Upon that proof a decree was entered condemning and forfeiting the ship and cargo, and they were ordered to be sold. From the decree this appeal is prosecuted. The as-

signments of error may be reduced to two contentions:

1. That the court erred in making an order for further proof because the testimony taken in *preparatorio* afforded no legal foundation for doubt, or proof of any overt act to justify the condemnation of the ship.

2. That the additional testimony taken still left the evidence insufficient for condemnation.

(1) Of the testimony taken in *preparatorio* the court said:

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port."

And, further:

[99] "So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far *short the cases cited fall in showing cause for condemnation, the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence.

"There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

"As this court has in a recent case had occasion to remark, the testimony in *preparatorio* rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information, through a letter from the American consul at Halifax, that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence, and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof; it furnishes ground for ordering further evidence."

It is urged by counsel for appellants that the court, therefore, based its order for further proof upon Commander Mackenzie's opinion, which, even if otherwise competent, was not in evidence. We, however, do not so interpret the remarks of the court. It is explicitly stated that the circumstances created a suspicion of an intention on the part of the ship to enter a Cuban port, but that the suspicion was insufficient for condemnation, without some proof in addition showing an overt act, which, as testimony in *pre-*
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paratorio rarely afforded, further proof was ordered.

This was not an abuse of discretion, and is clearly within the ruling of *The Sir William Peel*, 5 Wall. 534, *sub nom. United States v. The Sir William Peel*, 18 L. ed. 699. In that case the court said the preparatory proof which consisted *of the depositions of the master of the ship, the mate, and one seaman, "clearly required restitution" of the ship, and, declaring the rule, said, through Chief Justice Chase, that "regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board."

"If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

(2) For a statement of the case we may quote from the opinions of the district court. They clearly marshal and review all inculpatory and exculpatory circumstances, and give the impressions of the court of the character of witnesses the most important of whom testified in its presence. From the first opinion rendered on the testimony taken in *preparatorio*, as follows: The Newfoundland "cleared from Halifax, Nova Scotia, July 8, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat, and canned goods shipped by David Robertson & Co. Bills of lading were issued to them for 4,386 packages for Kingston, and 3,747 for Vera Cruz. These bills of lading are indorsed by them in blank. The charter party was for a voyage of three months to ports of the United States, West Indies, Central and South America, etc., in the customary printed form; and written therein was, 'including open Cuban ports, no contraband of war to be shipped;' and was to terminate at Halifax. Musgrave & Co. were the charterers."

"It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua la Grande or Caibairien, but on no account to enter any *blockaded port; and, if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston and wire for instructions. It seems clear from this testimony that it was the intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots; and that Kingston and Vera Cruz were 'contingent' or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the President's proclamations notifying a blockade.

"The Newfoundland sailed from Halifax on July 9. Her speed is about 8 knots; her registered tonnage, 567 tons. She steered for the 'Crooked Inland Passage' in the Bahamas, passing thence into the 'Old Bahama Channel,' and, going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Nuevitas, on the north coast of Cuba, where she was stopped by the United States ship of war Badger at 12:45 A. M., on Monday, July 18th. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course.

"The island of Jamaica lies almost due south from Nuevitas, which, being about 200 miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have changed her course, and proceeded eastward around Cape Maysi, and thence to Kingston. This undoubtedly would have been the shortest course, and, if Kingston was the destination, the sailing westward from Nuevitas would have carried the ship many hundreds of miles out of her course. It may be here observed that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is, 'Journal from Halifax, N. S., towards Kingston and Vera Cruz.' On Tuesday, 19th July, the head line is, 'Journal from Halifax, N. S., towards Vera Cruz and Kingston.' If, after reaching Nuevitas, there was an intention to go to Vera Cruz, the westwardly course would be the most direct."

From the second opinion on final hearing, as follows:

[102] "Lieutenant Evans, in command of the U. S. S. Tecumseh, *testifies that about 5 o'clock in the afternoon of July 19th, while on his station in the blockading squadron, 6 or 8 miles to the north and eastward of Havana light, and about 3½ miles from the nearest shore, he sighted the Newfoundland moving towards him on a westerly course; that he immediately stood towards her at full speed,—about 10 knots,—and overhauled her, sending his mate aboard to examine her papers. He estimates his position at the time as being latitude 23° 15' N., longitude 82° 13', and on a diagram prepared by the navigating officer of the Mayflower, and offered in evidence, he fixes her position as being unquestionably within a dotted circle, thinks that it was about the center of the circle, but, having taken no measurements at the time, would not undertake to fix it closer than within 3 miles. He fixes the hour of boarding at 5:35, and says that he left her 'in the vicinity of 6 o'clock,' she bearing off on a course about west by one-half north. Mate Nickerson, of the Tecumseh, fixes her position at the time of sighting the Newfoundland at 6 to 8 miles from Morro light, and about 3½ to 4 miles from the nearest shore, the Newfoundland being at that time about 9 miles to the northward and eastward, sailing west; the Tecumseh sailing about 4 miles to overhaul her. He fixes the hour of boarding at 5:35 exactly, and says

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that he returned aboard his ship about 5:50. He failed to enter upon the log of the Newfoundland the hour of boarding, as is usually, and always should be, done. He locates the point of boarding upon the diagram as does Lieutenant Evans; saw the Newfoundland for about 10 minutes after she stood off one or two points to the north of west; and says 'it began to settle down dusk then.'

"Ensign Pratt, of the Mayflower, whose watch began at 8 o'clock, testifies that about 8:20 he picked up a small light bearing north by west from him; reported the same to the commanding officer, who ordered the ship headed for it north by west, and the engines rung ahead full speed. Shortly after heading for it, the light was lost, but, standing on the same course about 20 minutes, and putting on forced draft, the light was picked up again a little to the westward. Altering *his course, and heading north-north-[103] west, the light shortly disappeared again. He gradually changed his course to the westward until he headed about northwest, standing on that course about 30 minutes, still not seeing the light, when about 9:10 he sighted it again, bearing southwest on his port beam, and inshore; headed for it again, and stood on until about 9:30, when the light was seen outshore of him on his starboard beam, and headed for it again, and came up with her at 10 o'clock. From subsequent developments it is probable that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland, visible only when nearly abeam through the doors on either side. It would be open only to about three fourths of a point of the compass, and the Mayflower, at full speed, making at times 16 miles an hour, would pass the point of visibility, until, by changing her course, it would again become visible and be picked up first on one quarter, then on the other. When the light was first seen, the Mayflower was heading east-northeast, and the light was bearing north by west from her, a point forward of the port beam, and estimated to be from 2 to 3 miles distant. No other lights were seen on the Newfoundland until she was overhauled. At that time all of the regulation lights were found to be burning brightly.

"Lieutenant Culver, navigating officer of the Mayflower, describes the chase substantially as above, and exhibits a tracing made on July 20th, showing the estimated positions of the respective vessels at the time when the light was first discovered and at the time of the capture, and the course sailed by each.

"Commander Mackenzie, of the Mayflower, was the senior officer of the blockade off Havana. The Mayflower covered about five points of the compass on the bearing from Morro light, and had been on that station during the month of July. He says that about 8:30 a faint light was reported about north by west of him, which he thought was a plain lantern. He describes the chase, and locates the positions of the two vessels on the tracing prepared by Lieutenant Culver. From this *testimony and upon this diagram it [104]

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would appear that the Newfoundland, when boarded by the Tecumseh, was at a point within a circle whose center is $10\frac{3}{4}$ miles from Morro light, whose bearing was south-west $\frac{1}{2}$ west.

"The testimony from the Newfoundland, relating to the same matter, will now be stated.

"Captain Malcolm, the master, says that he was boarded by the mate of the Tecumseh 14 miles off shore—off the nearest land—while sailing on a westward course; that the boarding officer, after examining his papers, advised him not to go any nearer the land, lest he should get a shell into him, and left him at 6:30; that thereafter he stood on a course one point north of west until 8 o'clock, when the Havana light bore about south by west, and from that time he put his ship back on a course due west, which he followed until boarded by the Mayflower. He exhibits a chart on which he has marked his course, and says that at 8:30 he passed Havana light, being $17\frac{1}{2}$ miles from it; that at 10 o'clock, when boarded by the Mayflower, he was 21 miles from Havana light, which bore then southeast by south one-half south.

"Salkus, the mate of the Newfoundland, testifies to the boarding by the Tecumseh at 6:10, and that the Havana lighthouse and Morro Castle were not visible; that they started on their course at 6:30, and at 8:30 were abreast of Havana light, which bore south about 16 or 17 miles. In explanation of the entry in his log he says that he took no bearings at the time of the entry, and knew that the ship was farther off than 10 miles. He says that at the time of the capture Morro light was not visible from the bridge, but that he saw it from the compass pole, 15 feet above the bridge.

"Payne, the engineer, testified to the boarding by the Tecumseh at 6:10, and his log contains an entry showing that the engines stopped at 6:10, and started again at 6:30.

"It thus appears that there is a wide divergence in the testimony as to the point at which the Newfoundland was when boarded by the Tecumseh, and some divergence as to the time of such boarding.

[105] "Lieutenant Evans and his mate fixed this location within *a circle whose radius is 3 miles. They say that they are certain as to her location within 3 miles, and believe that she was about the center of that circle, which is $10\frac{1}{2}$ miles from Morro light. Captain Malcolm and his mate fix the location at a point 24 miles from Morro light, $13\frac{1}{2}$ miles from the center of the circle above referred to, and $10\frac{1}{2}$ miles from that point of the circle nearest to the Newfoundland.

"There is marked discrepancy, and the first point to be decided is, Which is correct? Applying the usual tests by which testimony is weighed,—the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds,—there can be no doubt that there is a preponderance of probability in favor of that side

which, having no interest in the controversy, has the greater opportunity of knowledge.

"Lieutenant Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight, day and night. They were within 3 or 4 miles of the shore, with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character, and intelligence, and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

"Neither Captain Malcolm nor his mate were familiar with the locality. The former had once before been to Havana, the latter, never. Their interest is obvious. I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the Newfoundland within the described circle when boarded by the Tecumseh. I am not so clear as to the time. The mate Nickerson fixes it at 5:35 precisely, and says that he returned to the Tecumseh at 5:50; but he says that he watched the Newfoundland for about ten minutes after she left, when 'it began to settle down dusk.'

"*The sun set in that latitude on that day[about 6:30, and there is little twilight.

"The officers of the Newfoundland fix the hour of boarding at 6:10 and the time of departure at 6:30, and these figures are entered upon the engineer's log. This log has been in possession of the claimant since the capture, and some erasures appear in another part which may hereafter call for comment, and it therefore cannot be accepted as absolute verity, but giving the ship the benefit of the reasonable doubt which the testimony warrants, assuming that she sailed at 6:30, she is next seen by Ensign Pratt about 8:20, when he sighted a small light bearing north by west from the Mayflower, whose station on the cruising ground lay next west of the Tecumseh, and whose position at that time was about 6 miles north by west from Morro light. This small light was estimated to be about 2 or 3 miles from the Mayflower. The mate of the Newfoundland made this entry upon her log: '8:30 Havana light bearing south 10 miles.' If this testimony is taken as true, this would place the Newfoundland at a point 7 miles from the center of the circle adopted as the point of departure, and 10 miles from the extreme western circumference of it, and it would follow that she had consumed two hours in making that distance. As her speed during her voyage was on an average nearly 8 knots an hour, there is a considerable margin of time to be accounted for, which she endeavors to do by fixing her location at 8:30 at a point 17 miles from Havana. This is the testimony of her master, and the mate concurs in it, saying that the entry in his log was not an accurate statement of the ship's position at that time; that it was only intended to show that she was at least 10 miles from Havana light. It is not necessary to discuss nor decide now

how far a ship is concluded by the entries in her log. If the party making such entry is shown to have been drunk at the time, or habitually careless, or if made in a perfunctory way, without observations or the opportunity of observation, little weight might be given it; but, the log being intended to be a correct record of the facts contained therein, an entry made with full knowledge and opportunity of ascertaining *the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake, there must be conclusive evidence of the mistake. It is sufficient to say that such evidence has not been adduced here, and the entry upon the log, confirmed as it is by the testimony from the Mayflower, fixes the position of the Newfoundland at 8:30 at a point about 10 miles from the Havana light. From that point to the point of seizure her course can be marked with sufficient accuracy. That she sailed on a straight course from 8:30 to 10 o'clock, and that such course led her away from the entrance into the port of Havana, is entirely clear, whether the point was 17 miles from Morro light, as claimed by the Mayflower, or 21 miles, as claimed by the Newfoundland, or 18 miles, as agreed upon by her master and Ensign Pratt as the point from which they took their departure after the seizure, when they started upon their voyage to Charleston.

"The next incriminating charge is that the Newfoundland was sailing without lights. Ensign Pratt, who first sighted her, says he picked up a small light. All the witnesses from the Mayflower describe this light as that from an ordinary lantern, and not the masthead light. None of these witnesses saw any of the regulation lights until they came up with her about 10 o'clock, when they were all brightly burning. After the chase began, these regulation running lights, being visible only two points abaft the beam, would naturally not be seen.

"Coming westward from the point where she left the Tecumseh to the point where the faint light was sighted, her masthead light, whose visibility by the regulations is at least 5 miles, should certainly have been seen if there was proper vigilance aboard the Mayflower. That Ensign Pratt was vigilant is demonstrated by the fact that he picked up the dim light 2 or 3 miles off at 8:20. He went on duty at 8 o'clock. The officer who had the watch before that hour was not examined, nor were the lookouts, who are described by Commander Mackenzie as uncommonly efficient men. As it is, the testimony leaves this question open to reasonable *doubt, while it is probable that the masthead light, if burning, and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of visibility.

"The witnesses from the Newfoundland, including the sailor who lit them, all testify that the lights were lit at the usual hour, and they were all burning when she was overhauled.

"Commander Mackenzie and other witnesses from the Mayflower all testify that the small light already described was the only one seen: that there were no stray lights, such as are commonly seen aboard a steamer in the night-time.

"Taking the point of departure to be somewhere within the circle already described, and the time of departure at 6:30, and the rate of speed at nearly 8 knots, and following the courses described,—west by north until 8 o'clock, and then due west until 10 o'clock,—and plotting it upon the chart, I must conclude that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the Mayflower, at the point of capture at 10 o'clock, unless she had loitered somewhere upon her route.

"Outside the domain of the exact sciences, absolute certainty is rarely attainable, and there must always be an element of doubt as to every transaction the proof of which rests upon fallible human testimony, nowhere more fallible than in estimates of location and distances upon water.

"We will now look into the character and conduct of the Newfoundland, to see whether her presence off Havana is consistent with innocent intent.

"She is a small steamship, lately employed in the sealing business. She sailed from Halifax July 9th, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American customhouse to give two clearances. Captain Malcolm says that this *is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes 5 or 6, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and wherever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm, in his testimony *in preparatorio*, said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and, if those ports were blockaded, to go to Kingston and cable for orders. For reasons into which it is not the province of this court to inquire, neither Sagua nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to either. Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry; certain it is that he would have committed no offense cognizable here.

"Taking his course to the southward, he next appears off Nuevitas, where he is boarded by Lieutenant Titus, of the U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony in *preparatorio*, and it is repeated on this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course then should have been around the eastern end of the island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition, intelligent *men do not make such long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them; and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming, and coal-consuming venture that it staggers credulity to accept it as the true reason. Nor does the other reason given seem much more satisfactory. There was nothing unlawful in his setting out for Sagua, or any other open port in Cuba; and if, after information of the blockade, it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words 'from Halifax to Vera Cruz and —, Cuba.' The word 'Kingston' is written over and partially obliterates the word 'Cuba.' There is a blank space before the word 'Cuba' evidently intended to be filled in. 'Havana' would about fill it. The engineer appeared to be the most intelligent man on the ship, after the master. From this entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left blank if it was

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Sagua, or any other open port. In the *ab-[111] sence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his real destination, I must hold it to have been a pretensive destination, and his appearance before Havana is therefore not satisfactorily explained.

"Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound, he was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz; and when asked whether he was shaping his course by way of Cape San Antonio he replied that he had not made up his mind. In the same conversation he said that he had been making 8 knots an hour from the time he was boarded by the Tecumseh to time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston if he did not have enough coal. He was going to Kingston in order to take on coal. To Lieutenant Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

"Captain Malcolm says in his testimony that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

"It must be conceded that there is no proof of any attempt to enter the port of Havana; that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in *The Neutralitet*, 6 C. Rob. 30; *The Apollo*, 3 C. Rob. 308; *The Charlotte Christine*, 6 C. Rob. 101; *The Gute Erwartung*, 6 C. Rob. 182,—the cases relied on by the government."

The application of a more stringent rule to the Newfoundland than was applied in those cases was justified by the court on the ground that steam vessels have greater power of eluding blockades than sailing vessels possess.

The conclusion of the court was that the evidence established *that the ship was loiter-[112] ing about the coast seeking an opportunity to violate the blockade. Conceding, *arguendo*, that this was enough for her condemnation, we think the fact is very disputable. It is based upon the ship's nearness to the coast, the slowness of her movements deduced from her position when the Tecumseh boarded her and when the Mayflower captured her, and the taking of a longer route to Kingston than might have been selected.

These circumstances may be explained consistently with innocence. Against them the fact remains that she made no attempt to enter any Cuban port. She sailed by Caibairien. She sailed by Sagua, although a railroad connected it with Havana, and made it inviting to contraband enterprise. And she had sailed beyond Havana when she was

captured. But it is urged she must have loitered, and with guilty intention, because she ran only 12 miles in three hours, when she ought to have run 24 miles.

In this conclusion there are disputes of fact as well as disputes of inference. It depends upon the time it was and where she was when the Tecumseh boarded her, the time it was and where she was when the Mayflower seized her; and, granting a decision of these as contended for by the government, there are the elements of a varying course in the night and the retarding influence of the current to account for the time.

The fact of going around Cuba to Kingston, instead of turning back after she was boarded by the Tecumseh, is from our present view not completely accounted for. But our situation, it must be remembered, was not Captain Malcolm's situation. It was his view, he testified, of his duty to his employers. It was his way to avoid exciting the suspicion of the officers of the Tecumseh; and, in another place, without peril or responsibility for that or some other decision, we are not prepared to say that it is necessarily proof of guilt. After experience it is often easy to see that something else should have been done than that which was done, but, judging Captain Malcolm in his situation, was there not presented to him a fair conflict of reasons? It is very certain, if

[113]doubt came to him what *to do, he would avoid the hazard of the seizure of his ship at the comparatively small sacrifice of the coal and time which would be consumed by going to Kingston the longer way.

It is further urged that when the Newfoundland was seen and pursued by the Mayflower she had not her usual lights displayed. This, the district court said, the testimony left in reasonable doubt. "While it is probable," it was said, "that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of possibility." The limit was as narrow to all other officers of the pursuing vessel, and the possibilities it afforded must be considered as at least balanced by the positive testimony of all on board of the Newfoundland, including the sailor who lit them at the usual hour, and the fact that they were all burning when she was overhauled.

But it may be said that the ship has too many suspicious circumstances to account for, and that we overlook the probative strength arising from their number and their concurrence: that, if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument, but cannot carry it so far. And yet we have no desire to impair the effectiveness of blockades by declaring a more indulgent rule than that of prior cases, nor permit experiment with opportunities to break into blockaded ports. But there should be some tangible proof of such intention—a more definite demonstration than this record exhibits. As we have already seen, the learned trial judge was

constrained to say "that the testimony as to loitering falls very far short of the proof offered in *The Neutralitet*, 6 C. Rob. 30; *The Apollo*, 3 C. Rob. 308; *The Charlotte Christine*, 6 C. Rob. 101; *The Gute Erwartung*, 6 C. Rob. 182,—the cases relied on by the government." Their application, however, to the case at bar, whose facts "fall far short" of their facts, is insisted on because of the difference between the power of steam vessels and the power of sailing vessels. Undoubtedly there is a difference, but if steam has increased the power of blockade runners, it has increased in greater degree* when [114] conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective. *The Olinde Rodrigues*, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. 851.

The question in this case, then, is as to the adequacy of the proof, and we do not think it attains that degree which affords a reasonable assurance of the justice of the sentence of forfeiture. It raises doubts and suspicions,—makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Olinde Rodrigues*, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. 851.

It follows, therefore, that the decree of the District Court must be reversed and the cause remanded, with directions to enter a decree restoring the vessel and cargo, or if they have been sold, the proceeds of the sale, but without damages or costs.

So ordered.

S. H. H. CLARK, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, *Plffs. in Err.*,

v.

CITY OF KANSAS CITY, Kansas, Board of Education of the City of Kansas City, Kansas, *et al.*

(See S. C. Reporter's ed. 114-121.)

Appeal—right to raise constitutional question—discrimination against corporation—discrimination between agricultural and other lands, in statute as to annexation to city.

1. The discrimination between individuals and

NOTE.—As to power of the legislature to annex territory to municipalities, see *State ex rel. Richards v. Cincinnati* (Ohio) 27 L. R. A. 737, and note.

As to municipal taxation of rural lands within the limits of a corporation, see *Briggs v. Russellville* (Ky.) 34 L. R. A. 193, and note. Later cases, *Farwell v. Des Moines Brick Mfg. Co.* (Iowa) 35 L. R. A. 63; *Kimball v. Grantsville City* (Utah) 45 L. R. A. 628.

Annexation of rural lands to municipalities.

Extensions of the boundaries of municipal corporations so as to include agricultural or

corporations in respect to annexation to a city of lands held for agricultural purposes cannot be attacked as unconstitutional, to defeat the annexation of lands of a corporation which are not held for agricultural purposes.

2. A discrimination between agricultural lands and other lands in respect to the right of a city to annex them is not in violation of constitutional guarantees of due process of law and equal protection of the laws, as it is within the power of the state to classify objects of legislation.

[No. 268.]

Argued November 13, 1899. Decided January 15, 1900.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment af-

rural lands have given rise to numerous controversies in which either the action of the municipality in annexing territory under delegated power, or the authority of the legislature so to change municipal boundaries, has been assailed.

So far as the legislature itself is concerned, its power is generally recognized to be absolute, in the absence of some constitutional provision directly controlling the matter. Thus, what property should be embraced within the municipality, and whether it should be taken for municipal purposes, are held to be political questions, to be determined by the law-making power; and an attempt by the judiciary to revise the legislative act would be a usurpation of power. *Norris v. Waco*, 57 Tex. 635.

So, the fixing of the boundaries of a municipality or taxing district, and the amount of area it shall contain, are wholly matters of legislative discretion. And the exercise of such discretion is not a subject of judicial investigation or revision. *Kimball v. Grantsville City*, 19 Utah, 368, 45 L. R. A. 628, 57 Pac. 1.

The propriety of annexing agricultural lands to a municipality rests entirely within the discretion and under the control of the legislature. *Washburn v. Oshkosh*, 60 Wis. 453, 19 N. W. 364.

The legislature may, in extending the boundaries of a city, include rural districts the condition of which is materially different from the character of city property. *New Orleans v. Cucciar*, 27 La. Ann. 156.

The decision of the legislature as to the necessity of bringing agricultural lands within the limits of the municipality is not subject to review by the courts, at the instance of an aggrieved taxpayer. *Madry v. Cox*, 73 Tex. 538, 11 S. W. 541.

But an annexation statute in which the right to tax is made dependent upon the duty to exempt agricultural lands from taxation, violates the constitutional requirement that taxes be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. *State ex rel. Moody v. Wardell* (Mo.) 54 S. W. 574.

The legislature of Colorado has no power to extend or enlarge the territorial limits of a specially chartered town or city by adding thereto a noncontiguous strip of land. *Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751, 39 Pac. 425.

An exception is recognized in some states where the purpose of the act is to subject the territory annexed to inequitable taxation. Thus, a statute extending the limits of a city

firming a decision denying an injunction against the collection of city taxes on lands alleged to be illegally annexed to the city. *Affirmed*.

See same case below, 59 Kan. 427, 53 Pac. 468, — L. R. A. —.

Statement by Mr. Justice **McKenna**:

*This case was here once before on writ of [114] error to review a judgment of the supreme court of Kansas reversing a judgment of the *nisi prius* court sustaining a demurrer to the petition of plaintiffs. 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207.

*The writ was dismissed on the ground that [115] the judgment was not final. On the return of the case to the supreme court of the state such proceedings were had there and, by its direction, in the trial court, that a final judgment was entered, denying the relief

so as to include land used exclusively for farming purposes, situated at a distance from the municipality and not required for either streets, houses, or other purposes of a town, and passed solely for the purpose of increasing the city's revenue, amounts to a taking of private property without compensation, within the prohibitory clause of the Constitution. *Morford v. Unger*, 8 Iowa, 82.

But the judgment of the legislature "cannot be controlled on the ground of a mere difference of opinion as to the wants or necessities of the town, or upon mere conjecture or opinion as to the motives of the extension, but only upon the ground of a flagrant violation of constitutional right, to be demonstrated by the extrinsic facts showing the actual condition of the town with respect to territory, population, and locality, and the condition of the added territory with respect to population and in relation to the existing town." *Sharp v. Dunavan*, 17 B. Mon. 223.

And an annexation statute is not unconstitutional because it includes a portion of a farm on which is the residence, and which, from its relative situation and location, derives protection and benefits in common with other taxpayers from the municipal government. *Elkton Trustees v. Gill*, 94 Ky. 138, 21 S. W. 579.

But the majority of the courts do not agree with the reasoning of the above cases. Thus, mere extension of city limits so as to include agricultural lands is not taking property without due process of law, notwithstanding such annexation was unnecessary and was dictated by a desire to subject such property to city taxation. *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

And an act extending the limits of a municipality to include arable and pasture lands does not take private property without due process of law. That provision is a limitation upon the power of eminent domain, and has no relation whatever to the taxing power. *Groff v. Frederick City*, 44 Md. 67.

In *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, plaintiff's farm was annexed to the city of Pittsburgh. When it was taxed for city purposes he alleged that it was a taking of his property without due process of law. The court said: "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city and be governed by its authorities and its

prayed for, which judgment the supreme court affirmed, and the case was then brought here.

The question presented is the constitutionality of a statute of the state, and the validity of an ordinance passed by Kansas City under the statute. The statute (Gen. Stat. 1897, chap. 32, § 15) is as follows:

Cities of the First Class.

An Act Relating to Certain Cities of the First Class, and the Adding Thereto Certain Adjoining Territory.

Be it enacted by the Legislature of the State of Kansas: Sec. 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a popula-

laws, has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. . . . It may be true that he [plaintiff] does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. . . . But who can adjudge with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it? . . . These are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."

In *State, Bailey, Prosecutor, v. Brown*, 53 N. J. L. 162, 20 Atl. 772, the court, in deciding that agricultural land which had been originally embraced within the limits of a town could not be exempted from taxation for municipal purposes, says, in commenting on the rule that taxation of property which receives no benefit from the expenditure of the money was taking private property for public purposes without compensation, except in a few states, "the doctrine thus promulgated has no support in the jurisprudence of this country. . . . In the case of general taxation for governmental purposes, benefit is presumed to accrue to all."

The opposite view was strongly presented in a dissenting opinion by Agnew, Ch. J., in *Kelly v. Pittsburgh*, 85 Pa. 180, 27 Am. Rep. 639. The judge said: "If the legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given lines outside of the city to pay these city taxes. Thus, when we get rid of that confusion of thought which confounds extension of boundary and power of taxation, we perceive that taxes laid on mere farm lands to pay city levies applicable only to the built-up or true city is nothing more than an order to farmers to pay for the benefit of the city residents; it is taking the money of A to pay for improvements made for the use of B. This is palpably and flagrantly unjust, and therefore against common right. If the legislature itself cannot compel farmers to pay city taxes for purely local purposes in which they have no share, it is clear it cannot authorize the city to do indirectly what it cannot do directly. An order, with or without the extension of boundary, upon a certain class to pay taxes for local benefits conferred on others is wholly different from a power to lay a general tax for the support of

tion of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range,

government. The latter is a power to which every citizen of a state submits himself in consideration of the general benefits derived from government. But as to the former . . . the object is to make the owners of farms divide the expense of supporting municipal government with those who need it; . . . the true city is the built-up part, while the levy of taxes on farms is to confiscate property outside for the benefit of those within the true city. The power of the legislature is clear to divide the state, for convenient local government, into counties, townships, cities, boroughs, etc., conferring on each an appropriate autonomy. But in doing this the powers conferred must be adapted to the ends to be accomplished by each. A sound and large discretion is necessarily exercised in this adaptation of powers. But it is equally clear that the powers conferred must have a reasonable appropriateness to the end proposed. Such an exercise of power only can fairly comport with the true and acknowledged principles of our American government, which are well founded on the rights of the people and for their 'peace, safety, and happiness.' " And he quotes from *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648: "'The purposes for which men enter into society will determine the nature and terms of the social compact, and, as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it.'" Continuing, the judge said: "Therefore, while we concede the wide range to be given to legislative discretion in adapting the means to the end, that is, to the purposes of local government, there is a limit beyond which the legislative power cannot sacrifice the sacred right of private property. This limit is reached when it palpably and plainly sacrifices this right which the people themselves have jealously guarded against transgression in their fundamental law. There must be, therefore, a reasonable appropriateness in the means employed to execute the legislative purpose. . . . The taxing power conferred on the city, therefore, cannot extend to such a case as this, where a ruinous burden is laid on land wholly rural and outside the city proper, for purely local and city objects, in which . . . the owner has no interest. This distinction between local taxation for purely local purposes, and general taxation by the state, in which all are interested, cannot be overlooked or thrust aside. . . . In discussing this question, the advocates of unlimited power ignore the distinction so palpable between the general power of taxation for the benefit of the whole state, though laid in districts, and the imposition of

and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.*

The following is the ordinance:

Ordinance No. 2163.

[116] *An Ordinance Adding Certain Lands Therein Described, Known as the Union Pacific Lands, to and Making the Same a Part of the City of Kansas City, Kansas.

Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of

local burdens in return for specific benefits. As to the former, all men participate more or less in the general advantages of government; but there can be no such postulate for the latter where it is palpably clear the local burden is imposed without just cause and is plainly for the benefit of others. And a court must regard a substantial return not a merely speculative or shadowy benefit which amounts to no more than a pretext. . . . If the rights of property can be taken or taxed away, without a justifiable cause to bring the legislative act within the just powers of government, it is confiscation, not legal contribution."

Where the municipality acts under delegated power, the rule as laid down in *Vestal v. Little Rock*, 54 Ark. 321, 11 L. R. A. 778, 15 S. W. 891, 16 S. W. 291, has been cited with approval by the courts of other states. The court says: "City limits may reasonably and properly be extended so as to take in contiguous lands: (1) When they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use."

In this case the court annulled the action of the city in annexing territory consisting of farm and garden property which was not needed for city use, and the annexation of which would subject the owner to the burdens, without the benefits, of local government.

But agricultural lands adjacent to a town or village may be annexed thereto, provided they are in such close proximity to the platted portions as to have some unity of interest in the maintenance of municipal government. *Wahoo v. Tharp*, 45 Neb. 563, 63 N. W. 840.

And land used for farming and gardening purposes may be included by a municipal corporation in an annexation ordinance where the territory annexed was either already platted and largely occupied, or had the prospect of becoming. In the near future, desirable city property.

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Kansas City, Kansas, and is so situated as to be bounded on three fourths ($\frac{3}{4}$) of its boundary line by platted territory of and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens, now therefore,

Be it ordained by the mayor and councilmen of the city of Kansas City, Kansas: Sec. 1. That the following described territory, to wit: . . . Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, be and hereby is added to and made a part of the city of Kansas City, Kansas.

Sec. 2. This ordinance shall take effect and

Copeland v. St. Joseph, 126 Mo. 417, 29 S. W. 281.

So, an extension of city limits is not inequitable, unjust, or unreasonable because it takes in agricultural lands, the greater part of which is available for building purposes and much of it well located for residence property. *Parker v. Zelsler*, 73 Mo. App. 537.

Land occupied for horticultural and agricultural purposes may be annexed to a city, where the growth of the city is largely started in that direction, and it is necessary for its further development to open and include streets through such property. *Chandler v. Kokomo*, 137 Ind. 295, 36 N. E. 847.

And the annexation by a city of land used for agriculture is not improper, where its value is derived from its prospective town use, and not from its present country use. *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13.

A change of status of a tract of land from a farm to city lots by the exercise of a power granted to cities to extend their limits is not a taking of property without due process of law. *Callen v. Junction City*, 43 Kan. 627, 7 L. R. A. 736, 23 Pac. 652.

The right to extend city boundaries is not affected by the fact that the territory attempted to be annexed is occupied and used exclusively for agricultural and grazing purposes, where the statute under which the proceedings are conducted makes no discrimination with regard to the form or extent of new territory to be added, other than a limitation upon its width. *State v. Waxahachie*, 81 Tex. 626, 17 S. W. 348.

There is no law in Pennsylvania which prohibits the annexation of farm land to a city. The question of expediency is not for the court, but is exclusively for the determination, first of the inhabitants of the district, and afterwards of the city councils whose decision is final. *Susquehanna Twp. Appeal*, 17 Pa. Co. Ct. 398.

Where property is platted into lots, and marked in such a way as to impress upon it the character of urban as distinguished from rural use, the subdivisions are regarded as "lots" within the meaning of a statute authorizing the annexation of territory platted into lots. *Evansville v. Page*, 23 Ind. 525; *Glover v. Terre Haute*, 129 Ind. 593, 29 N. E. 412.

Owners of farming land adjacent to a city, who voluntarily subdivide their lands into blocks and lots, and thus create the conditions upon which the city is authorized to make their subdivisions a part of the municipality, cannot defeat such annexation by a claim that the extent of their homestead is thereby reduced to 1 acre without their consent. *Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616.

be in force from and after its passage and publication in the Kansas City Gazette.

After passage of the ordinance the city levied taxes on the lands, and this suit was brought to restrain their collection. The petition presented the facts and contained the following allegations:

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

"And plaintiffs are advised and so charge the fact to be that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, 'Exhibit A,' it is unconstitutional, null, and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States, which reads as follows: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.'

"Plaintiffs further allege upon information and belief that there was not, at the time of the passage of said chapter 74 of the Session Laws of Kansas for 1891, any city of thirty thousand (30,000) inhabitants or more in the state of Kansas where the conditions referred to in the first part of the said act permitting the adding of additional territory to a city by the passage of an ordinance merely exist; and plaintiffs are advised, and so charge the fact to be, that said act of the legislature, while purporting to be a general act, was intended solely to apply to the lands attempted to be taken within the limits of said Kansas City, Kansas, by said ordinance, 'Exhibit A.'"

The property over which the extension was made was actually used in part for railroad purposes, and consisted of roadbed and right of way, main and side tracks, buildings, and improvements. The portion not actually used for railroad purposes, the petition alleged, were vacant and unoccupied lands, which were held and possessed by the railroad company for railroad purposes.

Mr. N. H. Loomis argued the cause and, with Messrs. Winslow S. Pierce and A. L. Williams, filed a brief for plaintiffs in error:

Conceding that the legislature has the power to make classifications, and that it may have the power to classify the different kinds of property which may be taken within the limits of a city, such classification must be reasonable. It cannot be purely arbitrary.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Cooley, Const. Lim. p.* 393.

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The classification made of agricultural lands owned by individuals is unreasonable and arbitrary.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. Rep. 385.

The rights of the Union Pacific Railway Company are affected by the act complained of. Its lands are sought to be taken within the limits of a city and subjected to its burdens under the provisions of the very statute which is claimed to be unconstitutional. The receivers have therefore the right to avail themselves of the discrimination made in favor of agricultural lands owned by individuals, and against all other classes of property.

See *South Ottawa v. Perkins*, 94 U. S. 267, 24 L. ed. 157.

Messrs. F. D. Hutchings and T. A. Pollock argued the cause and filed a brief for defendant in error:

Plaintiffs in error are not in a position to question the constitutionality of the law under consideration.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Cooley, Const. Lim. 6th ed.* 196; *Lowndes County v. Hunter*, 49 Ala. 507; *Smith v. Inge*, 80 Ala. 283; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582.

No one can take advantage of an unconstitutional provision of a law who has no interest in it and is not affected by it.

State v. McNulty, 7 N. D. 169, 73 N. W. 87; *Jones v. Black*, 48 Ala. 540; *Switzerland County Comrs. v. Reeves*, 148 Ind. 467, 46 N. E. 995.

*Mr. Justice McKenna delivered the opinion of the court: [117]

The statute excepts from its operation lands used for agricultural purposes if owned by individuals. It includes such lands if owned by corporations. It is hence contended by plaintiff in error that the statute discriminates between the owners of agricultural lands, and between them again and the owners of all other lands, and infringes thereby the provision of the Constitution of the United States which guarantees to all persons the equal protection of the laws. [118]

Of the discrimination between owners of agricultural lands the supreme court of Kansas said the defendants in error (plaintiffs here) cannot be heard to complain. "Their lands are not agricultural lands. At least they do not allege them to be such lands, but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands held and possessed for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot, therefore, be heard to complain on that score. 'A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no

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interest in defeating it.' Cooley, Const. Lim. 6th ed. 196." *Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044.

We concur in this view, and it would be difficult to add anything to its expression. The discrimination occurs only in a particular use of the lands, and it would seem obvious that such use must be shown to make a cause of action,—a right infringed and to be redressed. If the lands of the plaintiff belonged to an individual they would be subject to the statute. Where, then, is the discrimination? In that, it is claimed, if the lands were used for agriculture, being owned by a corporation, they would be subject to the statute, but would not be if owned by an individual. But that is not a discrimination immediate and actual against plaintiff in error. It does not now, and there is nothing in the record to show that it ever will, exist. Not a law alone, but a law and its incidence, are necessary to a justiciable right or injury; and it therefore follows if plaintiff has a grievance under the statute which this court can redress it comes from the discrimination between agricultural lands and other lands,—a cause of action, not because the plaintiff is a corporation, but because it is an owner of such lands, and one which it would have even if it were an individual.

[119] *The answer to that charge depends upon the power of the state to classify objects of legislation; necessarily a broad power, and one which this court has so many times decided exists, and so many times has defined and illustrated the limits upon it of the provision of the Constitution of the United States invoked by plaintiff in error, that farther definition would seem impossible, and any new instance of its application not without exact or analogous example in some decided case.

The reasoning of the cases we need not repeat. It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations. "In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B (*Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161), to a different measure of damages than B (*Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207), and it permits special legislation in all its varieties. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570." *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

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And these principles have been affirmed in later cases, and a classification based on the difference between fire insurance and other insurance has been sustained; also on a difference between railroad and other corporations and of persons. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 20 Sup. Ct. Rep. 136, ante, 192.

In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the majority of the court decided that, in consequence of the great peril and possibility of fires being communicated by *the locomotives of railroad corporations, it was in the power of the state of Kansas to impose on them, in a suit successful against them, an attorney's fee, and not impose it on an unsuccessful plaintiff. It was said by Mr. Justice Brewer, after a review of the cases that —

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay, not only the damage which it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." 174 U. S. 106, 43 L. ed. 913, 19 Sup. Ct. Rep. 613.

In the case at bar the distinction is between tracts of agricultural lands in a certain relation to cities and lands used for other purposes in such relation.

We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use, it could be taken for granted, would only be temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city, and not be *moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may

justify, if not require, their inclusion within the municipal jurisdiction.

We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States.

Judgment affirmed.

ROBERT RAE, Jr., and Elizabeth Rae,
His Wife, *Plffs. in Err.*,
v.

HOMESTEAD LOAN & GUARANTY COMPANY.

(See S. C. Reporter's ed. 121-126.)

Writ of error to state court—Federal question—other question controlling.

The contention in a state court, that a contract for the payment of gold coin is invalid, will not be ground for writ of error from the Supreme Court of the United States, when the decree of the state court is for payment of a certain amount in dollars and cents, without specifying any particular kind of money, and this is affirmed by the supreme court of the state on the ground that the defendants have not been prejudiced by merely requiring them to respond in lawful money.

[No. 261.]

Submitted December 18, 1899. Decided January 22, 1900.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a decree on foreclosure of a mortgage payable in gold coin. *Affirmed.*

Same case below, 178 Ill. 369, 53 N. E. 220.

Statement by Mr. Chief Justice **Fuller**:

The Homestead Loan & Guaranty Company filed its bill in chancery in the circuit court of Cook county, Illinois, *against Robert Rae, Jr., and his wife, for the foreclosure of a certain mortgage or trust deed on real estate in that county, given by them to secure a bond whereby Rae acknowledged that he was bound to the company "in the sum of ninety-eight hundred dollars (\$9,800) in gold coin of the United States of America, of the present standard weight and fineness," and which recited that the company had advanced to him "the principal sum of forty-nine hundred dollars (\$4,900), which said sum, together with interest thereon, costs, charges, and expenses, amounting in the aggregate to the sum of seventy-eight hundred sixty-seven dollars and twenty cents (\$7,867.20) is to be repaid within ten years from date in gold coin as aforesaid, in monthly instalments of sixty-five dollars and fifty-six

cents (\$65.56) each, payable on the first day of each calendar month during the said term of ten years. . . ."

The bill alleged default in the payment of certain monthly instalments, and that, in pursuance of the terms of the bond and trust deed, the company had declared the entire amount of the loan due and payable, and prayed "that upon the hearing hereof the court will ascertain upon an accounting how much is due to the complainant under the terms of the said bond and trust deed, and will decree the payment of any amount so found due, by a short day, in gold coin of the United States of the present standard weight and fineness;" and for sale and foreclosure, if the amounts decreed were not paid.

Defendants demurred to the bill, and set forth the following causes of demurrer:

"(1) The matters and things set out in the complainants' bill are contrary to public policy and void. (2) Because it is not lawful for the complainants and the defendants to make any money but gold and silver money a money tender in payment of any debt contracted in the United States to be paid in the United States. (3) That so much of the act of Congress of February 28, 1878, entitled 'An Act to Authorize the Coinage of the Standard Silver Dollar, and to Restore Its Legal Tender Character,' which provides that gold and silver money of the United States shall be a legal tender for payment and discharge of debts and obligations, is valid, but the proviso permitting *parties to [123] make such special contracts as they please as to the payment of debts and obligations in money other than gold and silver is void. (4) That the contract or mortgage set forth in said bill and the relief prayed therein is void, as against public policy. (5) That by virtue of article 1, section 8, paragraph 5, of the Constitution of the United States, Congress alone has 'power to coin money and regulate the value thereof,' and that by article 1, section 10, paragraph 1, of said Constitution it is provided that 'no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender' in payment of debts, in contracts made in the United States to be performed in the United States. Said defendants claim, jointly and severally, the benefit of said constitutional provisions. (6) That said bill should be dismissed for want of equity."

The demurrer was overruled, defendants excepted, elected to abide by it, and refused to answer over. The bill was thereupon taken as confessed, and the circuit court on the evidence entered a decree of foreclosure, finding that the defendant Rae, Jr., "being indebted to the complainant in the sum of \$4,900 for a loan made by the complainant to said defendant, executed and delivered to the complainant his bond, bearing date the 1st day of August, 1895, which bond is correctly set out at length in complainant's bill;" that to secure the bond said trust deed was duly given and recorded, and was a valid and first lien on the premises therein described; that default had been made in the

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question,—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267, and Kipley v. Illinois ex rel. Akin, 42 L. ed. U. S. 998.

payment of instalments as alleged, and that the whole amount had been declared due; and that there was due from defendant to complainant, for principal and accrued interest, the sum of \$5,350.76, together with some other items; and decreed that if the sums due were not paid within five days the real estate mortgaged should be sold in satisfaction.

Defendants appealed to the appellate court of the state of Illinois for the first district, and assigned for error the action of the circuit court in overruling the demurrer, etc., and in not dismissing the bill because it claimed there was due the sum found to be due in gold coin of the United States of the [124]*present standard in weight and fineness. The decree was affirmed by the appellate court. *Rae v. Homestead Loan & Guaranty Co.* 76 Ill. App. 548.

From that decree, defendants appealed to the supreme court of Illinois, by which it was affirmed. *Rae v. Homestead Loan & Guaranty Co.* 178 Ill. 369, 53 N. E. 220. The opinion of the supreme court was as follows: "The elaborate and able argument for appellants cannot be considered on what appears from this record, as the decree does not find or require judgment in any particular kind of money, but finds the sum due in dollars and cents. Even if it were assumed that contracts of this character could not be sustained, still, by the final decree the appellants are not prejudiced,—they cannot be heard to complain in an appellate tribunal. If the character of money in which payment is contracted to be made be rejected from the contract, still the liability for payment in some kind of legal tender would exist, hence by the decree no prejudice resulted to appellants in overruling their demurrer."

The present writ of error was then brought, and defendants in error moved to dismiss or affirm.

Mr. Robert Rae submitted the cause for plaintiff in error.

Messrs. John P. Wilson and William B. McIlvaine submitted the cause for defendant in error.

[124] *Mr. Chief Justice Fuller delivered the opinion of the court:

The circuit court of Cook county did not find the sums due as due, nor decree their payment, in gold coin of the United States. The record does not show that when the instalments matured any demand was made for their payment in gold, nor that a tender of money other than gold was made, or, if made, that such tender would not have been accepted. The presumptions are entirely to the contrary. The circuit court decreed that the liability be discharged in any lawful money of the United States, and the supreme

[125] court held that *defendants below could not be heard to complain of a decree by which they were not prejudiced. This was a ground broad enough to sustain the judgment.

without reference to any Federal question supposed to be involved.

According to the terms of § 709 of the Revised Statutes, we exercise jurisdiction over the final judgments and decrees of state courts, where the validity of a treaty or statute of, or authority exercised under, the United States, is drawn in question, and the decision is against their validity; or where the validity of a statute of, or an authority exercised under, any state, is drawn in question on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority.

The decision of the supreme court of Illinois was not against the validity of a treaty or statute of, or authority exercised under, the United States; nor was it in favor of the validity of any statute of, or authority exercised under, the state of Illinois, asserted to be repugnant to the Constitution or laws of the United States; nor was it against any title, right, privilege, or immunity specially set up or claimed by plaintiffs in error.

The validity of part of the act of Congress of February 28, 1878 (20 Stat. at L. 25, chap. 20), was questioned, but plaintiffs in error cannot bring the case here on the objection that that contention was not sustained.

The benefit of clause 5, section 8, article 1, of the Constitution, empowering Congress to coin money and regulate the value thereof, and of clause 1, section 10, of article 1, providing that no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender for the payment of debts, was claimed; but the state courts did not deny to Congress any power granted, nor assert *in respect of the state any power prohibited, and it did not appear that plaintiffs in error were deprived of any benefit secured by either of those provisions. [126]

Plaintiffs in error pointed out no provision of the Constitution, or of any law of the United States, forbidding the making of contracts payable in gold coin of the United States, but contended that contracts so made payable were void because opposed to public policy. The state circuit court, however, simply held plaintiffs in error to respond in lawful money, and entered its decree accordingly, and the supreme court decided that plaintiffs in error could not complain of that decree, because not prejudiced thereby. This was not a decision against any right secured by the Constitution or laws of the United States specially set up or claimed by plaintiffs in error in those courts,

Writ of error dismissed.

LINDSAY & PHELPS COMPANY, *Plff. in Err.*,
v.

JOHN H. MULLEN and the State of Minnesota.

(See S. C. Reporter's ed. 126-155.)

Boom chartered by law—lien on logs for surveying and scaling—scale bills as evidence—record of scale bills—lien on logs of one owner for scaling logs of another—logs cut in another state—burden on interstate commerce—charge for use of waterways.

1. A boom is "chartered by law" within Minn. Stat. 1894, § 2400, when it is owned by a corporation having authority to maintain a boom, whether it is incorporated under a general law or a special law.
2. A lien upon logs of private parties for inspecting and scaling logs run through chartered booms is given to the surveyor general by Minn. Stat. 1894, § 2400, declaring that he "shall survey all logs and timber running out of any boom" now chartered or which may hereafter be chartered by law in his district.
3. Scale bills accompanied by a certificate of the surveyor general stating, as required by Minn. Stat. 1894, § 2402, the amount due him thereon and that he scaled the logs, timber, or lumber, relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection, are competent evidence.
4. A record of scale bills in the books of the surveyor general, as prescribed by Minn. Stat. 1894, § 2400, is not a necessary preliminary to his right to a lien under § 2402.
5. Subjecting the logs of one owner in a log boom to a statutory lien for fees due the surveyor general for surveying and scaling all the logs in the boom, including those of other owners, does not deprive the owner of property without due process of law, when he has chosen to avail himself of the boom.
6. A lien given by state statute on logs cut in another state for surveying and scaling them by the surveyor general while in a log boom does not constitute a burden on interstate commerce, but is a lawful charge imposed by the state for furnishing additional facilities for navigation of a waterway.
7. The extension of a shear boom across the navigable channel of the Mississippi and to near the Wisconsin shore, under authority of the state of Minnesota, cannot be complained of as an obstruction of navigation by one who has chosen to avail himself of its advantages, in order to escape a lien for surveying and scaling, under the state law, after the logs are within the limits of the state of Minnesota when neither the state of Wisconsin nor the United States makes any complaint.

[No. 44.]

Argued April 6, 7, 1899. Decided January 15, 1900.

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review a decision sustaining a lien for surveying and scaling all logs in a boom. *Affirmed.*

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Statement by Mr. Justice **Brewer**:

*On August 1, 1893, the plaintiff in error [127] commenced its action of replevin against one of the defendants in error, John H. Mullen, to recover possession of a quantity of logs said to be of the value of \$15,000. Mullen answered, alleging that he was the surveyor general of logs and lumber for the fourth district of Minnesota; that as such surveyor general he had scaled and surveyed a large number of logs in a boom belonging to the Minnesota Boom Company, for which service he was entitled to fees amounting to the sum of \$11,088.92, and had seized these logs under the statute giving him a lien, to enforce payment thereof, and praying for a return of the property, or, if that could not be had, for judgment for the sum of \$11,088.92, together with 10 per cent, \$1,108.89, costs of collection as provided by law, and interest. To this answer the plaintiff filed a reply, challenging on several grounds the validity of the claim for fees and lien. Thereafter the state of Minnesota was, on its application, made a party defendant, and answered setting forth in substance that since the filing of the pleadings the defendant Mullen had received from the state of Minnesota the full amount of his fees, and had transferred his claim to the state, and adopting the answer of Mullen, so far as it was applicable. On these pleadings the case went to trial before the court without a jury. No special findings of fact were made, but only a general finding for defendants. A bill of exceptions was preserved, reciting the testimony, showing that at the close the plaintiff requested of the court the following declarations:

"First. That it has not been shown that the logs for which *defendants claim fees for [128] scaling in this case ever ran into or through any boom chartered by law and therefore the defendants have no right to the fees claimed or to any lien on the plaintiff's logs therefor; but the court refused to make such declaration; to which ruling and order the plaintiff then and there duly excepted.

"Second. That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

"a. Because the scale bills, defendants' Exhibits 3 and 4, are not evidence of the scaling of the logs therein described.

"b. Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district.

"c. Because it appears that a very great proportion of the logs mentioned in these scale bills, defendants' Exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else.

"d. Because the pretended records of said scale bills were not in fact any record whatever.

"e. Because it does not appear that any of the log marks shown on defendants' scale bills, Exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the fourth lumber district of

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the state of Minnesota in accordance with the provisions of title 3, of chapter 32, General Statutes of the state of Minnesota.

"But the court refused to make such declaration; to which ruling and order the plaintiff duly excepted.

"Third. That the statute under which the defendants claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the state of interstate commerce, and is unconstitutional and void, being in contravention of subdivision 4, of section 8 of article 1 of the Constitution of the United States."

[129] Upon the general finding the court entered a judgment for the defendants for a return of the property or the payment of the fees, costs, and interest. Thereupon the plaintiff brought the case directly to this court by writ of error on the ground that the laws of Minnesota, under which these fees and lien were claimed, were in contravention of the Constitution of the United States.

The facts developed on the trial, and upon which the questions of law arise, are these: The state of Minnesota was by law divided into five districts for the inspection of logs and lumber. The fourth district was defined as follows: "The Mississippi river and its tributaries below the outlet of Lake Pepin to the southern line of Wabasha county." The defendant Mullen was the duly appointed and qualified surveyor general of logs and lumber for this district, and as such performed the services for which the fees and lien were claimed. The Minnesota Boom Company was a corporation organized under the general laws of the state of Minnesota in April, 1889. The purposes for which the corporation was organized are stated in article 1 of its charter:

"The general nature of the corporate business shall be the construction, maintenance, and use of booms, dams, and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi river, or either bank thereof, between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river or a point opposite thereto, and also upon, or on any side or bank of, any slough, bayou, branch, or part of the Mississippi river between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation beside the construction, maintenance, and operation of said structures shall be gathering, driving, booming, storing, assorting, rafting, brailing, and otherwise handling any and all logs, lumber, and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber, or timber upon any of said waters or within said territory, and this corporation shall have the right to charge and receive, and shall charge and receive, from any

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and all persons upon or in connection with *those logs, lumber, or timber for any work [130] or services done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid."

It constructed a boom on West Newton Slough, within the limits of the fourth inspection district, above defined. This slough is an arm or minor channel of the Mississippi river, bounded on its southwestern side by the main land, constituting the state of Minnesota, and on the other side by an island, extending up and down the river about 3 miles, and dividing this slough from the main channel of the river. The works of the boom were in this slough, but at the upper end of the island, extending diagonally across the river to the Wisconsin shore, was a structure called a shear boom, so arranged that when closed it turned all the logs coming down the river into the upper end of the boom. When one end of it was released it floated down the stream and thus allowed free passage up and down the main channel. Above the head of this boom the Chippewa river empties into the Mississippi. The Chippewa river is wholly within the limits of the state of Wisconsin, and the logs, which this boom was constructed to secure, and which in fact it did secure, were mainly logs coming out of that river and which had been cut within the limits of the state of Wisconsin.

The statutes of Minnesota, so far as they are pertinent to this inquiry, in reference to booms, scaling, and surveying, are the following:

"Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein, which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side, rolling, sluicing, *and [131] flooding dams or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber, and timber, driven, sluiced, or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams, and tools for breaking the rollways and driving such logs in season for making a thorough

drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs, and expenses have a lien on the logs for which same was incurred, and may seize, in whoever possession found, and hold a sufficient amount thereof to pay the same, and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect, and receive from the owner or owners of such logs the amount due for any such tolls. No injunctive order shall be granted to prevent the use or enjoyment of any such improvement or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state, *and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations, in such adjoining state created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purposes for which the corporation in this state is organized can be better effected thereby. *Provided*, That no such purchase or consolidation or other union shall be made without the assent of holders of two thirds (2/3) of the capital stock of such first (1st) named company. *Provided*, That all dams and other works erected under the authority given by this act shall be so constructed, used, and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs, and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act." Section 2 of chapter 221 of the Laws of the state of Minnesota for the year 1889.

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in

his district, and at the end of each week, when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the week, and shall sign the same; and he shall immediately record such bill in the books of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected *in accordance with such survey. [133] And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor generals, or copies of such records, duly certified, shall, in all courts of this state, be prima facie evidence of the matters stated in such scale bill, record, or copy." Section 14 of chapter 32 of the General Statutes of Minnesota for the year A. D. 1860, being now § 2400 of the Statutes of Minnesota of 1894.

"The fees of surveyor generals shall be: For surveying, scale marking, making scale bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet, for traveling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log-mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index to the record. And for the purpose of securing to the surveyor general the payment of his fees whether the same are for traveling, surveying, making scale bills, or recording the same or for any or all of such services such surveyor general shall have a lien upon all such logs, timber, or lumber surveyed and marked by him, for the amount due for his services thereon, and may retain such lien by affixing to the scale bill of such logs, timber, or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber, or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber, or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber, or lumber shall not be removed or *taken from the pos-[134] session or control of such surveyor general

until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber, or lumber, to pay the amount due him, with the costs of collection, first giving ten days' notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent on the amount due, for taking care of the property and, to the officer making the sale, ten per cent on the amount payable to the surveyor general." Section 16 of chapter 32 of the General Statutes of 1866, being § 2402 of the Statutes of 1894.

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log-mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages, and orders, and other instruments in writing for the sale, transfer, encumbrance, or delivery of any logs or timber in the same district.

"Third. A book in which shall be recorded the scale bills of all the logs, timber, and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to anyone, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or *marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force, and effect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and authorized to be kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this state, be taken and held to be prima facie evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office,

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but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all the courts of this state, be received and read as prima facie evidence of the matters and things in such record contained, and of the matters therein stated." General Statutes 1866, chap. 32, § 17. As amended 1877, chap. 18, § 3, being now § 2403 of the Statutes of Minnesota of 1894.

In addition to these statutes must be noticed chap. 401, Laws of Minnesota, 1895, which is entitled "An Act for the Relief of John H. Mullen, and to Appropriate Money therefor," the first two sections of which are as follows:

"§ 1. That the sum of fifteen thousand eight hundred (15,800) dollars be, and the same is hereby, appropriated out of any money in the state treasury not otherwise appropriated for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the fourth district of the state of Minnesota, in accordance with the instruction of the governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same *to said [136] Mullen, and the state treasurer is hereby directed to pay the same.

"§ 2. Before said payment is made said Mullen shall assign to the state of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the state of Minnesota shall proceed to collect the same in the name of said Mullen or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the state of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act."

Under the authority of this statute the defendant Mullen received payment of the amount charged for fees, etc., and assigned his claim to the state, and under and by virtue of this assignment the state became a party to this litigation, as heretofore stated.

Mr. Newel H. Clapp argued the cause, and Mr. Moses E. Clapp filed a brief, for plaintiff in error:

Anything contained in the articles of incorporation of a corporation organized under the general laws of the state, as was the Minnesota Boom Company, which is not warranted by the statutes authorizing the formation of the corporations, is void for want of authority.

Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409.

The rights and powers of such a corporation were under consideration before the supreme court of Wisconsin in *Black River*

Flooding-Dam Asso. v. Ketchum, 54 Wis. 313, 11 N. W. 551, in which it was held that unless a corporation organized under a statute of which the Minnesota statute is almost an exact copy had taken or could take prior possession of the entire stream, it acquired no rights whatever upon a river under that statute. This decision having been made before the law was enacted in Minnesota it would seem that it must be conclusive on this proposition.

The legislature cannot authorize the taking of the property of one person for rendering services upon his property and that of another for the benefit of a third.

Appleman v. Myre, 74 Mich. 359, 42 N. W. 48.

Mr. Wallace B. Douglas argued the cause and, with *Mr. H. W. Childs*, filed a brief for defendant in error:

The words "or other lawful business" contained in Minnesota Gen. Stat. chap. 34, tit. 2, § 1, include any other kind of business for a pecuniary profit not elsewhere provided for.

Brown v. Corbin, 40 Minn. 509, 42 N. W. 481.

If there is any business in the pine-forest states of this country which an individual may lawfully do, it is to float or drive his logs to mill or market.

Pierrepoint v. Lovelless, 72 N. Y. 211.

The great weight of authority sustains the view that in the timber states especially, where great lumbering interests are carried on, the floating of logs is navigation. Hence streams capable of being so used are called navigable.

Angell. *Water Courses*. 7th ed. § 537; Bouvier, *Law Dict.* title, *Navigable Waters*; *Morgan v. King*, 35 N. Y. 459, 91 Am. Dec. 58; *Rhodes v. Otis*, 33 Ala. 596, 73 Am. Dec. 439; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 342, 18 Am. Rep. 184; *Whisler v. Wilkinson*, 22 Wis. 572; *Smith v. Fonda*, 64 Miss. 551, 1 So. 757; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Treat v. Lord*, 42 Me. 558, 66 Am. Dec. 298; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Olson v. Merrill*, 42 Wis. 203; *Cohn v. Wausau Boom Co.* 47 Wis. 314, 2 N. W. 546.

Where a corporation is organized under a general law, that law is its charter.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *O'Brien v. Cummings*, 13 Mo. App. 197; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 340; *Smith v. Sherry*, 50 Wis. 214, 6 N. W. 561.

The articles of association of a company thus organized, taken in connection with the laws under which the organization takes place, form the constitution of the association, and answer the same purposes as a special charter.

1 Morawetz, *Priv. Corp.* § 318.

It is not necessary to have legislative au-

thority as a prerequisite to the right of constructing a boom in a navigable stream.

Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; *The City of Erie v. Canfield*, 27 Mich. 479; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270.

In refutation of the suggestion that it might not be lawful for the state to confer power to construct a boom at West Newton slough under the commerce clause of the Constitution, we deem the question determined and settled.

Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 698, 27 L. ed. 587, 2 Sup. Ct. Rep. 732.

The omission of the surveyor general to record the scale bills would at worst be an irregularity and so would not affect the legal force of the bills.

Fish v. Emerson, 44 N. Y. 376; *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304; *Hopper v. Lucas*, 86 Ind. 50.

The statute of Minnesota is a legitimate police regulation, and not a regulation of interstate commerce. In short, it is an inspection law.

Cooley, Const. Lim. 6th ed. 595; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *Hospes v. O'Brien*, 24 Fed. Rep. 145; *Minnesota v. Barber*, 136 U. S. 328, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Swift v. Sutphin*, 39 Fed. Rep. 630, 2 Inters. Com. Rep. 656; *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *The James Gray v. The John Fraser*, 21 How. 184, 16 L. ed. 106; *Benedict v. Vanderbilt*, 1 Robt. 194; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Tiedeman*, Pol. Power, 207; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 62, 27 L. ed. 384, 2 Sup. Ct. Rep. 87; *Huse v. Glover*, 119 U. S. 547, 30 L. ed. 489, 7 Sup. Ct. Rep. 313; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 84, 24 L. ed. 379; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; *Palmer v. Cuyahoga County Comrs.* 3 McLean, 226, Fed. Cas. No. 10,688; *Kellogg v. Union Co.* 12 Conn. 26; *Gibbons v. Ogden*, 9 Wheat. 203, 6 L. ed. 71; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; 176 U. S.

Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

[136] *Mr. Justice **Brewer** delivered the opinion of the court:

Upon the foregoing facts the plaintiff contends: First. That the boom at the West Newton Slough, through which the logs scaled by the defendant Mullen passed, was not "any boom . . . chartered by law" within the scope of § 2400 of the Statutes of 1894. This contention cannot be sustained. The words "chartered by law" are not to be understood as referring simply to corporations incorporated under special acts. A corporation which is organized under a general law is as much "chartered by law" as one whose organization is provided for by

[137] special act. So that on the face of this *statute, and giving to its words their natural meaning, it includes every corporation, whether incorporated under general or special law, with authority to maintain a boom. The mere fact that in early times four special charters were granted to boom companies cannot work any limitation upon the meaning of the words used in this statute. If the legislature of Minnesota had purposed any such distinction, its language would have been more apt. It would not have used words broad enough to have included any corporation of the kind described.

As a matter of fact, this corporation was organized some eighteen days before chapter 221 of the Laws of 1889 was passed. Prior to that time there was an act (General Statute Minnesota, 1866, chap. 34, § 1, as amended by chap. 13, Laws Minnesota, 1873) which authorized the formation of corporations for various purposes named, and also "other lawful business." Under that statute this corporation was formed. That the business of booming logs on the waters of streams running through the forests of the west is a lawful business cannot be doubted.

In *The City of Erie v. Canfield*, 27 Mich. 479, 482, the supreme court of Michigan said:

"It is clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season—where in fact the principal industry consists in cutting, floating, and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation; the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these

[138] waters, to manufacture and place *upon the market. It is just and reasonable, there-
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fore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream."

And in *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525, is a clear recognition of the lawfulness of this booming industry, as appears from the following quotation from page 464, L. ed. 527:

"There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter."

Indeed, it would strike a serious blow at the legislation of many of the northwestern states, and an immense volume of business that has been carried on under the authority of that legislation, to hold that the booming of logs was not a lawful business.

That those words, "other lawful business," as found in the statute, are not to be narrowly construed, but are broad enough to include an incorporation for this purpose, is made clear by the decision of the supreme court of Minnesota in *Brown v. Corbin*, 40 Minn. 508, 509, 42 N. W. 481, in which the court said:

"Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated,* and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of strictly private character as distinguished from those to be carried on by quasi-public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

The corporation then having a legal exist-

ence at the time the act of 1889 was passed, § 3 of the act expressly provided that it should apply to corporations previously organized for the purposes specified in § 2. In other words, all the rights, privileges, and powers conferred by the act of 1889 were by this section given to existing corporations. So that we have the case of a corporation, organized under the general law of the state, given by subsequent statute full powers in reference to the maintenance of a boom, and in fact maintaining a boom; and the case therefore comes within the specific description in § 2400 of a boom chartered by law.

Further than that, the legislature of Minnesota accepted the claim of the surveyor Mullen as valid under its laws, and thus impliedly recognized the boom company, involved in this controversy, as one chartered by law within the scope of the statutes providing for inspection, scaling, and charges therefor.

The second contention is that the statutes of Minnesota were not intended to and do not in fact give the surveyor general any lien upon the logs of private parties for inspecting and scaling logs run through chartered booms. Reference is made by counsel to several statutes in which there is provision for the action of the surveyor general in surveying and scaling lumber at the instance [140] of parties interested. We deem it unnecessary to investigate those statutes, for the sections quoted plainly indicate that the survey and scaling in case of a chartered boom is not solely at the instance of the owner or owners of the logs, but is compulsory. Section 2400 declares that "the surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district." To those unfamiliar with the logging business as carried on in the timber regions of the north and northwest this compulsory surveying and scaling may seem unnecessary, but all legislation may rightfully be adjusted to the actual operations of business, being intended to facilitate those operations and protect all who are engaged therein. Many are engaged in the cutting of logs in these lumber districts. That business is facilitated by any system which permits those parties to turn their logs into an adjacent stream and let them float down to some place where they can be collected and brailed. In that way each individual cutter is saved the necessity of brailing his logs at every place where he may bring them to the water. The several states in which these lumber districts are situated have assumed the power of taking charge of these logs thus put singly into a stream, collecting them at one place, separating them to their respective owners, and thus facilitating the forwarding in raft to market. Of course, such work entails expense, and the expense is rightfully charged upon the property thus separated and marked. The thought in this respect is well expressed by the supreme court of Minnesota in *Osborne v. Knife Falls Boom Corp.* 32 Minn. 406

412, 419, 50 Am. Rep. 590, 595, 21 N. W. 704, 707.

"Now it appears that there is a large number of persons . . . owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth, or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stopped before passing Knife River Falls; the interest of the former that their logs should be allowed to run over them without interruption. In *this conflict who is to de-[141] termine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of their conflicting interests? Obviously, the legislature—that department of government which, in the exercise of a lawmaking and a police power, prescribes the rules by which the use of public highways in general is regulated (*Pound v. Turek*, 95 U. S. 459, 24 L. ed. 525; *Watts v. Tittabawassee Boom Co.* 52 Mich. 203, 17 N. W. 809); and save as controlled by paramount law—that is to say, in this instance, by our state Constitution or enabling act—the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromises of conflicting interests—the best attainable good of all concerned. *Pound v. Turek*, 95 U. S. 459, 24 L. ed. 525; *Duluth Lumber Co. v. St. Louis Boom & Improv. Co.* 17 Fed. Rep. 419. In the exercise of its legislative discretion it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be,—as booms, dams, piers, sluiceways,—and what use may be made of them, and, in general, in what manner the business shall be conducted. . . . On the whole, this is an improvement of the river for the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation."

In furtherance of the thought thus expressed the legislature of Minnesota has given the right to boom companies duly incorporated to take possession of the great mass of floating logs coming down a stream, and requires that those logs thus taken possession of shall be inspected and scaled under the supervision of some state official. In that way each individual owner and cutter has a guaranty of safety in respect to his logs, and the general interests are so manifestly subserved that there can be no reasonable doubt of the legislative power *of su-[142] pervision, inspection, and scaling. And the language of the statute being mandatory, we are of the opinion that such was the in-

tent of the legislature, and that such legislation is within its power.

A third proposition is, that it is not shown that the defendant, Mullen, complied with the statutes of the state of Minnesota which give a lien on logs so as to be entitled to any lien on these logs, or any right of possession thereof, and it is with reference to this matter that the second declaration of law was asked by the plaintiff. The contentions of the plaintiff in this respect seem to be, first, that the scale bills were not of themselves competent evidence, and that without them there was no clear and satisfactory evidence of the number of feet surveyed and scaled; second, that because they were not recorded in the books of the surveyor general the right to a lien had not arisen; and, third, that the testimony shows that the logs in fact surveyed and scaled and for which these fees and lien were claimed were not all the property of this plaintiff.

With reference to the general proposition that the defendant, Mullen, by himself and deputies, was busy in scaling logs in that boom during the months named, there is abundant testimony, and when the question is only as to the sufficiency of testimony to establish a given fact, it is enough to say that this court does not inquire into the mere matter of sufficiency. Matters of fact are settled by the verdict of a jury or the general finding of a court, and if there be testimony fairly tending to support the finding, it is conclusive in this court.

But we are not disposed to question the competency of the scale bills as evidence. Section 2403 provides that the books of the surveyor general's office "are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this state, be taken and held to be prima facie evidence of the matters therein stated." In other words, the records, like the original instrument, are prima facie evidence of the matters stated in them. *Clark v. C. N. Nelson Lumber Co.* 34 Minn. 289, 25 N. W. 628; *Glaspie v. Keator*, 12 U. S. App. 281, 290, 56 Fed. Rep. 203, 5 C. C. A. 474. In both of [143] those cases scale bills somewhat *defective in form were declared under the statute competent evidence. Attached to the scale bills herein was a certificate of the surveyor general stating, as required by § 2402, the amount due him thereon, and that he scaled the logs, timber, or lumber relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection. The scale bills, thus certified, were delivered to the managing agent of the boom company. Now, whatever suggestions may be made as to the incompleteness of these scale bills, they were, as thus certified, competent evidence, and, when taken in connection with the other evidence of work actually done by the surveyor general and his deputies, was testimony fairly tending to support the general finding of the court, and we are not at liberty to ignore the effect of that finding.

With regard to the second contention, we
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do not understand that a record in the books of the surveyor general is preliminary to a right to any lien. By § 2402 he is given a lien for certain services; and while it is true that by § 2400 he is required to record the scale bills in the books of his office, and upon being paid his fees therefor to deliver the original bill to the owner or managing agent of the boom, yet for any services other than the mere making of the record we are of the opinion that under the two sections referred to he establishes his lien by the rendering of the services and affixing to the scale bill the prescribed certificate.

With respect to the final contention under this head, that the logs of the plaintiff, seized by the surveyor general, were so seized under a claim of lien for services rendered in inspecting and scaling logs other than those of the plaintiff as well as its own, the fact is as claimed. An important question is thus presented whether the logs of one party can be subjected to a lien for surveying and scaling, not only his own logs, but also for surveying and scaling logs belonging to other parties. The statement naturally suggests a negative answer, and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property. And yet, under the circumstances of the case, we *are constrained to hold that the lien was [144] good, and must be enforced for the entire amount claimed. And this upon the proposition that for the purposes of a lien the boom company must be considered in a qualified sense the owner of all logs that it takes into its possession. The legislature in providing for a lien recognizes only the boom company. By § 2 of chapter 221 it gives the company authority to establish a boom, construct all the works necessary for its successful operation; then empowers it to take possession of all logs floating down the stream (with certain exceptions not necessary to be noted in this connection), and in and by the conveniences of said boom to sort and brail all logs which it takes possession of; to "charge and collect reasonable and uniform tolls," and have a lien for the tolls, and all costs and expenses; hold a sufficient amount of the logs received to pay the same, and to make sale thereof in default of payment upon ten days' notice. Involved in the costs and expenses is the fee for inspection and scaling, as provided by the laws of the state, and the inspector is required to give at the end of each month to the owner or managing agent of the boom a true and correct scale bill for all the services he has rendered. So, while the owner of the logs may obtain from the surveyor general a certified copy of the inspection and scaling, yet the inspector deals in the first instance with the boom company. To it he gives his scale bill, properly certified, and by virtue thereof he is given a lien upon the logs in the custody of the boom company. The boom company, for its protection, is given a lien on the logs of each owner. Obviously there was seen to be a practical difficulty in limiting the lien of the surveyor general for his services in

inspecting and scaling to the logs separately upon which the services were rendered. The logs are turned into the custody of the boom company. It arranges for their separation and brailing, and delivers them, when thus brailed, to the owner as demanded. The fees for the surveyor general's services were therefore made chargeable to the boom company, and under its charter it had authority to collect from each log owner all charges and expenses, including therein the fees due [145] the surveyor *general. The log owner dealt with the boom company, and had a right to call from that company for a delivery of his logs duly brailed or rafted whenever he saw fit. To require the surveyor general to stand watch at the exit of the boom to demand of each log owner his fees, or in default of payment to seize the logs thus ready for their future transit down the river, would cast upon the surveyor general, not merely the duty of inspecting and scaling, but also, for his own protection, the duty of keeping an additional watch to secure the payment of his fees. It was not unreasonable on the part of the legislature, when it gave the boom company a lien upon all logs turned into the boom, to require that it should be responsible to the surveyor general for his fees, and that he, looking to the boom company for payment thereof, should have a right to enforce a lien upon any logs turned into the boom. It cannot be said that there is, in the nature of things, such an inseparable connection between services rendered and the thing upon which the services are rendered that a lien for the former can only be enforced upon the latter, or even that such lien must be limited to the owner of the latter, for it is within the discretion of the legislature to determine whether, considering all the circumstances, the use of a given instrumentality shall not subject the party seeking that use to a lien upon his property for all the services rendered by the state to the instrumentality. Take the ordinary case of a warehouse for the receipt and discharge of grain. Can it be that the lien for the services of a state inspector must necessarily attach separately, and only separately, to each bushel of grain delivered to and received therefrom? Is it not within the competency of the legislative power to declare that the owner of the elevator, like the owner of a boom, stands, as to all property received into it, as *pro tanto* an owner, and to give to any official charged with the duty of inspection a lien upon any and all of the property thus received for his services in the matter of inspection,—especially when it gives to the owner of the elevator or the boom a lien upon the property placed in his possession for all services, charges, and expenses?

[146] *We are of opinion that it was within the power of the legislature to so provide. It is not for the courts to inquire whether any other provision would have been wiser. The only question for us to consider is whether that which has been made was within the power of the legislature. It must be borne in mind that while the lien is given for the

services rendered, the use of the facilities of the boom is not compulsory. We do not mean to say that a log cutter may throw his logs loosely and separately into the river and let them float down, trusting to luck that they will do no injury. Doubtless anyone may make his own raft and send it down the stream, provided he places in charge of it a sufficient number of men to suitably protect it from doing injury or interfering with others in their use of the stream. A main purpose of the boom is to stop and collect the floating logs, and the state having control over the river as a highway of navigation may make such provisions for the use of that highway by the different parties seeking to use it as will prevent any injury by one upon the other. Just as the ordinary land highways are free to the use of the public, yet it is within the competency of the legislature to make such provisions as will prevent the use by one working injury to others; and if a party wishes to use a highway in a manner which may tend to work injury to others he cannot complain if the legislature interferes and provides some means for preventing such injury. In that way it may be said that any log owner may send his logs down the river without the use of the boom, and when he decides to avail himself of the boom it cannot be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions which the legislature prescribes for the use of such boom.

A final objection is that even if this boom was one chartered by law, within the meaning of § 2400, and although the defendant, Mullen, had performed all that was required of him by the statute to secure a lien, still the law as applied to this boom, and in so far as the logs in question are concerned, is a regulation of interstate commerce which the state of Minnesota has no authority to make. It appears that these *logs, and indeed the [147] bulk of the logs passing into this boom, came out of the Chippewa river, a stream wholly within the limits of the state of Wisconsin. The boom company was chartered by the state of Minnesota, and its principal works were within the limits of that state. Counsel for plaintiff refer to many decisions of this court in which the general power of Congress over interstate commerce and the inability of the state to burden in any direct way such commerce have been affirmed. Passing by most we may notice these quotations, as illustrating the scope of our decisions. Thus in *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238, it is held that "commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property;" and in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 385, 5 Sup. Ct. Rep. 826, 828: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and

property, and the navigation of public waters for that purpose;" and from *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 571, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 36, 7 Sup. Ct. Rep. 4, 10, 11, this paragraph is quoted: "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position; it does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent, in the management of his business throughout his entire voyage. . . . It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern.

[148] If each state was at liberty to *regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

Upon these authorities it is contended that the navigation of these logs from the place of cutting in Wisconsin along the navigable waters of Minnesota, to their market, wherever it may be in the lower waters of the Mississippi, must be free. If Minnesota can burden the transit with the expense of booming, inspection, or sealing, why may not Iowa, Illinois, Missouri, and any other state along whose borders the logs may pass before reaching their destination? Even if a state may (as would seem to be indicated by the decisions heretofore referred to), for logs cut within its borders, provide booms, compel their use, and enforce payment for the expenses thereof, because for those logs no interstate commerce has commenced, yet here Minnesota is directly regulating the transit of logs cut in another state and passing through its borders on their way to market. This is undoubtedly the most significant, if not perhaps the only, distinctive Federal question presented in this record.

We are not disposed to limit in the slightest degree the scope and effect of the decisions referred to. But we are of opinion that these authorities are not pertinent, and that the matter is governed by another line of decisions equally clear and as frequently recognized. The state has a right to improve the waterways within its limits, and to make reasonable charges for the use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal. This parallel line of decisions runs back to the early history of this court. In *Willson v. Black-Bird Creek Marsh Co.* 2 Pet. 245, 7 176 U. S.

L. ed. 412, it was held that, inasmuch as Congress had passed no act bearing upon the case, the state of Delaware might authorize the building of a dam across the Black-Bird Marsh Creek, although thereby a navigable waterway was obstructed. In *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525, the right of a state to make dams, booms, and other instrumentalities to be used in the navigation of logs and lumber was adjudged. Other decisions affirmed the power *of the state to [149] build bridges, even toll bridges, over navigable streams, to construct wharves, and charge wharfage. In *Huse v. Glover*, 119 U. S. 543, 548, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313, 315, 316, the right of the state of Illinois to collect tolls for the passage of vessels through locks in the Illinois river was sustained, the court saying:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."

In *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113, 116, a corporation had been authorized by the state of Michigan to improve the Manistee river, and to charge tolls for the use of the improvement. An action to collect tolls was resisted on the ground that the imposition was a taking of property without due process of law, which contention was overruled, and in the course of the opinion it was said:

"The Manistee river is wholly within the limits of Michigan. The state, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *Mobile County v. Kimball*, the free navigation of *those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699, 26 L. ed. 238, 240. And

to meet the cost of such improvements, the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse v. Glover*, 119 U. S. 543, 548, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state."

Many other cases of similar import might be cited, but these are enough to disclose the principle which is clearly recognized.

The principal works of the boom company are wholly within the state of Minnesota. The center of the main channel of the Mississippi river is northeast of the island. The state of Minnesota had therefore the undoubted right to improve this portion of the Mississippi river lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself, or could authorize a corporation to do the work, and it could prescribe any reasonable fees for the use of the improvement. The power of the state to authorize the construction of these works did not depend at all upon the question whence all or most of the logs likely to be run into the boom should come. It is enough that the state authorized this improvement and prescribed the conditions upon which it might be used by any owner of logs. These conditions are not shown to be unreasonable. It is a legitimate exercise of power on the part of a state to provide state supervision of what is done in works of such a character, and to require payment of reasonable charges for such supervision. It does not appear that the plaintiff was compelled to avail itself of this boom; that its logs were forcibly seized by the boom company, and against its will passed through the boom. On the contrary, it would seem not improbable from the testimony that the persons who organized and owned the boom company were engaged in the

[151]*business of cutting logs on the Chippewa river, and that this litigation sprang from their desire to get all the benefits of the boom without submission to the inspection laws of the state, which gave authority for the works. At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the state which authorized the construction of the works.

It is true that that which is called a "shear boom" extended across the navigable channel of the Mississippi and to near the Wisconsin shore; but if neither the state of Wisconsin nor the United States complained of this as an obstruction of the navigation of the Mississippi, it does not lie in the mouth of the plaintiff to complain. Indeed, its complaint is not that the shear boom interfered with its rights of navigation in any way, but that after its logs had been passed into the works constructed under the authority and within the limits of the state of Minnesota it was not permitted to avail itself of the advan-

tages furnished thereby and repudiate the charges prescribed by the state.

Before passing from a consideration of the right of this boom company under its charter to place the shear boom across the main channel of the Mississippi it may not be inappropriate to notice a decision of the supreme court of Wisconsin upon a like question. In *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 88, 38 N. W. 529, 539, it appeared that the St. Croix Boom Company was a corporation created by the state of Minnesota, and that it had constructed its boom on the St. Croix river at a place where the river was the boundary line between Minnesota and Wisconsin, and wholly occupied the river with its works. An action was brought to recover damages on account of the way in which the boom was constructed and operated. The opinion of the supreme court, by Mr. Justice Cassoday, is a very elaborate discussion of the rights of parties. In it it is said:

"The obstructions here complained of were in that part of the St. Croix river constituting the boundary line between *this state and [152] Minnesota. The defendant justifies under corporate authority derived solely from Minnesota. We are here confronted with the question whether such authority, so granted by that state alone and without the concurrence of this, is of any validity. Our Constitution declares that 'the state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed and bounded by the same.' Sec. 1, art. 9. Const. Wis. This provision is substantially the same as the 3d section of the act of Congress of August 6, 1846, enabling the organization of this state preparatory to its admission into the Union. Substantially the same provision, as applied to Minnesota, is found in § 2 of art. 2 of the Constitution of that state, which is in substance the same as § 2 of the enabling act for the organization of that state passed by Congress in 1857. Such 'concurrent jurisdiction,' therefore, is fairly established by the combined action of the general government and each of these two states. Its significance is the important inquiry presented. No one will deny that the one state has as much jurisdiction over the commerce of the river as the other, nor that the jurisdiction of each and both must be and remain subordinate to any action of Congress under the commercial clause of our national Constitution. The question recurs whether one of these states, without the concurrence of the other, can legally grant the booming privileges and rights authorized by the defendant's charter."

Without attempting fully to define the rights which either state might grant, it was held that a private party could not maintain an action for damages on the ground that Minnesota had exceeded its jurisdiction in granting rights upon waters within the limits of Wisconsin. Referring to *Rundle v.*

Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 335, the court stated the facts and the rulings in that case, and summed up its own views in these words (pages 98, 99, 38 N. W. 543, 544):

[153] "The plaintiffs owned certain mills in Pennsylvania, opposite Trenton, N. J., supplied with water from a dam in the Delaware river, by a title running back prior to 1771. In that year the two provinces, which subsequently became the states of Pennsylvania and New Jersey, respectively passed acts declaring the river a common highway for the purposes of navigation, and appointed commissioners with full power to improve such navigation and remove any obstructions. By compact in 1783 it was agreed by the two states that the river should continue to be and remain a common highway in its whole length and breadth, equally free and open for the use, benefit, and advantage of each of the two states. The defendant company was incorporated under the laws of New Jersey in 1830, and was thereby authorized to and did construct a canal in that state, with a feeder from a dam in that river above the plaintiffs'. The action was brought by reason of the diversion of such water, to the damage of the plaintiffs. The court held, in effect, that the plaintiffs had no grant of the usufruct of the waters of the river, but only a license to draw from their dam; that such license was revocable and in subjection to the superior right of the state to divert the water for public improvements, either by the state directly or by a corporation created for that purpose; that the plaintiffs, being but tenants at sufferance in the usufruct of the water of the two states, who owned the river as tenants in common, were not in a condition to question the relative rights of either state to use its waters without the consent of the other; that as, by the laws of their own state, the plaintiffs could have had no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so they could not sustain a suit against a corporation created by New Jersey for the same purpose, which had taken a part of the waters. The principle of that decision seems to be that a mere private party should not be heard to complain that one of two states, divided by such river, had invaded the rightful jurisdiction of the other by diverting more than its share of the waters. So here, we think, the plaintiffs are not entitled to be heard as to whether Minnesota has infringed the rightful jurisdiction of Wisconsin. This state is not a party to this [154] suit, and her comparative rights in *and upon the waters of the river at the points in question cannot be adjudicated in this action."

Without pursuing this subject further, we are of opinion that the improvement made in the Mississippi river by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just

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sense a burden upon interstate commerce. It is nothing more than action upon the part of a state in furnishing additional facilities for the navigation of the waterway, and for such additional facilities reasonable charges may be exacted. The "shear boom," even though it extends across the main channel of the Mississippi river and into the territory of Wisconsin, was not complained of by that state, and the plaintiff cannot be heard to raise any question in that respect. Indeed, its only purpose was to enable the boom company the more easily to collect the logs of plaintiff and others floating down the stream. The work of separation and brailing was done wholly within the limits of the state of Minnesota in works constructed therein. For these reasons we are of opinion that the judgment of the court below was right, and it is affirmed.

Mr. Justice Peckham, dissenting:

I dissent from that portion of the opinion of the court which determines the validity of a lien upon the logs of one owner in order to secure payment of the fees for the inspection and scaling of logs owned by another.

The situation in which the log owner is placed practically compels him to make use of the boom for the purpose of having his logs inspected and scaled as required by the law, and under such circumstances he cannot be properly or fairly held, by the use of the boom, to consent that his property should be taken for the debt of another person. The mere inconvenience, however great or small, to the inspector, of having *someone [155] watch at the exit of the boom to demand of each log owner the fees for inspecting and scaling his particular logs, furnishes no answer to the objection of the log owner to the taking of his property for the debt of another. This act accomplishes that result in its plainest and baldest form. It reduces to actual practice and in the form of a legislative enactment, sanctioned by judicial approval, the illustration that is generally made for the purpose of showing that there are some things so contrary to justice as to admit of no doubt of their utter illegality: such as the arbitrary taking, under the form of a legislative enactment, of the property of one man and bestowing it upon another.

If an owner is practically compelled, in order to conform to a statute, to use a warehouse for the receipt of his grain, I think it plain that it would be utterly illegal to permit a lien on the grain of such owner to attach, for the purpose of obtaining payment for the services of a state inspector in inspecting the grain of another. Whilst, as now decided by the court, a state regulation which substantially compels the sending of logs into the boom to be there inspected and scaled may not be a regulation of interstate commerce, I think a state regulation which confiscates the logs of one person to pay the debt of another clearly constitutes such a direct burden upon that commerce as to cause the statute making the regulation, at least to that extent, to be repugnant to the Constitution of the United States.

Without enlarging upon what seems to me a very great inroad made upon the rights of individual property by the opinion of the court herein, I am content merely to record my dissent from the doctrine therein announced.

I am authorized to say that Mr. Justice **Harlan**, Mr. Justice **Brown**, and Mr. Justice **White** concur in this dissent.

[156] **CHEW HING LUNG & COMPANY, Petitioners,**
v.

JOHN H. WISE, Collector of Customs for the Port of San Francisco.

(See S. C. Reporter's ed. 156-167.)

Dutiability of tapioca flour—free entry as tapioca.

1. Tapioca flour, being one of the three forms of tapioca known to commerce, is entitled to free entry under the tariff act of 1890, paragraph 730, as tapioca, even if it should be deemed fit for use as starch, so that, if not named on the free list, it would have been dutiable under paragraph 323, as a preparation fit for use as starch.
2. The use of tapioca flour by Chinese laundrymen on the Pacific coast as starch, and its use by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic and other gums, as well as for sizing cotton goods, and as an adulterant in the manufacture of candy and other articles, are insufficient to show that it is "fit for use as starch," within the meaning of the tariff act, as the article is commercially known in the markets of the United States as tapioca flour, and it does not compete with American starch for any of the purposes for which starch is commonly and ordinarily used in this country.
3. The general words, "preparations . . . fit for use as starch," are insufficient to show that an article fit for such use, but which is specially named on the free list, is "otherwise specially provided for" so as to prevent its exemption from duty.

[No. 36.]

Argued December 11, 12, 1899. Decided January 22, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision reversing that of the Circuit Court on appeal from the board of general appraisers under the tariff act. *Reversed.*

See same case below, 48 U. S. App. 517, 83 Fed. Rep. 162, 27 C. C. A. 494.

The facts are stated in the opinion.

Messrs. Aldis B. Browne and **Albert Comstock** argued the cause and, with

NOTE.—As to interpretation of commercial and trade names in tariff law, see *Dennison Mfg. Co. v. United States*, 18 C. C. A. 545 and note.

Messrs. Charles Page and **A. T. Britton**, filed a brief for petitioners:

The commercial designation is the first and most important designation to be ascertained in settling the meaning and application of tariff laws.

Robertson v. Salomon, 130 U. S. 412, 32 L. ed. 995, 9 Sup. Ct. Rep. 559; *Sonn v. Magone*, 159 U. S. 422, 40 L. ed. 204, 16 Sup. Ct. Rep. 67; *Cadwalader v. Zeh*, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288; *Dejonge v. Magone*, 159 U. S. 562, 40 L. ed. 260, 16 Sup. Ct. Rep. 119.

The article was designated by its commercial name as free. Such specific designation must control a general description, whether of quality or use, in the absence of evidence in the act which shows a special intent by Congress that in a given case or condition the article should be classified otherwise than as free.

Arthur v. Lahey, 96 U. S. 118, 24 L. ed. 768; *Robertson v. Glendenning*, 132 U. S. 158, 33 L. ed. 298, 10 Sup. Ct. Rep. 44; *Barber v. Schell*, 107 U. S. 617, 27 L. ed. 490, 2 Sup. Ct. Rep. 301; *Shoellkopf v. United States*, 38 U. S. App. 17, 71 Fed. Rep. 694, 18 C. C. A. 301; *Matheson v. United States*, 38 U. S. App. 25, 71 Fed. Rep. 394, 18 C. C. A. 143.

Tapioca was on the free list when the act of 1890 was passed, as it has been for twenty years. Tapioca flour has always been an acknowledged form of tapioca. The Treasury Department has always recognized its name and character and enforced its right to free entry. Under such circumstances the rules of the Department carry much weight in the courts.

Robertson v. Downing, 127 U. S. 613, 32 L. ed. 271, 8 Sup. Ct. Rep. 1328; *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; *United States v. Wooten*, 50 Fed. Rep. 693, Affirmed in 5 U. S. App. 235, 53 Fed. Rep. 344, 3 C. C. A. 553; *Swayne v. Hager*, 13 Sawy. 621, 37 Fed. Rep. 780.

The word "fit" as used in the tariff, means commercially fit.

Jessup & M. Paper Co. v. Cooper, 46 Fed. Rep. 186.

Even common use does not of itself make a thing suitable.

White v. United States, 69 Fed. Rep. 93.

It must be actually, and not theoretically, fit for use.

Townsend v. United States, 14 U. S. App. 413, 56 Fed. Rep. 222, 5 C. C. A. 489.

Neither the intention of the importer, nor the use after importation of any article, can determine its classification.

Magone v. Heller, 150 U. S. 70, 37 L. ed. 1001, 14 Sup. Ct. Rep. 18.

It is the use to which the articles are chiefly adapted and for which they are used that determines their character, within the meaning of this clause of the tariff act.

Hartranft v. Langfeld, 125 U. S. 129, 31 L. ed. 672, 8 Sup. Ct. Rep. 732. See also *Robertson v. Edelhoff*, 132 U. S. 624, 33 L. ed. 480, 10 Sup. Ct. Rep. 186.

"Ordinary use" furnishes the guide for classification.

Conn v. Magone, 159 U. S. 421, 40 L. ed. 204, 16 Sup. Ct. Rep. 67.

Assistant Attorney General **Hoyt** argued the cause and filed a brief for respondent.

[156] *Mr. Justice **Peckham** delivered the opinion of the court:

The question in this case, which comes before us on certiorari, is whether certain merchandise imported into this country is entitled to free entry or is subject to duty. The merchandise is claimed to be tapioca, and the question arises under the tariff act of 1890. 26 Stat. at L. 567.

Paragraph 323 (page 588) of the statute reads as follows:

"323. Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound."

Paragraph 730 (page 610) of the "free list." reads as follows:

"730. Tapioca, cassava, or cassady."

The government claims that the merchandise is a preparation fit for use as starch, and is therefore dutiable at 2 cents per pound under paragraph 323.

[157] The importers contend that the substance imported by them *is tapioca, in the form of tapioca flour, which is one of the three forms of tapioca known to commerce, and is therefore entitled to free entry under paragraph 730.

The merchandise was imported in November, 1893, at the port of San Francisco, and the collector of that port imposed a duty of 2 cents per pound upon it. The importers, claiming that it was entitled to free entry, appealed to the board of general appraisers, and that board decided that the imported article was free of duty, and judgment to that effect was entered. Upon appeal by the collector to the circuit court of the United States, in the ninth circuit, northern district of California, that court affirmed the decision of the board (77 Fed. Rep. 734), and the collector then appealed to the circuit court of appeals for the ninth circuit, where the judgment of the circuit court was reversed (48 U. S. App. 517, 83 Fed. Rep. 162, 27 C. C. A. 494), and the cause remanded with directions to affirm the decision of the collector. Upon application by the importers this court granted a writ of certiorari, it being alleged that there were inconsistent decisions in the circuit courts of appeals on this question.

Upon the trial of the case before the circuit court the parties agreed upon certain facts, and evidence was given in regard to the character of the substance imported and its fitness for use as starch, and the court found that the merchandise, though entered at the customhouse at San Francisco by the importers under various names, such as tapioca, sago, and root flour, is all the same substance, viz., the starch grains contained in and derived from the root botanically known as *jatropha manihot*. In the West Indies the root is known as cassava or manioc; in Brazil as mandioc; but all these names in-

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indicate the same thing, without change of condition or character.

There are two varieties of the root, one of which is very poisonous, and both varieties contain a large proportion of starch. The starchy substance constituting the importations involved in this controversy consists of the starch grains obtained from the manihot root by washing, scraping, and grating, or disintegrating it into pulp, which in the poisonous *variety is submitted to pressure [158] so as to separate therefrom the deleterious juices. The starch grains settle and the juice is subsequently decanted, leaving as a deposit a powder, which, after repeated washings with cold water and after being dried, is nearly pure starch, and is insoluble in cold water. This is the substance in controversy. If sufficient heat and motion are afterwards applied to the substance a mechanical change takes place, the grains becoming fractured and thereby agglutinated. The latter substance is partly soluble in cold water, and is the granulated tapioca known as "pearl" and "flake" tapioca of commerce.

The importations in question are from China, and are made chiefly for the purpose of supplying Chinese laundrymen, who use the flour as a starch and to a slight extent for food purposes. Its use for starch purposes in the laundry is, however, limited to the Chinese, except that in some instances in San Francisco it is so used in their business by white laundrymen by mixing it with wheat or corn starch. Wheat and corn and potato starch are the starches commonly used in the United States. Tapioca flour is also used in the eastern states by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic and other gums. It is also sometimes used for sizing cotton goods, and in addition as an adulterant in the manufacture of candy and other articles.

Among the white people dealing with the Chinese on the Pacific coast the substance in question is commonly known as "Chinese starch." In the general importing markets of the United States it is commercially known as tapioca flour, and in those markets the term "tapioca" includes that article in three forms, viz., flake tapioca, pearl tapioca, and tapioca flour. The substance in question is not imported into San Francisco by others than Chinese.

The circuit judge also found that the article in question is fit for use as starch in laundry work in the sense that by its use clothes can be starched, but it is not commonly used in such work as starch, throughout the United States, and is not known to be so used except on the Pacific coast. Judgment was therefore ordered for the importers.

*These findings of facts were assumed by [159] the circuit court of appeals, and upon them that court based its judgment, reversing the circuit court and affirming the action of the collector.

Upon these facts we are to determine which paragraph in the tariff act is to govern. The findings of the courts below that

the substance in question is included in the article of commerce known as tapioca, and is tapioca in one of its forms, would entitle it to free entry under paragraph 730, unless some other provision of the act nullifies that language. Paragraph 323 is relied on for that purpose. We think it does not have such effect. That paragraph is general in its nature, and provides for a duty upon starch, including in that name all preparations, from whatever substance produced, fit for use as starch. Any preparation, therefore, which is fit for that use would come within that general designation. What is a preparation "fit for use as starch" is another question, but assuming tapioca flour to be thus fit, it would be subject to duty under that paragraph, if there were not another and different provision in the statute relative to that same substance.

When we come to look at the free list in the same statute we find that tapioca is to be admitted free, and the finding of the court is that tapioca flour is one of the three forms of what is commercially known as tapioca, and under that provision the substance involved in this case would be entitled to free admission. Attempting, as is our duty, to give effect to the statute in all its parts, we think the proper construction of these provisions is that under paragraph 323 a duty is laid upon starch, including all preparations, from whatever substance produced, fit for use as starch; and assuming that tapioca flour is, within that general description, fit for such use, yet by virtue of paragraph 730, tapioca is placed on the free list, and the substance tapioca flour, being tapioca in one of its forms, is excepted from the general language of paragraph 323, and is entitled to free entry.

[160] It is so excepted, because although assuming it to be fit for use as starch, it is nevertheless tapioca, and tapioca is in so many words put on the free list. Effect is thus given to the general language of the paragraph concerning starch and all *preparations fit for use as such, excepting therefrom the one article specially named in paragraph 730, to which effect is given by allowing the exception.

This construction is in strict accordance with the rule that the designation of an article, *co nomine*, either for duty or as exempt from duty, must prevail over words of a general description which might otherwise include the article specially designated. *Homer v. The Collector*, 1 Wall. 486, *sub nom.* *Homer v. Austin*, 17 L. ed. 688; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Movius v. Arthur*, 95 U. S. 144, 24 L. ed. 420; *Arthur v. Lahey*, 96 U. S. 112, 24 L. ed. 766; *Arthur v. Rheims*, 96 U. S. 143, 24 L. ed. 813; *Chung Yune v. Kelly*, 14 Fed. Rep. 639, 643. The last case involves this particular substance.

It is urged, however, that the provision relating to the free list is that the articles named therein shall be exempt from duty "unless otherwise specially provided for in this act" (page 602, "free list"), and that tapioca flour is otherwise specially provided

for in the act by paragraph 323. We cannot concur in this view. Tapioca flour is not otherwise specially provided for in paragraph 323. It is not mentioned specially nor is it named at all in that paragraph, which uses only general language relating to starch and all preparations from whatever substance produced, fit for use as starch. If tapioca flour be such a preparation it would be included in that general description if not otherwise exempted. But there is no special provision for tapioca flour, making that substance, in terms, dutiable under that paragraph, while in the free list there is a special designation of tapioca, and tapioca flour is tapioca, just as much as either of its other forms, "flake" or "pearl," is tapioca.

It would seem that the language at the beginning of the provision for the free list, that the following articles shall be exempt from duty, "unless otherwise specially provided for in this act," strengthened the argument that tapioca flour, being in fact tapioca in one of its well-known forms, was exempt from duty, because in order not to be exempt the article must be otherwise specially made dutiable. It is not so made dutiable, and is therefore by the clear provision of the act made free of duty. Being in truth tapioca, and commercially *known as [161] such, it does not come under the description of starch, although in great part composed of that substance. The commercial designation of an article is the first and most important thing to be ascertained, and governs in the construction of the tariff law when that article is mentioned, unless there is something else in the law which restrains the operation of this rule. *Arthur v. Morrison*, 96 U. S. 108, 24 L. ed. 764; *Arthur v. Lahey*, 96 U. S. 112, 24 L. ed. 766; *Arthur v. Rheims*, 96 U. S. 143, 24 L. ed. 813; *Robertson v. Salomon*, 130 U. S. 412, 32 L. ed. 995, 9 Sup. Ct. Rep. 559; *Bogle v. Magone*, 152 U. S. 623, 38 L. ed. 574, 14 Sup. Ct. Rep. 718.

The case is not within the principle decided in *Magone v. Heller*, 150 U. S. 70, 37 L. ed. 1001, 14 Sup. Ct. Rep. 18. There the contest was between a clause of the tariff act of 1883, providing for a duty upon sulphate of potash, *co nomine*, and a clause exempting from a duty "all substances expressly used for manure." It was held that a kind of sulphate of potash, the only common use of which, either by itself or in combination with other materials, was for manure or in the manufacture thereof, was entitled to free entry, and was not subjected to duty, as sulphate of potash. Whether the imported article was at the time of importation "expressly used for manure" in the sense defined in the opinion, was held to be a question of fact, and that the court below erred in denying the collector's request to submit the case to the jury and in directing a verdict for the importer. The term "expressly used for manure," it was said, was equivalent to "used expressly" or "particularly" or "especially" for manure, and if it were

found as a fact that the article was so used, it was exempt from duty.

If the statute in this case had said that starch was dutiable, including all preparations from whatever substance produced, expressly intended and fit for use as starch, then tapioca flour, if fit and intended for such use, might be dutiable under the paragraph in question, and not be exempt as a form of tapioca. But when the language is, fit for use as starch, it is so much more general that it is properly qualified by the subsequent paragraph which exempts tapioca, and consequently tapioca flour, one of its commercially known forms.

[162] Thus far we have proceeded upon the assumption that tapioca *flour was a preparation fit for use as starch, and therefore dutiable under paragraph 323, unless excepted therefrom by paragraph 730; but we are of opinion that tapioca flour is not a preparation fit for such use within the meaning of the statute. The substance in question is not commercially known as starch, nor as any preparation fit for use as such. In the markets of the United States it is commercially known as tapioca flour, while the term "tapioca" includes precisely the same substance. Its use as starch for laundry purposes is limited to the Chinese on the Pacific coast.

It is not imported into San Francisco by any other than Chinese, nor is it manufactured in this country into the article commonly known as starch, nor is it to any extent used as a substitute therefor, although it is chemically a starch because a large part of it consists of a starchy substance.

Upon the finding and the proofs in this case we are of opinion that this article does not come within paragraph 323. We think the language of that paragraph means any preparation which is so far fit for use as starch as to be commonly used or known as such or as a substitute therefor. This substance does not come within that language as thus construed. The use of the article by the Chinese on the Pacific coast for laundry purposes is so infinitesimally small that it wholly fails to show that it is fit for that use within the meaning of the statute. The evidence in this case is that the attempt to use it for laundry purposes by white laundrymen in California gave such poor results that it was abandoned as a failure.

There is one finding by the circuit judge in this case in which it is said that the substance is used in the eastern states *for starch purposes* by calico printers and carpet manufacturers to thicken colors; also for book binding and in the manufacture of paper; also for filling in painting, and in the manufacture of a substitute for gum arabic and other gums, sometimes for sizing cotton goods, and also as an adulterant in the manufacture of candy in some cases and in other articles. The expression in that finding, that the substance is used in the eastern states *for starch purposes*, is an inadvertence, because the finding, although it

[163] rests upon the evidence *as well as upon the
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agreed statement of facts stipulated between the parties, yet there is nothing in the evidence or in the stipulation to show that the enumerated purposes were starch purposes. In the stipulation it is said that the substance in controversy *is used in the eastern states by calico printers, etc.* The expression "for starch purposes" does not appear in the agreed statement of facts, and in naming the uses for which the substance is used it would appear that most of them are not what would be ordinarily understood as a starch purpose.

Sizing cotton goods might perhaps be regarded as somewhat of a starch purpose, as starch is sometimes used in that way. The evidence does not show that this use is general, and the expression, fit for use as starch, would not in our judgment include that use. We think it would not in the ordinary acceptance of the term be called a starch purpose. Glue would accomplish much the same purpose and might be used therefor. The use by calico printers and carpet manufacturers to thicken colors is not the ordinary use of starch, nor is it a starch purpose. Nor would its use as an adulterant in the manufacture of candy and other articles be properly described as such a purpose.

Assuming, as counsel for the government claims, and as is undoubtedly entirely true, that the policy shown in the tariff act is protection to American industries, yet the article here in controversy does not and cannot compete with American starch, for any of the purposes for which starch is commonly and ordinarily used in this country. The evidence to that effect, we think, is conclusive.

In *Chung Yune v. Kelly*, 14 Fed. Rep. 639, the circuit court for the district of Oregon submitted to the jury whether "the article in question" (which was in fact tapioca flour, though imported as sago flour), "imported and entered by the defendant, is a starch known to commerce as such, and made and intended to be used primarily by laundrymen in the stiffening and polishing of clothes." The jury returned a negative answer and the court said: "This answer is undoubtedly according to the law and the fact." The *substance was held to be exempt [164] from duty under the tariff act (Rev. Stat. p. 488) as root flour, but the plaintiff was not allowed to recover back the duty which he had paid, because having claimed in his protest that the article was *sago* flour, the court felt compelled to confine him to his specific ground of protest, and consequently the government kept his money, although the importer had in fact imported an article entitled to free entry under the law.

The case of *Townsend v. United States*, 14 U. S. App. 413, 56 Fed. Rep. 222, 5 C. C. A. 488, holds that paragraph 323 of the tariff act of 1890 includes only those preparations which are actually, and not theoretically, fit for use as starch, and which can be practically used as such, and not those which can be made, by manufacture, fit for such use. Counsel for the government criticises that case as not decided upon the

same amount of evidence that has been given in this case upon the question whether the article is or is not fit for use as starch. But in the opinion delivered in the case it is seen that, while not precisely identical, the facts are substantially the same as in the case at bar. The court says the article is used mostly by calico printers and carpet manufacturers to thicken colors and in the manufacture of a substance for gum arabic or other gums; also for the sizing of cotton goods, a purpose for which starch is also used to a certain extent, but the weight of the testimony was in the opinion of the court that it was not used for laundry purposes. We, think the same facts appear in the case before us, the use for laundry purposes by a few Chinese on the Pacific coast not being sufficient in extent to enable us to say that it is so used in any but the most minute quantities. It seems to us clear from the finding and from the evidence that the substance is not commercially known by the people in this country as starch nor as adapted to the ordinary purposes of that article, and it has not been manufactured into commercial starch, and is not known and is not fit for use as such.

The Treasury Department has heretofore announced decisions which are entitled to much weight upon the question herein presented. Prior to the tariff act of 1870 (16 [165] Stat. at L. 256, 268, *chap. 255), both starch and tapioca had been made dutiable, sometimes at the same and sometimes at different rates of duty. By the latter act, "tapioca, cassava, or cassada" were placed in the free list, while "root flour" was placed in the free list in 1872. 17 Stat. at L. 236, chap. 315. The Treasury Department held tapioca flour entitled to free entry as tapioca. The Secretary said: "It appears, upon investigation, that tapioca is prepared in three forms, namely, flake, pearl, and flour, and that these terms do not indicate any substantial difference in the character or quality of the article, but merely indicate its form or appearance." Decisions, Treasury Department, 1887-1890, No. 3161, March 23, 1877.

Under the act of 1883 (22 Stat. at L. 488, 521, chap. 121), tapioca was continued in the free list, as was also root flour (page 520), while starch was made dutiable as potato or corn starch at a certain rate, "other starch, two and a half cents per pound" (page 503). The Treasury Department held, July 7, 1883, that tapioca flour was to be admitted free of duty, without regard to the use for which it was ultimately intended, and that the provision in that act for a duty upon "other starch" than potato or corn starch did not cover tapioca flour. Decisions, Treasury Department, No. 5802.

Subsequently to that time various importations had been made of this article, upon which duties had been assessed at the rate of 2½ cents per pound, as starch, although imported under various names as "sago, sago crude, sago flour, tapioca," etc.

Exemption had been claimed for these articles as coming under the provisions of the

free list as "root flour, sago crude, and sago flour," and "tapioca, cassava, or cassada" The article had been classified by the collector under the tariff act as "other starch," for the reason that it was, as claimed, imported and was actually used as starch by the Chinese laundries throughout the states and territories. The department, under date of January 11, 1887, again held that "flour made from tapioca, cassava, or cassada root may be admitted free of duties, without regard to the use for which it is ultimately intended." Samples of the flour had been submitted to the*United States chemist, who re-[166]ported that it was "chemically a starch, obtained from the root of Janipha manihut or Jatropha manihot," yet it was considered in its commercial character to be tapioca; it was so returned by the appraiser, and it was directed that the merchandise should be admitted free of duty. Decisions, Treasury Department, 1887-1890, No. 7971, January 11, 1887.

On September 21, 1888, certain so-called flour was imported which the importers claimed to be free of duty, and upon which the collector assessed a duty of 2½ cents per pound under the provisions of the act already mentioned, providing for such a duty on "other starch," etc. Samples of the merchandise in question were submitted to the United States chemist at the port of New York, who found the article to be tapioca starch, and under the department's decisions of July 7, 1883, and January 11, 1887, it was held that flour made from tapioca although chemically a starch, was to be admitted free of duty under the provisions for tapioca, without regard to the use to which it was ultimately intended. The appeal was allowed, and the collector directed to reliquidate the entry and to take measures for refunding the duties exacted. Treasury Department Decisions, *supra*, No. 9031.

These decisions were principally based upon the provisions of the acts which related to tapioca (one decision being exclusively upon the tapioca provision), and although in some cases in which the question as to tapioca arose the act also provided for the free entry of root flour, the decisions that tapioca flour was entitled to free entry were substantially founded upon the tapioca provision in the act, and not upon the root flour item.

Subsequently, when Congress by the act of 1890 omitted root flour from the free list and imposed a duty upon starch and all preparations, from whatever substance produced, fit for use as starch, we do not think that any argument can be drawn therefrom in favor of the construction which would impose a duty on tapioca flour as a preparation fit for use as starch, while at the same time there is a clause in the act providing for free entry of tapioca, the substance tapioca flour being one of its forms. Many other flours might come under *the denomination of root flour which [167] were not specially declared in the act to be free from duty, and the dropping of the root flour from the free list might relegate

such flour to the dutiable list. Not so as to tapioca flour which is still found in the free list. The omission of root flour from the free list, therefore, had no effect upon tapioca flour, and if there had been an intention to include it in the dutiable list, especially after these repeated decisions of the Treasury that it was entitled to free admission as tapioca, we cannot but believe that Congress would have expressed that intention with reasonable clearness.

The judgment of the Circuit Court of Appeals of the Ninth Circuit should be reversed, and that of the Circuit Court for the Northern District of California affirmed, and the case remanded to that court with such directions, and it is so ordered.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Appt.*,
v.

WILLIAM H. TOMPKINS, W. T. La Follette, and Alexander Kirkpatrick, Constituting the Board of Railroad Commissioners of the State of South Dakota, *et al.*

(See S. C. Reporter's ed. 167-180.)

Statute fixing carrier's rates—reasonableness of rates—insufficient findings.

1. The reasonableness of a schedule of rates for local business of a railroad company must be determined by a comparison between the

NOTE.—Reasonableness of state limitation of railroad rates

Although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, it is well established that the courts may decide whether or not such rates are unjust or unreasonable, and such as to work a practical destruction to rights of property, and if so found may restrain their operation. In other words, the legislature has power to fix railroad rates, and the extent of judicial interference is protection against unreasonable rates.

Unreasonableness does not necessarily mean confiscation; rates are not necessarily reasonable because they produce some revenue, much or little. *Southern P. Co. v. Railroad Comrs.* 78 Fed. Rep. 236.

The question whether the cost of a railroad or its present value should be taken as the basis of computation in determining the reasonableness of rates is suggested by Mr. Justice Brewer in *Ames v. Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835, but it is not answered further than to say that he thinks there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the legislature are just and reasonable, and that often many factors enter into the determination of the problem.

In affirming the decision in this case the United States Supreme Court says: "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property be-
176 U. S. U. S., Book 44.

gross receipts and the costs of doing the business, and cannot be determined until the cost of doing the business is ascertained.

2. The especial importance of a full and clear finding of facts by the trial court on an issue as to the reasonableness of a schedule of maximum rates for a railroad company makes it proper for the court on appeal, when there is no finding of the cost of doing the business, to remand the case, with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require, in order that the benefit of the services of a competent master and an approval of his findings by the trial court may be had in the determination of the question.

[No. 131.]

*Argued October 31 and November 1, 1899.
Decided January 22, 1900.*

APPEAL from a decree of the Circuit Court of the United States for the District of South Dakota dismissing a bill to restrain the enforcement of a schedule of maximum charges for the control of local railroads. *Reversed.*

See same case below, 90 Fed. Rep. 363.

Statement by Mr. Justice **Brewer**:

*On February 3, 1897, the legislature of [168] South Dakota passed an act relating to common carriers. Laws of 1897, chap. 100. The act provided for the appointment of a board of railroad commissioners, and by § 20 this board was authorized to make a schedule of reasonable maximum fares and charges for

ing used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." *Smyth v. Ames*, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418.

The cost of reproduction is too narrow a basis for the determination by a railroad commission of the value of the road on which it is entitled to earn a return from tariff rates. The location of the road and the increment of its value due to the settling, seasoning, and permanent establishment of the railroad and to its established business and goodwill should be taken into consideration. *Metropolitan Trust Co. v. Houston & T. C. R. Co.* 90 Fed. Rep. 683.

If there is room for a difference of intelligent opinion as to whether or not the rates fixed by commissioners will be remunerative, the courts must leave the matter to the test experiment. *Pensacola & A. R. Co. v. State*,
27

the transportation of passengers, freight, and cars on the railroads within the state. There was a proviso in the section that the maximum charge for the carriage of passengers on roads of standard gauge should not be greater than 3 cents per mile. On August 26, 1897, the board of railroad commissioners, having taken the preliminary steps required by the statute in respect to notice, etc., made and published its schedule of maximum charges for the control of all local railroads. On the next day the Chicago, Milwaukee, & St. Paul Railway Company, plaintiff and appellant, filed its bill in the circuit court of the United States for the district of South Dakota, seeking to restrain the enforcement of such schedule. The bill alleged generally that the existing rates were fair and reasonable; that those established by the railroad commissioners were unjust and unreasonable; would not only fail to afford the plaintiff adequate compensation for the services to be performed, but also would operate to deprive it of its property without just compensation. The railroad commissioners filed their answer on October 4, 1897, in which they alleged that the existing rates were extortionate and unreasonably high—in many instances so high as to prohibit the shipment of ordinary products; that the freight rates were much higher than those charged by the complainant company for similar services upon its lines of railway in other and adjoining states, being about 90 per cent higher than the rates charged in the state of Iowa; that the passenger rates were at least 25 per cent higher than those charged by the plaintiff over its lines of railway in other states, and much higher than those charged by other

railway companies for like transportation in other states. In addition to these matters the answer averred that the plaintiff and the Chicago & Northwestern Railway Company were owners of competing lines of railway, running westerly from Chicago and traversing the states of Illinois, Wisconsin, Minnesota, and Iowa; that during the years from 1880 to 1883 as competing companies they constructed their lines of railway into and through that part of the then territory of Dakota, now the state of South Dakota; that at that time there were no people, business, or industry to be accommodated or served by the construction of said lines of railway, and that the construction was not in response to any existing demand for the same, but was for the purpose of pre-empting and occupying the territory in anticipation of its settlement and development; that a rapid occupation followed such extension of railroad lines, and a large immigration flowed into the territory; that this rapid immigration ceased in 1884, and that many of the settlers disappeared in the years following, so that in certain portions of the territory there was almost a depopulation; that going in thus early the plaintiff acquired its right of way, depots, and terminal grounds at a substantially nominal cost; that the capitalization of the railroad, in stocks and bonds, was fixed during this period of excitement and rapid immigration, had never been changed, and was extravagantly high. The answer also contrasted the value of the property as shown by such capitalization in stocks and bonds and that returned by the railroad company to the state for the purposes of taxation. It also averred that the Dakota lines were of much greater earning value to com-

25 Fla. 310, 3 L. R. A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Chicago, B. & Q. R. Co. v. Dey, 38 Fed. Rep. 656.

Rates fixed by legislative authority which will give some compensation, however small, to the owners of railroad property cannot be held by the courts to be insufficient; but when the rates prescribed will not pay any compensation to the owners, *i. e.*, some dividend to stockholders after payment of fixed charges and costs of service, the courts have power to interfere. Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325.

The justice of the statute limiting rates of transportation must be determined with reference to its effect on the whole of a class of railroads, where they are classified by the statute, and not with reference to its effect on one particular road. St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L. R. A. 452, 15 S. W. 18.

The effect on the entire line of a railroad is the correct test of the reasonableness of rates of fare which are attacked as a taking of property without just compensation or due process of law. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, Affirming 54 Ark. 101, 11 L. R. A. 452, 15 S. W. 18.

The rates are not necessarily unreasonable or unjust because they are not remunerative on a certain portion of the line. Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752.

The reasonableness or unreasonableness of

rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier or to the profits derived from it. Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A tariff of railroad rates fixed by a commission, which will so diminish the earnings of a road that they will not be able to pay half the interest on its bonded debt above the operating expenses, is unjust and unreasonable, where, without waste or mismanagement in construction or operation, the road has cost far more than the amount of stock and bonds outstanding, which represent money expended in its construction, and the rates have been voluntarily decreased by the company more than 50 per cent during ten years, while under these rates the stock representing two fifths of the value of the road has never received a dividend, and for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

A street railroad company is deprived of its property without due process of law by an ordinance requiring it to sell commutation tickets, where its net earnings, after paying 5 per cent interest on its bonds in a market in which 6 per cent is the usual rate for real estate mortgages and like securities, are only 5.2 per cent

plainant than the *merc pro rata* mileage of the lines in that state would indicate, and that no account had been taken or allowance made for the value to the plaintiff of the long-haul business done on other parts of its lines afforded by the interstate business running into Dakota. Upon the issue thus presented by these pleadings testimony was taken before an examiner. This testimony is preserved in the record, and amounts to several hundred printed pages. The examiner simply reported the testimony, without any findings of fact or conclusions of law. The case went to hearing before the district judge, who, without the aid of a master, examined the pleadings and this volume of testimony, and, on July 20, 1898, rendered a decree dismissing plaintiff's bill. 90 Fed. Rep. 363. Besides delivering an opinion, the court made the following findings of facts and conclusion of law:

"This cause came on to be heard upon the pleadings and proofs at this term, and was argued by counsel; and thereupon, upon consideration thereof, the court finds the following facts:

"I. That the value of complainant's property in the state of South Dakota is ten million dollars.

"II. That the fair value of the proportion of complainant's said property assignable to local traffic was, for the year ending June 30, 1894, \$2,200,000, and for the year ending June 30, 1895, \$2,600,000, and for the year ending June 30, 1896, \$2,100,000, and for the year ending June 30, 1897, \$1,900,000.

"III. That the gross local earnings of complainant in the state of South Dakota for the fiscal year ending June 30, 1894, was \$407,606.35, and for the year ending June 30, 1895, was \$330,642.85, and for the year end-

ing June 30, 1896, was \$328,105.95, and for the year ending June 30, 1897, was \$311,085.-42.

"IV. That the local earnings on the complainant's lines under existing tariffs, on the same proportion of the total *value of the roads in South Dakota as the local earnings bear to the gross earnings from all sources in South Dakota, were: For the year 1894, 18.5 per cent; for the year 1895, 12.7 per cent; for the year 1896, 15.6 per cent; for the year 1897, 16.3 per cent. [171]

"V. That applying the schedule of rates sought to be enjoined in this action to the local traffic during the years above mentioned, on the same method of calculation, the value of complainant's property assignable to local traffic would be for the years ending June 30, 1894, \$1,900,000; June 30, 1895, \$2,300,000; June 30, 1896, \$1,800,000; June 30, 1897, \$1,600,000.

"VI. Under the commissioners' schedule the gross earnings from local traffic would have amounted to the sum of \$342,381.98 for the year ending June 30, 1894, and \$277,518.-40 for the year ending June 30, 1895, and \$275,607.79 for the year ending June 30, 1896, and \$261,295.21 for the year ending June 30, 1897.

"VII. That these earnings for the fiscal year 1894 would equal 18 per cent of the value thus ascertained, and for the year 1895 would equal 12.1 per cent, and for the year 1896 would equal 15.3 per cent, and for the year 1897 would equal 16.2 per cent.

"VIII. That owing to the small difference between the percentage earned under the complainant's schedule of rates and fares and the commissioners' schedule of rates and fares for the four years prior to the com-

adopting a conservative estimate of the value of its property and the largest estimate of its earnings. Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. Rep. 577.

It is not sufficient to show that railroad property is confiscated or taken without due process of law because the income at the rates of fare fixed by law will pay only 1½ per cent on the original cost of the road, when the road is held by a reorganized corporation or its trustees after foreclosure. Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

The fact that rates are not large enough to enable the company to pay expenses and interest on its debts, does not show that they are unreasonably low, since the earnings might be insufficient for this, and yet be large enough to defray current repairs and expenses and pay a profit on the reasonable cost of building and equipping the road. The debts may have been contracted through extravagance and mismanagement. Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752.

The power of the state to fix maximum rates and charges for railroad transportation does not include the right to compel a discrimination in rates in favor of those who buy 1000-mile tickets. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

In this case the Michigan statute, requiring 1000-mile tickets to be sold by railroad companies at a reduced rate, to be valid for two years 176 U. S.

from date of purchase, was held to be an "arbitrary enactment" in favor of those who were willing and able to buy such tickets, and to violate the constitutional right of railroad companies to due process of law and equal protection of the laws.

On the authority of this case, the New York court of appeals in Beardsley v. New York, L. E. & W. R. Co. 162 N. Y. 230, 56 N. E. 488, declared the New York statute requiring railroad companies to issue mileage books to be invalid as to companies existing at the time of its enactment as in violation of the Federal Constitution.

An allegation that rates fixed by the commissioners for one road are unjust and unreasonable when compared with rates permitted on other lines of railroad in the same state, operated under the same conditions, is not sufficient to overthrow the reasonableness or justice of the rate complained of, as a rate reasonable and just in itself for one road may not be so for another, though they connect with each other. Storrs v. Pensacola & A. R. Co. 29 Fla. 617, 11 So. 226.

Reasonableness of the rates established by statute is not shown by the fact that they are higher than those charged in another state, since the kind and amount of business and its cost are factors which determine largely the question of rates, and these vary in the different states. Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

mencement of this suit, and owing further to the amount of the percentages which would have been earned during said four years under the commissioners' schedule, the court is unable to find beyond a reasonable doubt that the local earnings under said commissioners' schedule would not during the years aforesaid have earned the reasonable cost of earning said local earnings and some reward to the owner of the property over and above said cost of operation.

"IX. That the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896, and 1897 was.

[172] "X. As a conclusion of law the court finds that the enforcement of the proposed schedule of reasonable maximum rates *and fares will not deprive the complainant of its property without due process of law, or deprive it of the equal protection of the laws, or operate to take the property of complainant for public use without just compensation."

From the decree thus entered the plaintiff took its appeal to this court.

Messrs. A. B. Kittredge and George R. Peck argued the cause and filed a brief for appellant.

Messrs. T. H. Null and John L. Pyle argued the cause and, with *Mr. W. O. Temple*, filed a brief for appellees.

[172] *Mr. Justice **Brewer** delivered the opinion of the court:

Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men; and by this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state, or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup.

Ct. Rep. 334, 388, 1191; **Dow v. Beidelman*, [173] 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. Rep. 1028; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. Rep. 462, 702; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *McCaughey v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.

In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld.

Such being unquestionably the law, it is obviously of the *utmost importance that the [174] facts shall be clearly and accurately found and distinctly stated by the trial court, and that those facts shall sustain the conclusion reached.

We are of opinion that neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and we are also of opinion that the process by which the court came to its conclusion is not one which can be relied upon. The court proceeded upon the

theory that a comparison of the actual gross receipts of the company from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the question of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvious that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts.

In the light of these general and obvious propositions we proceed to examine the computations and reasoning of the court. For reasons which will be apparent hereafter we do not stop to inquire whether its findings are correct deductions from the testimony, but take them as they are stated. It may be premised that the books of the plaintiff, showing its business for the four years, were examined, and so much as was deemed necessary admitted in evidence. From those books was disclosed with mathematical accuracy the gross receipts of the company on all its business in all the states during each of the four years and the actual cost of doing [175] that business *during each of those years: also the gross receipts from the business done in South Dakota, and separately the amount which was received in that state from interstate business and that from local. If the schedule of rates prescribed by the defendants had been in force during the four years, and the same amount of business had been done by the company, the reduction in gross receipts from the passenger business would have been 15 per cent, and from the freight business 17 per cent. Of course, the cost of doing the business would be substantially the same. The court found the value of the plaintiff's property in South Dakota to be \$10,000,000, although, according to the testimony, it was bonded for over \$19,000,000. It held that it was not fair to consider that sum, \$10,000,000, the value of the property employed in doing local business, for it was also used in doing interstate business; and that the true way to determine the value of the property which could be regarded as employed in local business was by dividing the total value of \$10,000,000 in the same proportion that existed between the amount of gross receipts from interstate business and that from local business, each of which amounts was, as we have seen, accurately shown by the testimony. Upon that basis of 176 U. S.

division it found that the value of the company's property employed in local business was for the first year, \$2,200,000; the second year, \$2,600,000; the third year, \$2,100,000, and the last year, \$1,900,000, and also that the gross receipts from local business were for the first year, 18.5 per cent of the valuation; for the second year, 12.7 per cent; for the third year, 15.6 per cent; and for the last year, 16.3 per cent. In other words, for these several years the company received as compensation for doing its local business the per cent named of the real value of the property used in doing that business. Then, proceeding on the supposition that the defendants' schedule had been in force and the rates reduced as therein prescribed during these four years, it divided the valuation of \$10,000,000 on the like proportion of the receipts from interstate business to the receipts from local business as thus diminished, and upon such division found that the valuation of the plaintiff's property engaged in local *business would have been, for [176] the first year, \$1,900,000; for the second year, \$2,300,000; for the third year, \$1,800,000; and the last year, \$1,600,000; and upon such basis that the gross receipts from local business would have amounted to 18 per cent of the value of the property for the first year, 12.1 for the second, 15.3 for the third, and 16.2 for the last. Upon this it held that the difference between the per cent of receipts in the two cases was slight, and that there was no change in what may rightfully be called the earning capacity of the property sufficient to justify a declaration that the reduced rates prescribed were unreasonable. In other words, it was of the opinion that the earning capacity was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

But that there was some fallacy in this reasoning would seem to be suggested by the fact that although the defendants' schedule would have reduced the actual receipts 15 per cent on the passenger and 17 per cent on the freight business, the earning capacity for the last year was diminished only $\frac{1}{6}$ of 1 per cent. Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was \$10,000,000, and the total receipts both from interstate and local business were \$1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be \$5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving \$500,000 the company only receives \$100,000. The total receipts for interstate and local business being then \$600,-

000, the valuation of \$10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers \$8,333,000, and to that engaged in earning local receipts \$1,667,000. But if [177] \$1,667,000 worth *of property earns \$100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as \$8,333,000, and it earned \$500,000, its earning capacity was the same as that employed in local business—6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced.

Again, in another way, the error of the court's computation is manifested. The testimony discloses that the operating expenses of the entire system during each of the four years were over 60 per cent of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts. Reduce the gross receipts 15 per cent—and the reduction by the defendants' rates was 15 per cent on passengers and 17 per cent on freight business—it would leave only 25 per cent of the gross receipts as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But the testimony shows that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent of the gross receipts (and there was testimony tending to show that it was as much if not more) then a reduction of 15 per cent in the gross receipts would leave the property earning nothing more than expenses of operation. These computations show that the method which the court pursued was erroneous, and that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by the defendants were unreasonable or not.

But here we are confronted by the ninth statement in the findings of fact, to wit, [178] "that the court is unable to find from *the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896, and 1897 was." If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount

of money paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible. Take the ordinary case of condemnation of real estate, the value is to be determined by the trial tribunal, whether jury or court, and yet no one is able to state the exact value. In this very case the court fixed the value of the company's property in South Dakota at \$10,000,000, and yet it is impossible from the testimony to say that this conclusion was absolutely accurate, that there was testimony tending to show to a dollar such value. Beyond the figures given from the books of the company of the actual cost of doing the total business of the company there was the testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks *is greater; there are the wages of the [179] employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinion of experts familiar with railroad business is competent testimony, and cannot be disregarded.

We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined.

The question then arises, What disposition of the case shall this court make? Ought we to examine the testimony, find the facts, and from those facts deduce the proper conclusion?

It would doubtless be within the compe-

tency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, a similar case, he, as circuit justice presiding in the circuit court of Nebraska, undertook the

[180]work of examining the testimony, *making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a state in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests.

We are aware that the findings made by the master may be challenged when presented to the trial court for consideration, and it may become its duty to examine the testimony to see whether those findings are sustained, as likewise if sustained by the trial court it may become our duty to examine the testimony for the same purpose. But before we are called upon to make such examination we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court. As we have said, those findings may not be challenged by either party, and if so a large burden will be taken from the appellate court.

For these reasons we not merely reverse the decree of the trial court, but also remand the case to that court with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require.

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*HARRY W. DICKERMAN, Trustee, et al., [181]
Petitioners,

v.

NORTHERN TRUST COMPANY et al.

(See S. C. Reporter's ed. 181-206.)

Foreclosure of mortgage against corporation—collusive judgment as excuse for—declaring whole debt due for default—negotiability of bonds redeemable by instalments determined by drawings—illegality of purpose of corporation as affecting validity of mortgage; bonus of stock given to bondholders—declaration that stock is fully paid—set-off against foreclosure of bondholders' liability for stock.

1. A judgment against a corporation is not collusive in the legal sense, so as to prevent its nonpayment from constituting a default for which a mortgage debt may be declared due under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due, and was properly conducted.
2. An instant declaration by trustees that both principal and interest of a mortgage are due because of the nonpayment of an execution on a judgment against the mortgagor, which is a corporation, cannot be contested by stockholders, where the directors of the company do not make any objection, on the ground that the provision of the mortgage for such declaration if the execution was not paid "forthwith" allowed a reasonable time for such payment.

NOTE.—As to set-off on mortgage foreclosure, see note to *Brown v. Corriell* (N. J.) 21 L. R. A. 321.

Stock as bonus to purchaser of bonds.

Existing creditors of a corporation cannot impeach a transaction by which the corporate stock is increased and issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security so as to avoid the mortgage and treat the advance as a payment for stock. *Dummer v. Smedley*, 110 Mich. 466, 38 L. R. A. 490, 68 N. W. 260.

This decision is limited to existing creditors, but several cases hold that such a bonus to purchasers of bonds may be valid, even as against subsequent creditors.

Although a railroad company in the exercise of good faith may use bonds and stock to pay for the construction of its road, it cannot rightfully, at least as against creditors or stockholders, issue its stock to anyone as full paid without getting some fair or reasonable equivalent for it. *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476.

Increased stock disposed of to purchasers of bonds in equal amount in order to induce them to buy the bonds was held to be lawful where the actual value of both stock and bonds was not more than the par value of the bonds which was paid to the company on the purchase. *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530.

The usual method of raising money to build railroads or for any legitimate corporate purpose was not intended to be forbidden by Minn. Act 1887, chap. 12, making it unlawful for a railroad company to sell, dispose of, or pledge any of its shares or issue them until fully paid,

3. Bonds need not be produced in evidence prior to a decree of foreclosure and sale, in a suit by trustees under a mortgage securing the bonds, where the evidence is sufficient to prove that the bonds were valid and were outstanding obligations.
4. The negotiability of bonds due on or before a certain date is not defeated by a provision making them redeemable by instalments determined by drawings.
5. The illegality of the purpose for which a corporation was originally organized cannot become a material inquiry in a suit to foreclose a mortgage upon the property of the concern, if the mortgage was made while the corporation had power to create it, and the illegality was wholly extrinsic to the mortgage.
6. A bonus in stock given to purchasers of the bonds of a corporation, simply as an inducement to take the bonds, if this is done in good faith, will not entitle dissenting stockholders to have a deduction of the par value of the stock made from the bonds.
7. A declaration that shares of stock issued as a bonus to purchasers of bonds are fully paid up and unassessable is conclusive in favor of the holders as against the corporation and its stockholders, when the rights of creditors are not involved.
8. The right to set off as against some individual bondholders their obligation for unpaid stock cannot be allowed in a suit by a trustee for all the bondholders to foreclose a mortgage, in which the bonds must be treated as an entirety.

[No. 33.]

Argued April 5, 6, 1899. Decided January 22, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirm-

ing a decree of the Circuit Court on foreclosure of a mortgage. *Affirmed.*
See same case below, 53 U. S. App. 270, 80 Fed. Rep. 450, 25 C. C. A. 549.

nor except for money, labor, or property actually received and applied for corporate purposes, and declaring that all fictitious stock shall be void. The delivery of stock as a part of the contract by which bonds of the company are sold is not forbidden by this statute if the amount is not unreasonable or beyond the value actually received. *Brown v. Duluth, M. & N. R. Co.* 53 Fed. Rep. 889. See also note to *Dummer v. Smedley (Mich.)* 38 L. R. A. 490, on bonus stock of corporations.

Other cases are to the contrary.

In case of bonus stock given as an inducement to the purchase of bonds of a corporation it was held, in *Hebberd v. Southwestern Land & Cattle Co.* 55 N. J. Eq. 18, 36 Atl. 122, that while such transaction was valid as between the corporation and the purchaser, the holders of such bonus stock might be required to pay for it in satisfaction of the demands of creditors after the exhaustion of all other assets, upon the ground that its issuance was a fraud in law upon the creditors. This case seems to treat the issue of such bonds as a mere bonus, and not as a part of the consideration of the sale.

So, where a large amount of stock was issued to accompany bonds of the corporation in order to induce the purchase of the latter, and one of the directors of the company took some of these shares on which 40 per cent was credited but not paid, it was said that, as be-

ing a decree of the Circuit Court on foreclosure of a mortgage. *Affirmed.*

See same case below, 53 U. S. App. 270, 80 Fed. Rep. 450, 25 C. C. A. 549.

Statement by Mr. Justice **Brown**:

This was a bill in equity filed in the circuit court for the northern district of Illinois by the Northern Trust Company, *a corporation[182] organized under the laws of Illinois, having its principal office in Chicago, and Ovid B. Jameson, a citizen of the state of Indiana, as trustees, against the Columbia Straw-Paper Company, a corporation organized under the laws of the state of New Jersey, to foreclose a trust deed of some thirty-nine paper-mill properties, leaseholds, and water powers, situated in thirty-two different counties and in nine different states. This deed, which was dated December 31, 1892, was given to secure the payment of one thousand bonds of the paper company of \$1,000 each, with coupons bearing interest at 6 per cent per annum, payable half yearly. These bonds were issued and delivered to one Emanuel Stein, in part payment for the properties acquired by it from him.

The bill, which was in the ordinary form of a foreclosure bill, averred that by the terms of the bonds it was agreed by the paper company that it would redeem, on the 1st day of December, 1893, one hundred of such bonds, and annually thereafter until December 1, 1901, a similar number, and that the principal of such bonds should become due if the paper company should make default for a period of three months in the payment of any interest, and an election so to do were given in writing; that, by the terms of the mortgage or deed of trust, it should become enforceable, provided default were made in the payment of any one of the bonds which had become due and payable for one month

tween the stockholder and the corporation, the transaction was unquestionably valid and was unaffected by the peculiar considerations which arise when it is impeached in the interests of a creditor, but it is added that the rule is inflexible that in all matters pertaining to the assets creditors must be preferred to stockholders, and that personal profits of members which would diminish the common fund must be held for the benefit of the corporation until creditors are paid. Therefore, it is decided that this director's claim to the bonus of 40 per cent on these shares must yield to the demand of a creditor of the corporation. *Skrainka v. Allen*, 7 Mo. App. 434. This decision was affirmed on this point in 76 Mo. 384. A similar decision was made in this case as to the effect of bonds issued to stockholders, as in fact, though not in name, a bonus in order to compensate them for the burden of calls which they had not understood would ever be required.

And an agreement by which a subscriber to the organization stock of a corporation is to have, on payment therefor, not only the stock, but an equal amount of the bonds of the company, was declared void, not only as to creditors, but as to the corporation itself, since it amounts to a stratagem or device by which the payment of the subscription is to be avoided. *Morow v. Nashville Iron, Steel, & Charcoal Co.* 57 Tenn. 262, 3 L. R. A. 37, 10 S. W. 495.

thereafter, or, if default should be made in the payment of interest on any of such bonds, or in the performance of any of the covenants or conditions in the bonds or mortgage, and such default should continue for three months after written demand for payment or performance by the trust company, or if a judgment or order should be made, or any effective resolution adopted by the paper company for the winding up of such company, "or if a distress, attachment, garnishment, or execution be respectively levied or sued out against any of the chattels or property of either company, and such company shall not forthwith upon such distress, attachment, garnishment, or execution being levied or sued out, remove, discharge, or pay such distress, attachment, garnishment, or execution."

[183] *The bill alleged as the only grounds for enforcing the security of the mortgage, (1) that the mortgagor had made default in redeeming or discharging the several amounts of bonds designated in the mortgage and bonds for redemption; (2) in failing to pay certain instalments of interest; and (3) in failing to pay a certain execution sued out on January 22, 1895, against the property of the company upon a judgment obtained against it by one James Flanagan before a justice of the peace of Cook county, Illinois. That by reason of such default complainants had declared the principal and interest of the bonds to be immediately due and payable.

The bill contained the usual prayer for foreclosure and sale, and for a receiver and an injunction against disposing of any of the mortgaged property. The trustees having taken possession of the property, a receiver was appointed by consent of the company upon the same day the bill was filed.

The answer of the paper company admitted the material allegations of the bill, averred its inability to pay its debts, and asserted that the property covered by the mortgage was worth much more than the amount of the bonds and the indebtedness of the company.

A few days thereafter Dickerman, together with others, filed a petition setting forth that they, with other stockholders of the defendant company, had been injured by the wrongful and fraudulent manner in which its securities had been issued; that the defendant and its defense were under the control and direction of the bondholders and their trustees; that the directors were not fitted to conduct the suit by reason of their adverse interests, and prayed to be made defendants and be allowed to plead, answer, or demur to the bill, and to file a cross bill. This was allowed.

Thereupon petitioners filed their answer admitting the execution of the bonds and mortgage, but denying that the bondholders were entitled to the benefit of the trust created by the mortgage; denied that all of the one thousand bonds were duly issued, negotiated, and sold, or that they were outstanding and valid obligations of the mortgagor; and also denied that all of such bonds and coupons had come into the possession *of

or were held by, persons who had become the owners thereof in good faith and for a valuable consideration.

They further set forth in great detail the manner in which the combination had been formed in the summer of 1892, to purchase seventy paper mills with their plants, appliances, and goodwill, by means of securing from their respective owners option contracts whereby each owner agreed to sell his property to the combination for a stated sum in cash, and the residue in the capital stock of the corporation to be organized, to which the seventy paper mills, with their properties, etc., were to be conveyed; that the corporation so to be formed was to be capitalized at \$3,000,000 of common and \$1,000,000 of preferred stock, to be issued at par, in part payment for the mills at the option prices so obtained, until the whole amount was exhausted, and that in such contingency the corporation so to be organized was to have the power to issue \$1,000,000 of its bonds to complete the payment for said mills; that after options had been obtained upon thirty-nine mills, the total purchase price of which was \$2,788,000 in cash, stock, and notes, the parties met to consider them, and decided that it would be necessary to provide \$1,000,000 to purchase the property and furnish the running capital; that the combination thereupon caused the option contracts to be transferred to one Emanuel Stein, and then arranged to divide up and to fraudulently appropriate to themselves \$2,113,000 of the capital stock of the proposed corporation, which would not be required to pay for the thirty-one mills which were left out of the combination.

That after having arranged how many of the one thousand mortgage bonds of the new corporation each member of the combination was to receive for an equal amount in cash, and how many shares of preferred and common stock each was to receive gratuitously with bonds, they caused articles of incorporation to be filed December 6, 1892, in the state of New Jersey, to organize the paper company with a capital stock of \$4,000,000, with themselves and their agents as directors. That on December 14, 1892, they procured Stein, who held the option contracts for the purchase of the thirty-nine mills, *to present[185] to the stockholders a proposition to secure the titles to the thirty-nine mills, and to convey the same to the new corporation for \$5,000,000, as follows: \$1,800 in cash; \$1,000,000 in first-mortgage bonds; \$1,000,000 in preferred and \$2,998,200 in the common stock of the new company; that this proposition was accepted by the stockholders and also by the directors, and the property conveyed to the company; the bonds and capital stock divided among the members of the combination, as had been previously arranged, and that such persons still owned and were still liable for their capital stock in a much larger amount than the bonds of the company; and that the latter were owned by the same persons, who were liable on their stock. That the Columbia Straw-Paper Company having been organized for the purpose of taking

such conveyances, and thus consolidating said mill plants, their contention was that, by reason of fraudulent overvaluation of the various mill plants and properties upon which options of purchase had been taken, a defense in the nature of a set-off existed in favor of the company against such bondholders as were also stockholders to the extent of the unpaid part of the stock held by them.

The answer also contained an averment that the judgment and execution in favor of Flanagan before a justice of the peace was a fraudulent and collusive act on the part of the managers of the defendant company, in order to give the trustees the right to begin this foreclosure proceeding; that in pursuance of this the directors had fraudulently neglected and refused to pay six interest coupons on the bonds owned by Flanagan, in order that a suit might be instituted thereon; that the defendant corporation appeared upon the return of the summons, consented to an immediate trial, made no defense, but allowed judgment to be entered and an execution to issue on the same day, and that the firm of lawyers who had devised this proceeding acted as solicitors for the trustees in filing the bill of foreclosure. It was denied that the straw-paper company was insolvent, and was averred that the complainants and others had combined to wreck the company and defraud the defendant stockholders by withdrawing from *the treasury of the company bonds and stock to the value of \$3,000,000, which the complainants held in trust for the company, and that the same are assets and not liabilities, as in the bill of complaint alleged.

Defendants also filed a cross bill for an accounting in respect of the transactions complained of, especially in reference to the issue of the alleged mortgage bonds and the preferred and common stock; and if, on such accounting, anything should appear to be due from any of the defendants to the straw-paper company, a decree might be entered for the payment of the same, and that the receiver theretofore appointed might be removed and a proper and practical person be appointed receiver in his stead, with power to take possession of the property, as well as of the books, papers, and writings of the Columbia Straw-Paper Company, and that an injunction issue restraining the officers and directors of the company from interfering with his possession. The cross bill was subsequently stricken from the files.

Defendants later amended their answer, alleging that the bonds and mortgage were part of an illegal scheme to create a monopoly, regulate prices, and prevent competition among the mills purchased, who had, prior to the consolidation, been in active competition with each other.

The case was referred to a master to take proofs and report the testimony. He reported that the material allegations of the bill were sustained by the proofs; that all of the one thousand bonds, set up in the bill, were negotiated and sold and were outstanding and valid obligations of the company;

that the company made default in redeeming the first one hundred bonds, maturing December 1, 1893, as well as one hundred and five bonds maturing December 1, 1894; that the company also made default in the payment of interest upon its bonds due June 1 and December 1, 1894, though the same was duly demanded; that by reason thereof, and of the execution obtained by Flanagan, the complainants declared the principal and interest of the entire issue to be immediately due and payable; that they had been requested in writing by the holders of more than one third of the bonds to enforce the provisions of *the deed of trust; that the com-[187]pany had been for some time and was still insolvent; that at the date of the report there was due upon the bonds, principal and interest, \$1,249,632.86; that the contention of the defendants, that the bonds were not issued and outstanding, was not supported by the testimony; that the contention that the stock of the company, which passed into the hands of Emanuel Stein by virtue of his contract with the company, was not fully paid-up stock, was also not supported; that as a matter of fact such stock was received by Stein as fully paid stock, and that as a matter of law no question in regard to it between the stockholders of the company could be inquired into in this proceeding. He further found that there were no creditors of the company except those represented in this suit.

The defendant stockholders, who were complainants in the cross bill, filed exceptions to this report, which, upon a hearing by the court, was overruled, and a decree of sale nisi entered in favor of the original complainants. *Northern Trust Co. v. Columbia Straw-Paper Co.* 75 Fed. Rep. 936. On appeal to the circuit court of appeals for the seventh circuit the decree of the circuit court was affirmed. 53 U. S. App. 270, 80 Fed. Rep. 450, 25 C. C. A. 549. Whereupon the appellants applied for and were granted a writ of certiorari from this court.

Messrs. Otto Gresham and John S. Cooper argued the cause and filed a brief for petitioners:

The entry of the decree of foreclosure and sale without the introduction of the bonds and interest coupons in evidence constituted error for which the decree should be reversed.

Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; *Dowden v. Wilson*, 71 Ill. 485; *Moore v. Titman*, 35 Ill. 310; *Lucas v. Harris*, 20 Ill. 166; *George v. Ludlow*, 66 Mich. 176, 33 N. W. 169; *Beers v. Hawley*, 3 Conn. 110; *Field v. Anderson*, 55 Ark. 546, 18 S. W. 1038; *Schumpert v. Dillard*, 55 Miss. 348; 2 Jones, Mortgages, § 1469.

The action of the trustees in declaring the principal of the bonds and the interest due, because the mortgagor corporation had not paid the execution issued under the Flanagan judgment, was wrongful and cannot be sustained.

Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 37 Fed. Rep. 289, 3 L. R. A. 90; 176 U. S.

Bennett v. Lycoming County Mut. Ins. Co. 67 N. Y. 274; *Anderson*, Law Dict. title, *Forthwith*; 2 Cook, Corp. 4th ed. § 772; *Pugh v. Fairmount Gold & Silver Min. Co.* 112 U. S. 238, 28 L. ed. 684, 5 Sup. Ct. Rep. 131; 5 Thomp. Corp. § 6124.

The bonds of the Columbia Straw Paper Company secured by the mortgage sought to be foreclosed, although negotiable in form, had their negotiability destroyed by stipulations rendering their payment subject to contingencies.

Jones, Corporate Bonds & Mortgages, § 191; *Union Cattle Co. v. International Trust Co.* 149 Mass. 492, 21 N. E. 962; *McClelland v. Norfolk Southern R. Co.* 110 N. Y. 476, 1 L. R. A. 299, 18 N. E. 238; *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

The purpose and object of the promoters was to organize an unlawful combination in restraint of trade and commerce,—the organization of the Columbia Straw Paper Company,—the execution and delivery of the bonds and mortgage were acts in pursuance thereof and therefore both are void.

Starr & C. Rev. Stat. 1896, p. 1252; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

The answer should have been amended and the prayer of the Miller petition granted.

Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550.

After a bill is answered it can only be disposed of at final hearing.

Betts v. Lewis, 19 How. 72, 15 L. ed. 576; *Payne v. Cowan*, Smedes & M. Ch. 35; *Glegg v. Legh*, 4 Madd. 193; *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17 L. ed. 725; *Lautz v. Gordon*, 28 Fed. Rep. 264; *White v. Bower*, 48 Fed. Rep. 187; *Noonan v. Lee*, 2 Black, 499, *sub nom.* *Noonan v. Bralley*, 17 L. ed. 278; 2 Dan. Ch. Pr. 1547; *Washington R. Co. v. Bradley*, 10 Wall. 299, 19 L. ed. 894; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *Jones v. Smith*, 14 Ill. 229; *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 371, Fed. Cas. No. 1,810; *Equity Rule* 94; *Bayliss v. La Fayette, M. & B. R. Co.* 8 Biss. 193, Fed. Cas. No. 1,140; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; *Morawetz, Priv. Corp.* § 306.

The transaction with Stein did not amount to a sale.

Butler v. Thomson, 92 U. S. 412, 23 L. ed. 684; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; 1 Thomp. Corp. §§ 456-458, 460; *Story*, Eq. Jur. pp. 1430, 1445; *Lloyd v. Preston*, 146 U. S. 630, 36 L. ed. 1111, 13 Sup. Ct. Rep. 131; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505.

Every shareholder in the corporation is entitled to insist that every other shareholder shall contribute his ratable part of the company's capital for the common benefit.

Morawetz, Priv. Corp. §§ 270, 286, 288; 176 U. S.

Clark v. Bever, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468.

Set-off is enforceable in equity where there are mutual debits and mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow set-off.

Gray v. Rollo, 18 Wall. 629, 21 L. ed. 927; *Wanzer v. Truly*, 17 How. 584, 15 L. ed. 216; *Story*, Eq. Jur. 3d ed. §§ 1430, 1445; *Goodwin v. Kency*, 49 Conn. 563.

Mr. Louis Marshall argued the cause and, with *Messrs. Charles A. Dupee* and *Monroe L. Willard*, filed a brief for respondents:

The evidence fails to show that the organization of the Columbia Straw Paper Company and the execution of its mortgage and the issuance of its bonds were in pursuance of a scheme for the purpose of organizing a trust, contrary to the laws of the state of Illinois, or the statutes of the United States.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Thomp. Corp.* 6400, 6501; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639, 28 Atl. 973; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386, 7 N. Y. Supp. 406; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 24 N. E. 660; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *India Bagging Asso. v. Kock*, 14 La. Ann. 168; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 468, 41 N. E. 188; *Sharp v. Taylor*, 2 Phill. Ch. 801; *McBlair v. Gibbes*, 17 How. 232, 15 L. ed. 132; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 56 N. W. 864; *Dennehy v. McNulta*, 59 U. S. App. 264, 41 L. R. A. 609, 86 Fed. Rep. 825, 30 C. C. A. 422.

There was no fraudulent overvaluation of the properties conveyed by Stein to the defendant company, and hence all the stock became fully paid.

Coit v. North Carolina Gold Amalgamating Co. 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Coit v. North Carolina Gold Amalgamating Co.* 14 Fed. Rep. 12; *Bank of Fort Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; 1 Cook, Stock & Stockholders, § 35; 2 Thomp. Corp. §§ 16-18; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Young v. Erie Iron Co.* 65 Mich. 111, 31 N. W. 814; *Rickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250; *Carr v. Le Fevre*, 27 Pa. 413; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544:

Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co. 144 N. Y. 163, 26 L. R. A. 610, 39 N. E. 17; *Van Fleet v. Jones*, 75 Hun, 340, 26 N. Y. Supp. 1082; *Sehenek v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Skinner v. Smith*, 134 N. Y. 240, 31 N. E. 911; *Lorillard v. Clyde*, 86 N. Y. 384; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. Rep. 736; *Northwestern Mut. L. Ins. Co. v. Cotton Exchange Real Estate Co.* 70 Fed. Rep. 155; *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538; *Grant v. East & West R. Co.* 13 U. S. App. 1, 54 Fed. Rep. 569, 4 C. C. A. 511; *Com. v. Central Pass. R. Co.* 52 Pa. 506; *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Danville, H. & W. R. Co. v. Kase*, 41 W. N. C. 411, 39 Atl. 301; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Van Dyck v. MeQuade*, 86 N. Y. 38; *Whitney v. Cammann*, 137 N. Y. 344, 33 N. E. 305; *White Corbin & Co. v. Jones*, 86 Hun, 59, 34 N. Y. Supp. 203; *Monongahela Nav. Co. v. United States*, 148 U. S. 328, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; *Washburn v. National Wall Paper Co.* 51 U. S. App. 380, 81 Fed. Rep. 17, 26 C. C. A. 312.

The defendant corporation could not maintain an action or defense such as was set up by appellants.

1 Cook, Stock & Stockholders, §§ 38-47; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Brandt v. Ehlen*, 59 Md. 1; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Du Pont v. Tilden*, 42 Fed. Rep. 87; *New Jersey Corporation Laws*, § 55; *Hebberd v. Southwestern Land & Cattle Co.* 55 N. J. Eq. 18, 36 Atl. 122; *Krohn v. Williamson*, 62 Fed. Rep. 869; *Williamson v. Krohn*, 31 U. S. App. 325, 66 Fed. Rep. 655, 13 C. C. A. 668; *Wells v. Green Bay & M. Canal Co.* 90 Wis. 442, 64 N. W. 69; *John R. Proctor Land Co. v. Cooke*, 19 Ky. L. Rep. 1734, 44 S. W. 391; *Granite Roofing Co. v. Michael*, 54 Md. 65; *Re Ambrose Lake Tin & Copper Min. Co.* L. R. 14 Ch. Div. 390; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544; *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Union Loan & T. Co. v. Southern California Motor Road Co.* 51 Fed. Rep. 840; *Smith v. Ferries & C. H. R. Co.* (Cal.) 51 Pac. 710.

Appellants cannot, as stockholders, maintain a proceeding to enforce payment by the bondholders of their alleged unpaid stock for a fraudulent overvaluation, since appellants participated and acquiesced in the transaction.

1 Cook, Stock & Stockholders, §§ 39, 40; *Re Gold Co.* L. R. 11 Ch. Div. 701; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Callanan v. Windsor*, 78 Iowa, 193, 42 N. W. 652; *Lewis v. New York Iron Co.* N. Y. L. J. April 30, 1890; *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291; *Wood v. Corry Waterworks Co.* 44 Fed. Rep. 146, 12 L. R. A. 168; *Re Syracuse C. & N. Y. R. Co.* 91 N. Y. 4; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 273, 26 N. E. 145; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159; *Parsons v. Hayes*, 14 Abb. N. C. 419; *Langdon v. Fogg*, 21 Blatchf. 392, 18 Fed. Rep. 8; *Thompson v. Bemis Paper Co.* 127 Mass. 595; *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 262; *Washburn v. National Wall Paper Co.* 51 U. S. App. 380, 81 Fed. Rep. 21, 26 C. C. A. 312; *Ten Eyck v. Pontiae, O. & P. A. R. Co.* 114 Mich. 494, 72 N. W. 362; *Nierosi v. Calera Land Co.* 115 Ala. 429, 22 So. 147; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Drake v. New York Suburban Water Co.* 26 App. Div. 499, 50 N. Y. Supp. 826; *Unekles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *National Wall Paper Co. v. Hobbs*, 90 Hun, 288, 35 N. Y. Supp. 932; *Morawetz, Priv. Corp.* 2d ed. § 290; *Seymour v. Spring Forest Cemetery Asso.* 144 N. Y. 341, 26 L. R. A. 859, 39 N. E. 365; 1 Pom. Eq. Jur. 401, 402; *Waterman, Set-Off*, pp. 3, 469, 470.

Where all the bonds and stock of a company are conveyed for property which the company acquires, all "then" stockholders assenting, neither the company, nor any then or subsequent stockholder, can complain.

Seovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Foster v. Seymour*, 23 Fed. Rep. 65; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. Rep. 736; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544.

In no new view of the case can any relief be granted against the stockholders of the Columbia Straw Paper Company in this action brought in a forum other than that of New Jersey, the laws of which regulate this corporation.

Erickson v. Nesmith, 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830; *Lowry v. Inman*, 46 N. Y. 119; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845; *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932; *Patterson v. Lynde*, 112 Ill. 196; *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; *May v. Black*, 77 Wis. 101, 45 N. W. 949; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184.

The court did not err in striking appellants' cross bill from the files.

Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 526, 27 L. ed. 1019, 3 Sup. Ct. Rep. 315; *Lund v. Skanes Enskilda Bank*, 96 Ill. 181; *Cross v. De Valle*, 1 Wall. 1, 17 L. ed. 515; *American & General Mortg. & Invest. Corp. v. Marquam*, 62 Fed. Rep. 960; 1 Fost.

Fed. Pr. § 171; 2 Dan. Ch. Pr. 1551; *Forbes v. Memphis, E. P. & P. R. Co.* 2 Woods, 323, Fed. Cas. No. 4,926; *Deery v. Cray*, 5 Wall. 795, 18 L. ed. 653; *Gregg v. Moss*, 14 Wall. 564, 20 L. ed. 740; *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 144, 24 L. ed. 1008; *Cannon v. Pratt*, 99 U. S. 619, 25 L. ed. 446; *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. ed. 468, 4 Sup. Ct. Rep. 515; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541.

There was no necessity for a production of the bonds before the master.

Toler v. East Tennessee, V. & G. R. Co. 67 Fed. Rep. 168; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 150, 35 L. ed. 121, 11 Sup. Ct. Rep. 512.

There was no collusion or fraud in connection with the Flanagan judgment and the issuing of an execution thereon and the proceedings by reason thereof.

Standard Dict. *Collusion*; Anderson, Law Dict. *Collusion*; Bouvier, Law Dict. *Collusion*; *Gottlieb v. Miller*, 154 Ill. 52, 39 N. E. 992; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 630, 31 L. R. A. 265, 41 N. E. 185; *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338; *Farmers' Loan & T. Co. v. Green Bay & M. R. Co.* 10 Biss. 203, 6 Fed. Rep. 100; *Leavenworth County v. Chicago, R. I. & P. R. Co.* 25 Fed. Rep. 229; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. Rep. 168.

[187] *Mr. Justice Brown delivered the opinion of the court:

This case presents primarily the question whether a minority of the stockholders of a corporation have a right to intervene in the foreclosure of a mortgage upon the corporate property for the purpose of showing that the property was sold to the corporation by the connivance of the mortgagees at a gross overvaluation, and to compel the bonds held by them to be *subjected to a set-off of their indebtedness to the corporation for unpaid stock.

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It should be borne in mind in connection with the several defenses set up by the interveners that they do not appear here in the capacity of creditors, but as stockholders; that their rights are the rights of the corporation and must be asserted and enforced through the corporation, and upon the theory that the latter has or threatens, by collusion or otherwise, to neglect the proper defense of the foreclosure suit. *Dodge v. Woolsey*, 18 How. 331, 341, 343, 15 L. ed. 401, 405; *Koehler v. Black River Falls Iron Co.* 2 Black, 715, 17 L. ed. 339; *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17 L. ed. 725; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 654; *Haves v. Oakland*, 104 U. S. 450, 460, 26 L. ed. 827, 832; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 560; *Cook, Stock & Stockholders*, §§ 645, 659, 750.

There are several preliminary objections made by the interveners to this foreclosure which require to be disposed of before entering
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ing upon the proper merits of the case. They are—

1. That the bonds were not due. This in a certain sense is true. The bonds were peculiar in this respect. There was no date fixed for their maturity, but there was a provision that on the 1st day of December, 1893, and upon the same date in every succeeding year, the company would redeem a certain number of bonds to be ascertained by drawings made under the direction of the Northern Trust Company in the month of November in each year. That immediately after such drawing the company should cause the numbers of the bonds drawn for redemption to be published in New York and Chicago newspapers, and that every bond so drawn should become redeemable on the 1st day of December next thereafter. There was no evidence that any such drawing was ever made, and the trust company did not institute their foreclosure proceedings upon the theory that any of the bonds, by their terms, had matured.

There was, however, a provision that the mortgage should become enforceable, if the trustees should declare the principal *and in-[189] terest upon the bonds to be immediately payable, after any execution should be levied or sued out against the chattels or property of the company, and such company should not forthwith, upon such execution being levied or sued out, remove, discharge, or pay the same.

It appears that one James Flanagan, who was a bondholder, brought suit against the company on January 22, 1895, upon six coupons. The action appears to have been brought directly or indirectly through the legal firm who were also counsel of the defendant company. Summons was issued, returnable January 28, 1895, and served upon the president of the company at 5 o'clock P. M. on the day it was issued (22d). On the same afternoon, the president appeared before the justice of the peace and consented to an immediate trial, which resulted in a judgment for \$180. Execution being sworn out, it was issued and placed in the hands of the constable at about half-past five o'clock of the same day. Later on the same day the trustees gave notice to the company that by reason of such execution having been unpaid, they declared the principal and interest upon the one thousand bonds named and described in the trust deed to be immediately payable, and upon the same night the trustees took possession of the property of the company in the vicinity of Chicago, the officers and agents of the company making no resistance. It also appeared that the president of the company had been in consultation with the attorneys of the trustees about foreclosing the mortgage and taking possession of the property, for several days prior to January 22.

Upon this state of facts the master, to whom the case was referred, reported that the contention of the defendants, that the procurement of the Flanagan judgment was the result of a collusion of the company, was not supported by the testimony. This was

also the opinion both of the circuit court and of the court of appeals.

We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the [190] principal and interest of *the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is denned by Bouvier as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law," and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one. In *Morris v. Tuthill*, 72 N. Y. 575, which was also a suit to foreclose a mortgage, the court observed: "The facts that the assignor of a mortgage and his assignee acted in concert with the view unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose a mortgage. So, also, the facts that the assignee took title from motives of malice, and solely with the view to bring an action, and that the assignor assigned from a like motive, and without consideration, furnish no defense, and do not impeach plaintiff's title. It is sufficient to sustain the action that the mortgage debt is due, has been transferred to and is owned by plaintiff; and the mortgagor can only arrest the action by paying or tendering and bringing into court the amount due."

If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis v. Flagg*, 35 N. J. Eq. 491; *Dering v. Winchelsea*, 1 Cox, Ch. Cas. 318; *McMullen v. Ritchie*, 64 Fed. Rep. 253, 261; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. Rep. 168.

[191] *Now, in this case there is no doubt that Flanagan's claim was an honest one; that the coupons upon which he brought the suit were due and unpaid, and there is nothing to show that he would not have been entitled to a judgment upon them if the defendant had made a contest. The company was notoriously insolvent. Its coupons for 1894 and 1895 were unpaid. All its prop-

erty was subject to the mortgage given to secure its bonds. It could no longer continue its business. Flanagan had a perfect right to bring suit, and under these circumstances the president of the company was guilty of no wrong in consenting to a judgment and to the immediate issue of an execution. The company was not bound to defend if there were no defense. The forms of law were complied with. It would doubtless have been more seemly if judgment had not been entered until the return day of the summons, if the execution had not issued until the expiration of the twenty days allowed by law, and if the trustees had not been so alert in seizing upon the nonpayment of the judgment as an excuse for declaring the principal and interest of the bonds to be due. But this haste did not render the judgment or execution void. If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of stockholders cannot question their right to do so. The fact that the Flanagan action was undertaken for the purpose of enabling the trustee to declare the principal and interest due does not invalidate the proceeding so long as there was a debt due, an action properly conducted to recover it, and the object to be gained was not an illegal one.

The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a nonresident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the *question of jurisdiction, in- [192] quire into the motives which actuated the parties in making the conveyance. *M'Donald v. Smalley*, 1 Pet. 620, 7 L. ed. 287; *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759.

The law is equally well settled that, if a person take up a bona fide residence in another state, he may sue in the Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the state in which the court was held. *Cheever v. Wilson*, 9 Wall. 108, 123, 19 L. ed. 604, 608; *Briggs v. French*, 2 Sumn. 251, Fed. Cas. No. 1,871; *Catlett v. Pacific Ins. Co.* 1 Paine, 594, Fed. Cas. No. 2,517; *Cooper v. Galbraith*, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; *Johnson v. Monell*, Woolw. 390, Fed. Cas. No. 7,399. So, also, in cases where a surety attacks a judgment against his principal upon the ground that it was obtained for the purpose of defrauding him, it must be made to appear either that no debt existed

against the principal, or that the amount was grossly exaggerated for the purpose of defrauding the surety. *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94; *Annett v. Terry*, 35 N. Y. 256; *Dougherty's Estate*, 9 Watts & S. 189, 43 Am. Dec. 326; *Thompson's Appeal*, 57 Pa. 175; *Willard v. Whitney*, 49 Me. 235; *Pierce v. Jackson*, 6 Mass. 242; *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110; *Berger v. Williams*, 4 McLean, 577, Fed. Cas. No. 1,341; *Feaster v. Woodfill*, 23 Ind. 493. So, too, it has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. *Bloxam v. Metropolitan R. Co.* L. R. 3 Ch. 337; *Seaton v. Grant*, L. R. 2 Ch. 459; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5.

In this connection it is claimed that the trust company was premature in declaring the principal and interest of the mortgage to be due, although the mortgage provided that such declaration might be made if the company should not "forthwith," upon execution being sued out, discharge or pay it. It is insisted that the company was entitled to a reasonable time in analogy to certain cases which hold that in insurance companies the word "forthwith" carries this significance. [193]*But "forthwith" is defined by Bouvier as indicating that "as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case." In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours. *Anderson* (Law. Dict.) says of the word that it "has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done." There are many cases which turn upon the question whether a person was not too late in complying with a requirement that a thing must be done forthwith, but we can recall none where he has been held in default for doing such act too speedily, and as the corporation in this case made no objection to an instant declaration by the trustees that they would treat the principal and interest of the mortgage as due, it was not within the power of the appellants to set up the fact that they acted with too great haste. It is one of those matters within the discretion of the directors, and we do not think the appellants are in a position to impugn their judgment. *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 472, 25 L. ed. 438, 442; *Cook, Stock & Stockholders*, § 750. Possibly the mortgagor or the unsecured creditors of the mortgagor might have had some reason to complain, but, so far as the mortgagees are concerned, the action seems to have been taken in their interest, and to have redounded in their benefit.

2. That the bonds were not put in evidence prior to the decree of foreclosure and sale. This objection is unsound. The foreclosure suit was by mortgagees in possession. The bill averred and the answer of the company admitted the issue of one thousand bonds of \$1,000 each, with the accompanying interest 176 U. S.

coupons, and the answer of the interveners admitted that these bonds were issued and certified by the trust company, and only denied that all of them were duly issued, negotiated, and sold, and that they were valid and outstanding obligations. The testimony for both parties showed that the entire number were certified and issued by the company, and the master also made a finding to the same effect. He also found that they were valid *obligations of the company, and that [194] there was due thereon \$1,249,632.86. Given the number of bonds and coupons, the amount due was a simple matter of mathematical computation. No further proof was required to justify a decree of foreclosure and sale. Nothing could be gained by an order to produce the bonds before the master prior to such decree. The complainants were trustees under the mortgage, and had no personal interest in the bonds, but held the legal title to the mortgage, which they were foreclosing for the benefit of others. This power was expressly given them by the mortgage. It was sufficient to prove that the bonds were valid and were outstanding obligations of the company, and it was not necessary to show in whose hands they were or to require their production. Indeed, an order to that effect could only result in delaying a decree indefinitely, since in cases of corporate mortgages the bonds are often widely scattered, owned in foreign countries, or by persons totally ignorant that a suit for foreclosure is in progress. Months and even years might be required to produce them all. The practice has been to order a decree for foreclosure and sale without their production. *Guarantee Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 150, 35 L. ed. 116, 121, 11 Sup. Ct. Rep. 512; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. Rep. 168, 180.

When, after a sale, the case is referred to a master for proof of claims against the proceeds of sale, they must, of course, be brought into court for payment and cancellation, and the title of each holder must then be proved.

3. That the bonds were not negotiable. This objection is also unsound. The bonds were payable "to the bearer, or, when registered, to the registered owner thereof," were declared to be due on or before December 1, 1901, and were redeemable by annual drawings conducted under the supervision of the trust company. It was not known which bonds it would redeem in any one year, as this was to be determined by drawings; but its promise was to redeem all of them before December 1, 1901. Considering the nature of corporate bonds, and the difficulty of redeeming so large a number and amount upon any one day, we do not think the fact that they were *redeemable by instalments, deter- [195] mined by drawings, impaired their negotiability. Promissory notes much more indefinite as to their time and payment have been held to be negotiable (*Stevens v. Blunt*, 7 Mass. 240; *Goodloe v. Taylor*, 10 N. C. (3 Hawks) 458; *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464) and in *Goshen & M. Turnp. Road v. Hurtin*, 9 Johns. 217, 6 Am. Dec. 273,

it was held directly "that a promise in writing to pay a certain sum" in such manner and proportion, and at such time and place, as he shall from time to time require, is a promissory note.

It is at least doubtful whether the fact that these bonds were or were not negotiable is a material one; but assuming it to be such, we think they were negotiable within the meaning of the law.

4. That the circuit court should have allowed the answer to be amended for the purpose of showing that the organization of the defendant company, and the execution of the bonds and mortgage, were parts of a scheme to form a trust or unlawful combination in restraint of trade. After the answer of the defendant company and the original answer of the appellants—who had been admitted as defendants by leave of court—were filed, and all the proofs had been taken, appellants filed an amendment to their answer, setting up that the bonds and mortgage were parts of a combination or trust in restraint of trade, and in direct violation of the act of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and also in violation of the act of the general assembly of Illinois "to provide for the punishment of persons, copartnerships, or corporations forming pools, trusts, and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891. The answer set out the facts at length, averring that there were seventy mills engaged in the manufacture of straw paper, all in competition with each other, and that the company obtained control of forty of the mills and operated sixteen. This amended answer was filed without objection from court or counsel, and still remains as part of the pleadings in the case.

[196] Prior, however, to this amendment being filed, and on January 10, 1896, Charles A. Miller filed his petition to be *made a party defendant and to set up the trust or monopoly defense. His petition, which sets out with great particularity his theory of a trust, was with its affidavits and all the testimony in the case submitted to the court, carefully examined, and finally denied.

But admitting everything that can be claimed for the combination in this connection, we do not see how it can affect materially the foreclosure of this mortgage. If this were a proceeding in *quo warranto* to attack the organization of the corporation, or an indictment under the statute of Illinois, or an action against a member of the combination to enforce any of the provisions of the original contract, the validity of such contract would become an important question. But in a suit to foreclose a mortgage upon the property of the concern, it is difficult to see how the purpose for which the corporation was originally organized can become a material inquiry. So long as the corporation existed, it had the power to create a mortgage, and when that mortgage became due the trustee had a right to foreclose. This trustee was no party to the alleged combination, and the fraud, if any existed, was

wholly extrinsic to the mortgage. It would seem a curious defense if a mortgagor could set up against the mortgage that the property covered by it was used for an illegal purpose unknown to the mortgagee, as, for instance, gambling, and therefore that the mortgage was invalid.

5. That the court erred in holding that the evidence did not support the contention of the petitioners, that there is a liability, enforceable in this cause, against the bondholders holding stock that is not paid for, to the Columbia Straw-Paper Company, amounting to \$2,113,000, and which indebtedness should be set off against the indebtedness on each bond. This proposition involves the real merits of the case. The gravamen of the petitioners' contention is that the bondholders should be held for the difference between the amount paid by Stein for the thirty-nine mill properties, namely, \$1,887,000 of stock, and the amount for which he subsequently turned them over to the paper company, namely, \$4,000,000 in stock, the difference being \$2,113,000.

*In support of this contention petitioners [197] introduced evidence of the following facts:

In October, 1892, there were about seventy straw-paper mills doing business in the northwestern states, and having a practical monopoly of the manufacture of straw paper.

Some efforts had been made to combine them in a single corporation, but they had proved unsuccessful, when, in February, 1892, the scheme was revived by one Stein, who represented a firm of New York capitalists, certain other capitalists in Buffalo, who were represented by one Beard, and still others in Chicago.

As the result of certain conferences between Stein and some others who had previously endeavored to obtain options, Philo D. Beard and Thomas T. Ramsdell undertook to obtain options for the purchase of these mills, to be turned over to a corporation to be organized by Beard and Ramsdell with a capital stock of \$4,000,000. The options did not specify the number of mills that were to join, although it seems to have been understood that the entire seventy were to be gotten in if possible, but as a matter of fact Beard and Ramsdell obtained options upon only thirty-nine. The options show clearly that it was intended to turn the properties over to the new corporation. For these properties they agreed to pay \$2,788,000, part in cash (\$766,000), part in preferred stock (\$629,000), part in common stock (\$1,258,000), and part in notes (\$135,000) of the new company. The stock payments thus aggregated \$1,887,000.

Instead of calling the mill owners together and organizing a new corporation, Beard and Ramsdell turned over the options to Stein; and articles of incorporation were drawn by a member of the New York firm under the laws of New Jersey, which were executed by Beard, one Taylor, a clerk in the office of the New York firm, and one Heppeneimer, a New York lawyer residing in New Jersey, each of these subscribing for four

[198] shares, aggregating twelve shares out of a total issue of 40,000 shares. These articles of incorporation were filed in the office of the secretary of state on December 6, 1892. The three incorporators met immediately in Hoboken as stockholders, and elected themselves as directors with six *others, two of whom were members of the New York firm, and the others clerks in their office. Not a single mill owner who expected to become a stockholder was placed on the board at this time, although representations had been made by the syndicate that a majority of the stockholders would be mill owners. Philo D. Beard was elected president and Samuel H. Guggenheimer secretary.

Immediately thereafter, and on December 10, 1892, Stein, who held all the options, assuming to act as an independent owner, though he had obtained the options for the benefit of the company, and had promised to pay for them in the stock of the company, made a proposition in writing drawn by a member of the New York firm to this board of directors to sell the thirty-nine mills to the paper company for \$5,000,000, being an advance of \$2,113,000 over what he had agreed to pay for them. This proposition was drafted by the New York firm, and the stockholders upon the day the proposition was received had another meeting and instructed themselves as directors to accept. They authorized Beard as president to enter into a contract with Stein, which was accordingly done. Stein and wife acknowledged it before a clerk in the office of the Chicago firm.

This board of directors served for only two weeks, when they were succeeded by another board composed of Beard, Stein, Heppenheimer, and others mostly in their interest.

For the next month the members of the Chicago firm were busy in getting the mill owners to deposit their title deeds and abstracts, but nothing appears to have been said to them of what had occurred in New York. The New York firm engaged itself in raising money to pay for the bonds, and deposited over \$800,000 with the trust company to be disbursed to the mill owners, which money should be checked out by its personal agent, who proceeded to make settlements with the mill owners and take over their properties by giving checks payable to Stein, who indorsed them over. Stein testified that he did not understand the plan, but left everything to the agent to attend to, though it involved Stein paying out one million in cash and four millions in stock.

[199] The *principal parties in interest did not seem to trust Stein, and attended to the payment of the purchase price themselves.

It appears that 957 shares of preferred and 4,441 shares of common stock went directly into the hands of Beard; 859 shares of the preferred and 4,357 shares of common stock to the New York firm; to the friends of this firm 420 shares of preferred and 840 shares of common stock; to the Chicago firm, 172 shares of preferred and 515 shares of common; to a trustee, 1,110 shares of preferred and 2,232 shares of common; to Stein,

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himself, 270 shares of preferred and 2,377 shares of common. No money consideration passed from Stein or from any of these parties to the company for any of this stock.

It thus appears that the syndicate received 3,788 shares of preferred and 14,751 shares of common stock from the treasury of the company, aggregating 18,459 shares of the par value of \$1,854,900. As it took but \$1,887,000 of the stock at par to acquire the mills, this leaves \$258,100 unaccounted for. This is explained in the testimony of Sherwood, where he says that this stock went to the promoters and their friends. Add this \$258,100 to the \$1,854,900 above stated, and it amounts to \$2,113,000, which is the total capitalization of \$4,000,000, less the \$1,887,000 that went to the mill owners.

As thus organized the corporation began business. It raised the price of paper \$6 a ton, which invited competition, and a new corporation was organized by the New York firm under the laws of New Jersey, called the Paper Commission Company. The sole function of this company was to sell the product of the straw-paper company, and the other paper mills which had not given options, the straw-paper company paying the new company a commission of 25 per cent for selling all its paper, reducing the net price realized by the straw-paper company to less than it had obtained when selling its own paper.

The mill owners, although the largest stockholders, never seem to have been treated as a factor in these operations, and in some way or other the syndicate got possession of \$2,113,000 in stocks and bonds, which they appear to have used in furtherance of their own interests.

*From this testimony it would appear: [200]

(1) That the options were to be secured for the benefit of a corporation to be organized by Beard and Ramsdell, and that the mill owners were to be paid principally in the stock of such corporation;

(2) That Stein, the successor of Beard and Ramsdell, had no title personally to the property he pretended to sell, but that he held it as trustee for the corporation to be organized;

(3) That the corporation was organized by three parties who held but twelve shares out of forty thousand shares, one of the three being a clerk in the office of the New York firm, and the other two acting in their interest;

(4) That a member of the New York firm drew the proposition by which Stein offered to sell these properties to a corporation, in which the member himself was the only responsible stockholder;

(5) That the owners of the mill properties knew nothing of the organization of the corporation, or of its acceptance of Stein's proposition to sell his properties to the straw-paper company;

(6) That the stock was fixed at \$5,000,000 upon the idea that seventy mills would join in the combination, but as a matter of

fact only thirty-nine joined; that but \$2,788,000 was paid for these properties, and that \$2,113,000 of stock was distributed among the parties who got up the corporation without any distinct consideration being received;

(7) That the mill owners received stock which was worth but one half the value of that which they supposed they would receive.

Assuming these facts to have made out a case of fraud in the organization of the straw-paper company, and in the purchase of the mill properties, it is difficult to see how they affect the validity of the bonds as a whole, the right of the trustee to foreclose, or how they can entitle the complainant to compel the bondholders, so far at least as they were innocent holders, to set off their indebtedness to the paper company for stock, against the indebtedness of the company upon the bonds.

[201] The company did, in fact, go through the form of an organization *under the laws of the state of New Jersey, and while the first board of directors seem to have been mere tools in the hands of the New York firm with no real interest in the company, they appear to have conformed to the letter of the law, and until formally dissolved the corporation had a legal existence. As thus organized it accepted a proposition from Stein to purchase the mills for \$5,000,000, namely, \$1,800 in cash; \$1,000,000 in bonds; \$1,000,000 in preferred stock, and \$2,998,200 in common stock of the paper company, "all of which," both preferred and common, "shall be fully paid and unassessable, and so expressed on the face of the certificates." It thus appears that the entire transaction by which the title of the thirty-nine mills was finally vested in the straw-paper company was accomplished through three distinct transfers: First, from the several owners of these properties to Beard and Ramsdell; second, by assignment from Beard and Ramsdell to Stein; and, third, from Stein to the paper company. It also appears that when the mortgage was made the legal title to the property was in the straw-paper company; and that, whatever be the circumstances connected with the organization of the company and the transfer from Stein, it had the legal right to make this mortgage. The master found that all of this issue of \$1,000,000 in bonds was negotiated and sold, and is now outstanding, and a valid obligation of the paper company; that they are the same bonds described in the mortgage, and that they are now due and unpaid. The original options given by the owners of the mill properties provided that \$766,000 should be paid in cash, and in the facts above stated it appears that a member of the New York firm engaged himself in raising money to pay for the bonds, and deposited over \$800,000 with the trust company to be disbursed to the mill owners.

The testimony also showed that the bonds were all paid for in full, and there is no testimony to the contrary. The decree of the circuit court also found that all of the

bonds were duly issued, negotiated, and sold, and were outstanding and valid obligations of the company, and the affirmance of that decree by the court of appeals showed that also to be its *finding. A list of the parties [202] to whom the bonds were delivered by the Northern Trust Company upon the request of the straw-paper company shows that nearly all the bonds were originally issued to Samuel Untermyer, Philo D. Beard, John D. Hood, to members of the Chicago firm, and others more or less connected with the organization of the company. But the testimony shows that far the larger part of them had been transferred to other parties, presumably for the purpose of raising the \$800,000 deposited with the trust company. There is nothing to impugn the good faith of most of these holdings. It is true that these parties in disposing of the bonds allowed to each purchaser of a \$1,000-bond \$200 of preferred and \$400 of common stock, but they did not seem to have profited by this themselves. And if it were necessary to the negotiation of the bonds to give a bonus in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106. Certainly, if this bonus were received in ignorance of the fraud practised upon the original mill owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a bonus, particularly in view of the fact that the stock might turn out to be worthless.

In addition to this, however, the contract with Stein provided that the stock to be issued to him should declare upon the face of the certificates to be fully paid and unassessable, and we know of no principle upon which it can be held that innocent bondholders can be required to deduct from the face of their bonds the amount unpaid upon their stock. The very authorities which hold that the declaration that the stock is fully paid and unassessable is not binding upon creditors, also hold that the corporation cannot repudiate it and proceed to collect either from the person receiving the stock or his transferee the unpaid part of the par value. Thus in *Scovill v. Thayer*, 105 U. S. 143, 153, 26 L. ed. 968, 973, in which a similar declaration was *held to be invalid against creditors, it [203] was said: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it

had been expressly authorized by the charter."

There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defense; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders the declaration that the shares are fully paid up and unassessable is a valid one. If an action by the corporation would not lie to recover the unpaid part of the subscription, then such unpaid part cannot be deducted from the bonds.

Somewhat different considerations apply to those who took part in the organization of the company, and in the purchase of the thirty-nine mills, and who received the bonds and stock of the paper company with notice of the fraudulent character of the scheme. We are not disposed to condone the offenses of those who, through Beard and Ramsdell and their assignee Stein as their agents, purchased these plants for \$2,788,000, and immediately thereafter went through the form of repurchasing of their own agents (in fact, of themselves) the same properties at \$5,000,000. These men stood in the light of promoters of the straw-paper company. A promoter is one who "brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself." Cook, Stock & Stockholders, § 651. Or, as defined by the English statute of 7 & 8 Vict. chap. 110, § 3, "every person acting, by whatever name, in the forming *and establishing of a company at any period prior to the company" becoming fully incorporated. See also Lloyd, Corporate Liability for Acts of Promoters, 17. He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. Lloyd, Corporate Liability, 18; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 16 S. E. 360. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders. Cook, Stock & Stockholders, § 651. "Accordingly, it has been held that, if persons start a company, and induce others to subscribe for shares, for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or suppression of the truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for any loss which it has suffered." Morawetz, Priv. 176 U. S.

Corp. §§ 291, 294, 546; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 372; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918.

In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain." Morawetz, Priv. Corp. § 546; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505; *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628; *Twycross v. Grant*, L. R. 2 C. P. Div. 469, 503; *Whaley Bridge Calico Printing Co. v. Green*, L. R. 5 Q. B. Div. 111; *Thompson, Liability of Officers & Agents*, 218, § 20.

*It is true that the options were taken[205] from each owner of the thirty-nine mill plants severally, and that no mention was made of the number that were to be taken into the new corporation. But each option contract showed that it was the purpose of Beard and Ramsdell to organize one or more corporations with a capital of one million preferred and three millions of common stock, and with a bonded indebtedness of \$1,000,000. This clause of itself, as well as the whole scheme of the contract, indicates that a large number of similar options were to be obtained, and that one or more large corporations was to be organized to conduct the business. It goes without saying that it never could have been contemplated that any one or any small number of these mills, which were comparatively insignificant affairs, were to be reorganized with a capital stock of \$4,000,000. The oral testimony indicates that it was the understanding that all the straw-paper mills in that section of the country, some seventy in number, were to be consolidated into the new corporation, and such upon the testimony before us would appear to be the fact. Now, if it were understood by the owners of these thirty-nine mills, who received in cash and stock \$2,788,000 for their plants, that Beard and Ramsdell, who held themselves out in the option contracts as promoters of the new corporation, were to transfer these options to Stein, and that the latter was to set himself up as a purchaser and resell these properties to the new corporation for \$5,000,000, it is impossible to suppose that they would have consented to the arrangement. Bound as these promoters were to deal fairly and honestly with the stockholders in the new corporation, they were guilty of apparently inexcusable conduct in excluding the mill owners from all participation in organizing the new corporation, putting in their own clerks as directors, and paying off the mill owners in stock which was really of little more than half the value they must have expected to receive. If they were unable to obtain op-

tions upon only thirty-nine out of the seventy mills, they should have made known this fact, or at least given these mill owners the benefit of the surplus stock. Of course, they

[206] were entitled to charge *a reasonable sum for their services and expenses, but the parties who represented the substantial interests in the new corporation were entitled to be informed of the steps taken. We think that no acquaintance with legal principles was necessary to apprise these parties that they were not dealing fairly with the owners of the mills in concealing from them the facts connected with this purchase, and in dealing with the property as if they themselves were the only parties in interest.

It is difficult, however, to see how justice can be done by a reversal of the decree appealed from. This is a decree ordering a foreclosure and sale of the property to pay the bonds, to which the bondholders are clearly entitled. It finds that all the bonds were duly issued, negotiated, and sold, and that they are outstanding and valid obligations of the company, and that they are now held by a large number of persons who have become the owners thereof for a valuable consideration. These bonds must ultimately be presented for redemption from the proceeds of sale, and we see nothing in the decree appealed from to prevent an inquiry being instituted as to their validity in the hands of their present holders. We are clearly of opinion that, so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individual bondholder. Whether the corporation, or those who sue in its behalf, may hold them liable for the par value of the stock or are confined to a rescission of the transaction, is a question upon which we express no opinion.

We are therefore of opinion that the *decree of foreclosure and sale appealed from must be affirmed.*

Mr. Justice **Shiras** and Mr. Justice **Peckham** concurred in the result, but were of opinion that the question of fraud was irrelevant to the issue.

der authority of an order of the probate court is an assignee within the meaning of the act of Congress of March 3, 1875, which allows an assignee of such contracts to sue in the Federal court only when suit might have been brought in that court if no assignment had been made.

[No. 229.]

Submitted January 8, 1900. Decided January 29, 1900.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a decision dismissing a suit for want of jurisdiction. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was a suit brought in the circuit court of the United States for the eastern district of Louisiana by William C. Glass, a citizen of the state of Missouri, against the parish of Concordia, to recover on certain warrants or orders for levee work; and, having been dismissed for want of jurisdiction, came to this court on the following certificate:

"This cause was tried at the present term of the court solely on the defendant's exception to the jurisdiction of the court, and it appearing from the jurisdictional facts alleged in plaintiff's petition, admitted to be true by said exception, that the warrants and orders sued on were payable to the order of Matthew Carr, deceased, who was a citizen of the state of Louisiana, and were assets of his estate, and that the plaintiff acquired title thereto through a judicial sale made by the sheriff of the parish of Concordia on the 22d day of May, 1868, under authority of an order of the probate court of said parish having the administration of said estate; that plaintiff *at the date of his said purchase and at the date of filing his original petition herein, on the 2d day of November, 1877, was a citizen of the state of Missouri, and that the defendant was a citizen of the state of Louisiana. Under the state of facts the only question at issue upon the trial of said exception was whether the case, for the purpose of jurisdiction, comes within the following restriction imposed by § 1 of the act of Congress approved March 3, 1875; 'Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange.' And the court, for the reasons set forth in the written opinion hereto annexed and made part hereof, has this day maintained the defendant's exception to the jurisdiction of this court, and dismissed plaintiff's petition, with leave to amend, if so advised, and without prejudice, and now grants this certificate for the purpose of enabling the plaintiff to obtain a review by the Supreme Court of said jurisdictional question under the 5th section of the act of Congress approved March 3, 1891."

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[207] *WILLIAM C. GLASS, *Plff. in Err.*,

v.

POLICE JURY OF THE PARISH OF CONCORDIA.

(See S. C. Reporter's ed. 207-210)

Federal jurisdiction—diverse citizenship in case of assignment—purchaser at judicial sale as assignee.

A purchaser of warrants at a judicial sale un-

NOTE.—As to diverse citizenship as ground of Federal jurisdiction,—see notes to *Roberts v. Lewis*, 36 L. ed. U. S. 579; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

Messrs. J. D. Rouse and William Grant submitted the cause for plaintiff in error.

Messrs. Edgar H. Farrar, Benjamin F. Jonas, Ernest B. Kruttschnitt, and Henry L. Lazarus submitted the cause for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[208] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Counsel for plaintiff in error state in their argument: "We concede that neither Carr, his heirs, nor the administrator of his estate, nor the sheriff who made the sale, nor the judge who ordered the sale, possessed the necessary citizenship to sue on the warrants in the circuit court at the time this action was brought. But we assert, on principle, that a purchaser at a sale made by authority [209] of a probate court *derives title from none of these sources, but takes title by the adjudication of the law acting directly, *in rem*, upon the property itself."

The 11th section of the judiciary act of 1789 provided: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

In *Serè v. Pitot*, 6 Cranch, 332, 3 L. ed. 240, the assets of an insolvent partnership passed to syndics appointed for the benefit of creditors under the laws of the territory of Orleans, and this court held that the syndics could not sue in the Federal courts if the insolvents could not have done so. Mr. Chief Justice Marshall said: "The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a chose in action in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is therefore within the very terms of the law. The case decided in 4 Cranch was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term 'assignees,' and are therefore not within the words of the act."

The applicable language of the 1st section of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), which regulated the jurisdiction of the circuit courts when this suit was instituted, was as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The differences between this provision and 176 U. S.

that of the act *of 1789 are not material here. [210] *Serè v. Pitot* was decided in 1810; has been cited many times; frequently, with approval, on analogous points (*Smith v. Fort Scott & A. R. Co.* 99 U. S. 398, 25 L. ed. 437; *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. ed. 1136; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563); though criticised in *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736, has never been overruled, and is decisive of the present case.

The title to Carr's estate passed on his death to his heirs. La. Rev. Civil Code, arts. 940 *et seq.* These warrants were sold at a judicial sale under authority of an order of the probate court of the parish, having the administration of the estate, by the sheriff of that parish. Glass became the purchaser, and the adjudication made and recorded by the sheriff gave him title. Rev. Civil Code, arts. 2622, 2623. And, moreover, the Code provided that "all the warranties to which private sales are subject exist against the heir in judicial sales of the property of successions." Art. 2624; *Deloach v. Elder*, 14 La. Ann. 673. The title thus obtained did not devolve on Glass in the same manner as the law devolves title by its own operation on an executor, an administrator, an heir, a universal legatee, or a receiver, but was transferred by the sale and the adjudication. The purchaser at sales on judgment and execution similarly obtains title through the act of the executive officer.

Conceding that proceedings in settlement of estates in probate courts are in themselves proceedings *in rem*, yet the title to property ordered to be sold in such proceedings is not transferred by the mere order of sale, but by the sale taking place as prescribed. Its validity depends on the jurisdiction of the probate court; its transfer is accomplished in the designated way through the designated instrumentality.

In our opinion Glass came within the restriction of the statute, and the circuit court correctly held that jurisdiction could not be sustained.

Judgment affirmed.

*UNITED STATES, *Appt.*,

[211]

v.

BELLINGHAM BAY BOOM COMPANY.

(See S. C. Reporter's ed. 211-218.)

Navigable waters—obstruction of, by boom—boom authorized by law.

1. A log boom constructed in a manner conformable to a state statute at a time when Congress had not assumed jurisdiction over the waters in question is "affirmatively au-

NOTE.—Obstruction of navigable stream by log booms.

Unless prohibited by statute, riparian owners may maintain booms in rivers which are floatable for logs, so long as they do not violate any public law or obstruct the navigation of the river by any method in which it may be used,

thorized by law," within the meaning of the river and harbor act of 1890, § 10 (26 Stat. at L. 426), which prohibited any obstruction, "not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction."

2. A log boom which completely blocks up the channel of a navigable river, leaving no space for the free passage of boats and vessels, although it has what is termed a "trip," which may be opened for the passage of vessels, is not authorized by 1 Hill (Wash.) Ann. Stat. § 1592, which provides that a boom shall be so constructed as to allow the free passage between it and the opposite shore for all vessels or for ordinary purposes of navigation, and such boom is therefore not exempt from the prohibition of the river and harbor act of 1890, § 10, prohibiting obstructions to navigation if not affirmatively authorized by law.
3. The conformity of a log boom to the provisions of a state statute so as to exempt it from prohibition under the river and harbor

or infringe upon the rights of other riparian owners. *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295, 46 Wis. 237, 49 N. W. 978.

The legislature may, by general law, confer on individuals rights to construct booms across water ways which are not navigable except for small boats and for floating logs, in opposition and paramount to the public right. *State v. Elk Island Boom Co.* 41 W. Va. 796, 24 S. E. 590.

A general statute imposing a penalty for obstructing a navigable river does not apply to a boom company whose charter gives it the right to maintain a boom in a river navigable only for the running of logs. *Edwards v. Wausau Boom Co.* 67 Wis. 463, 30 N. W. 716.

Temporary sheer or guide booms may be constructed across the channels of a floatable stream as incident to the reasonable use of the stream for running and securing logs in order to direct them into proper places in which to detain them for use, but the channel must not be permanently obstructed to navigation by such means. *Veazle v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256, 81 Am. Dec. 569.

Temporary obstructions of the channel of a river navigable for floating timber, for the purpose of preparing and securing timber for future transportation and necessary to the useful navigation of the stream at suitable seasons, do not violate the rights of others if they are in the customary and contemplated mode, and are not unnecessarily and unduly continued. If a boom is indispensable to a reasonable enjoyment of the stream as a public highway, and it is discontinued or removed in a reasonable time after the necessity for it ceases, its erection during a low stage of water when the stream cannot be used for floating or rafting is not unlawful. *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406, 5 So. 438.

But those desiring to have the benefit of a boom law which depends on usage must comply with its conditions by providing an opening in the boom and sorting and passing through the logs of other persons descending the river as fast as can reasonably be done. *Lowber v. Welis*, 13 How. Pr. 454.

A boom company will be liable for needlessly and wilfully obstructing by its booms a stream navigable for floating rafts, logs, and timber, to the hindrance and consequent injury of persons driving their own logs. *Watts v. Tittabawassee Boom Co.* 52 Mich. 203, 17 N. W. 809.

A log driving company has no right to throw

act of 1890, § 10, is not a question for the state courts alone, but must be decided by a Federal court when suit is brought for an injunction against the boom as an obstruction to navigation prohibited by the Federal law.

[No. 21.]

Submitted January 18, 1899. Ordered for oral argument March 13, 1899. Resubmitted December 15, 1899. Decided January 29, 1900.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the Circuit Court dismissing a bill for injunction against a log boom as an obstruction to navigation. *Reversed.*

See same case below, 48 U. S. App. 443, 81 Fed. Rep. 658, 26 C. C. A. 547.

The facts are stated in the opinion.

a boom across a river and use it for the storing of logs for a season in such a way as to prevent the use of the river by other persons wishing to drive logs therein. *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270.

A boom cannot be maintained which completely closes the stream. *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. 978.

A boom across a stream is a nuisance if at times it interferes with the use of the stream by those who have a right to navigate it, although the principal use of the stream may be for floating logs and the boom may lawfully facilitate the logging business. *Cincinnati Coopers Co. v. Com.* 11 Ky. L. Rep. 629.

If a river is a public highway, all impediments to its use, such as booms, are nuisances. But if it can be used only for certain purposes the riparian owner is bound only to abstain from obstructing it. *Morgan v. King*, 18 Barb. 277.

In the absence of statutory authority there is no right to block a navigable stream by booms. *Enos v. Hamilton*, 24 Wis. 658.

A boom cannot be maintained in the public waters of a bay in such a way as to cut off access to a wharf. *Union Mill Co. v. Shores*, 66 Wis. 476, 29 N. W. 243.

Usage can give loggers no right to block a navigable stream by placing a boom across it so that vessels cannot pass through. *Gifford v. McArthur*, 55 Mich. 535, 22 N. W. 28.

And it has been held that owners of property on the banks of a navigable river have no right to construct booms or piers in it without the authority of the legislature. *Leigh v. Holt*, 5 Biss. 338, Fed. Cas. No. 8,220.

And that a pier erected in the Mississippi river as part of a boom for logs, with no other authority than that arising from the ownership of the adjacent shore, is an unlawful structure and that the owner will be liable for the sinking of a boat which runs against it in the dark. *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619.

So, if, to catch logs coming down a river, the owner throws a boom across a stream, he will be liable for the injury caused thereby to the owner of a steamboat which is prevented by the boom from reaching its destination. *Crandell v. Mooney*, 23 U. C. C. P. 212.

But the owner of logs is not guilty of a nuisance in booming them in a slough leading off from a navigable river which is at times dry, although at times of high water there is water

Solicitor General John K. Richards submitted the cause for appellant:

Until Congress assumes control of navigable waters within a state the state may by appropriate legislation regulate the use of such waters. But such power of the state is always subject to the paramount authority of Congress when it sees fit to take control.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668; *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143; *Cardwell v. American Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578.

enough to admit of the passage of steamboats, and the owner can recover for the negligence of a steamboat owner in running against the boom and releasing the logs. *Caster v. The Dr. Franklin*, 1 Minn. 73, Gil. 51.

And the fact that a boom in a river embraces a portion of the water capable of being navigated by large vessels does not necessarily constitute a nuisance which may be abated by force. The need of boom facilities to make the floatage of a river of value should be considered in any rules laid down as to the public use of the stream. *The City of Erie v. Canfield*, 27 Mich. 479.

So, the owner of land to low water mark who operates a sawmill upon his land may, to facilitate his business, construct a boom into the river to receive his logs if he does not interfere with the right of the public to navigate the stream. *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 1 S. W. 765.

A proviso in the charter of a boom company, that the boom shall not extend more than half way across the stream, and that navigation shall not be impeded, will not prevent the maintenance of a sheer boom, which, when necessary to stop the running of the logs and guide them into the boom, may be extended entirely across the stream. *Susquehanna Boom Co. v. West Branch Boom Co.*, cited in 121 Pa. 161.

The extension of a movable sheer boom diagonally across the navigable channel of the Mississippi river to the Wisconsin shore under authority of the state of Minnesota cannot be complained of as an obstruction to navigation by one who has chosen to avail himself of its advantages, in order to escape a lien for surveying and scaling, under the state law, after the logs are within the limits of the state of Minnesota, where neither the state of Wisconsin nor the United States makes any complaint. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, ante, 400, 20 Sup. Ct. Rep. 325.

The public right to complain of the placing of booms in the streams of the state, so far as the same are not unreasonable, must be held to have been waived by the passing of laws for the formation of boom companies. *Atty. Gen. ex rel. Muskegon Boom Co. v. Evart Boom Co.* 34 Mich. 462.

Under the Michigan statute for the organization of boom companies the companies have the right, in the streams where they can lawfully do business, to construct and maintain all neces-

The words "affirmatively authorized by law" refer to congressional action, and not to state.

United States v. Burns, 54 Fed. Rep. 351. No counsel for appellee.

*Mr. Justice **Peckham** delivered the opinion of the court:

This suit was commenced in the circuit court of the United States for the state of Washington, northern division. The government brought it under the direction of the Attorney General, to obtain an injunction enjoining the defendant from further continuing a certain boom which it had constructed across the Nooksack river in that state, and to obtain the removal of the same as an obstruction to the navigation of that river.

The defendant is a corporation organized under the laws of the state of Washington, and in its answer it denied that the boom

sary booms for that purpose, but they must be constructed and used in such a manner as to allow free passage of commerce along the stream. *Coburn v. Muskegon Boom Co.* 72 Mich. 134, 40 N. W. 198.

The Nevada statutes authorize persons complying with their requirements to make and construct all proper and necessary booms along streams of water for the driving of logs, providing they do not interrupt the free navigation of the stream. *Mandiebaum v. Russell*, 4 Nev. 551.

Boom companies organized under the Washington act of 1895 have no right to interfere with the navigation or use of the stream upon which they have constructed booms. *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890.

And the presence of a "trip" which may be opened for the passage of vessels through a boom which otherwise completely blocks the channel of a navigable river is held in the principal case not to comply with the Washington statute requiring a boom to be so constructed as to allow free passage between it and the opposite shore for all vessels or for ordinary purposes of navigation.

The question of the relative power of general or local governments to permit or abolish log booms has risen in other cases than the principal case. Thus in *Queddy River Driving Boom Co. v. Davidson*, 10 Can. Sup. Ct. 222, it was held that the New Brunswick legislature could not authorize the obstruction of a tidal navigable river by the erection of booms therein. The power over the subject-matter was held to be in the dominion of Parliament.

In the absence of any action by Congress a state may authorize the construction of a boom in a small navigable river of the state where its presence would do more good than harm. *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Heerman v. Beef Slough Mfg. Boom, Log Driving & Transp. Co.* 8 Biss. 334, Fed. Cas. No. 6,320; *United States v. Beef Slough Mfg. Boom, Log Driving & Transp. Co.* 8 Biss. 421, Fed. Cas. No. 14,559.

Where a river forms a boundary between two states each may, in the absence of legislation by Congress, authorize the construction of booms within its own territory. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 38 N. W. 529.

[212] was an obstruction to the navigation of the river, and *alleged that it was duly authorized to construct and maintain it by virtue of an act of the legislature of the state, and that it had completed the structure prior to the enactment of the Federal river and harbor bill on the 19th of September, in the year 1890.

The authority under which this suit was commenced is the river and harbor act of 1890, approved September 19 of that year (26 Stat. at L. 426, 454, chap. 907), the 10th section of which reads as follows:

"Sec. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

On the trial it appeared that the Nooksack river is a navigable stream having its source in Whatcom county, state of Washington, and runs through Whatcom county to Bellingham bay, emptying into that bay, and thence into the Pacific ocean. The waters of the river lie wholly within Whatcom county, and they are navigable from its mouth for a [213] distance *of several miles towards its source by light water craft. The boom in question, built by the defendant company at a point just above where the river empties into the bay, is frequently an obstruction to the navigation of the river by steamboats and other craft, as the boom crosses the channel of the river and entirely fills it, excepting that there is what is termed a "trip," which may be opened and vessels pass through the same on their way up and down the river. This "trip" is, however, frequently so choked and blocked up by logs and driftwood coming down the river as to render it impossible to open it.

The defendant during the continuance of the boom has from time to time expended moneys for the improvement of the navigation of the river by removing brush, trees,

and drift from the mouth thereof, and it has removed trees, snags, and drift from the channel for a distance of from 15 to 20 miles from the mouth of the river. Navigation for boats and water craft has thereby been considerably facilitated, but at the same time the obstruction to the navigation of the river by reason of the existence of the boom is material and at times total. The river is used for navigation by steamboats and small craft for a distance of some miles from its mouth. One of the chief purposes for which the river is used is as an outlet for floating saw logs and timber products to the mills and to market.

The circuit court was of opinion that as the chief value of the Nooksack river as a highway is for the floating of saw logs, that persons and corporations having to use it for that purpose have rights equal to the rights of others to use the river for a highway for boats and vessels, and that a boom at the mouth of the river being necessary for gathering and holding logs is to be regarded as an aid to the use of the river for a lawful purpose, and entitled to protection, the same as a wharf or pier constructed at a place for the convenience of vessels; that the boom was constructed under the authority of the state legislature, and it was for that reason excepted from the provisions of the 10th section of the act of Congress. The court therefore dismissed the bill. 72 Fed. Rep. 585.

*The government appealed to the circuit [214] court of appeals for the ninth circuit, and that court held that as at the time of the building of the boom there was no act of Congress on the subject, and a state statute authorized the building, it was affirmatively authorized by law within the meaning of the 10th section of the act of Congress. It also held that whether or not the boom was constructed in strict accordance with the terms and provisions of the state statute could not be considered, as that was a question to be determined by the state, and not by the Federal court. On these grounds it affirmed the judgment. 48 U. S. App. 443, 81 Fed. Rep. 658, 26 C. C. A. 547.

It is evident that the first sentence of the 10th section of the Federal act refers to an obstruction created after the passage of the act. The obstruction prohibited is one that is "not affirmatively authorized by law," and the section then provides that "the continuance of any such obstruction, . . . whether heretofore or hereafter created, shall constitute an offense," and authority is given to the Attorney General to cause a suit of this character to be commenced.

At the time when the boom was constructed, Congress had not by any legislation asserted its authority over nor taken into its own jurisdiction the subject of obstructions to the navigation of this river. The appropriations made by Congress in different years since 1884, for improvements in the Nooksack, among other rivers in the territory of Washington, did not constitute such an assumption of jurisdiction over the navigation of the Nooksack river as to prevent the state

from legislating upon the subject. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811. As Congress had not assumed such jurisdiction either at the time of the passage of the act by the legislature of Washington permitting the construction of a boom by the defendant, nor at the time of its actual construction, then, if it were constructed in a manner conformable to the state statute, it was affirmatively authorized by law at the time of the passage of the act of Congress. It is contended by the government that this term refers to a law of Congress, and does not include any law of a state legislature. We do not so construe § 10.

[215] *Congress, it must be assumed, was aware of the fact that until it acted upon the subject of navigable streams, which were entirely within the confines of a single state, although connecting with waters beyond its boundaries, that such state had plenary power over the subject of that navigation, and it knew that when, in the absence of any statute of Congress on the subject, an obstruction to such a navigable river had been built under the authority of an act of the legislature of the state, such obstruction was legal and affirmatively authorized by law, because it was so authorized by the law of a state at a time when Congress had passed no act upon the subject. When Congress, in 1890, passed the river and harbor bill we think the expression contained in § 10 in regard to obstructions "not affirmatively authorized by law," meant, not only a law of Congress, but a law of the state in which the river was situated, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances, we cannot doubt, was an obstruction "affirmatively authorized by law." When, therefore, the section continues, and provides that "any such obstruction, . . . whether heretofore or hereafter created," shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an "obstruction not affirmatively authorized by law." If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was therefore valid.

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned. When Congress chooses to act, it is not concluded by anything that the states or that individuals by their authority or acquiescence have done, from assuming entire control of the matter, and abating any obstructions that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is [216] undoubted. This has been *decided in numerous cases, and in the case of *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811, many of them are referred to by Mr. Justice Bradley in deliv- 176 U. S.

ering the opinion of the court. If, however, in exercising its right in regard to the regulation and control of commerce, private property must be taken, the government is obliged to make compensation to the owner. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622. Whether ordering the removal of the obstruction, unaccompanied by the actual taking of the property, would under other circumstances affect the question of compensation, it is not necessary to here decide, as, for the reason hereafter given, the boom was an unauthorized obstruction, and subject to abatement as such under the act of Congress.

As this defendant claims that the obstruction in the river was affirmatively authorized by an act of the state legislature, we must look at that act for the purpose of determining the validity of the claim. The act under which the boom was created is entitled "An Act to Declare and Regulate the Powers, Rights, and Duties of Corporations Organized to Build Booms and to Catch Logs and Timber Products Therein." The 3d section provides: "Such corporations shall have the power, and are hereby authorized, in any of the waters of this state, or the dividing waters thereof, to construct, maintain, and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corporations: *Provided*, That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation." 1 Hill, Anno. Stat. (Wash.) chap. 7, § 1592.

The reading of this section shows that the boom authorized to be constructed was one which should allow the free passage between the boom and the opposite shore of boats, vessels, etc. The evidence shows that this boom was not so constructed, because it crossed the channel of the river, completely blocking it, and left no space for the free passage of [217] *boats and vessels between the end of the boom and the opposite shore. The building of the so-called "trip" was no compliance with the act. By the passage of the river and harbor bill, containing the above-mentioned 10th section, Congress had acted upon the subject, and has provided for the removal of any obstruction to a navigable river with the exceptions named in the section. When the Attorney General, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty, to decide the question whether the existing obstruction is or is not affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the state, when such law is claimed to be a justification for its creation or continuance. That question is not for the state 441

alone, but must necessarily be decided by the Federal court in the course of exercising the jurisdiction conferred upon it by the Federal statute. We therefore cannot concur with the views of the circuit court of appeals upon this subject.

The authority cited by that court for its position was *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811. In that case, however, there had been no act of Congress upon the subject of the navigation of the Willamette river, and without such statute it was held that the United States could not bring within the scope of its laws, obstructions and nuisances in navigable streams within a state, such obstructions and nuisances being offenses against the laws of the state within which the navigable waters lie, and constitute no offense against the United States, in the absence of a statute. The court used the following language:

"There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be

[218] indicted or prohibited *as such; but they are not offenses against the United States laws which do not exist; and none such exist except what are to be found on the statute book.

. . . The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a Federal one. The failure of the state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

If there were here no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal court to decide.

There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law. For this reason the government was entitled to a decision in its favor, and we therefore reverse the decrees of the Circuit Court of Appeals for the Ninth Circuit and of the Circuit Court of the

United States for the District of Washington, Northern Division, and remand the case to the Circuit Court for further proceedings in accordance with this opinion.

So ordered.

*TOLEDO, ST. LOUIS, & KANSAS CITY[219]
RAILROAD COMPANY *et al.*, Petitioners,

v.

CONTINENTAL TRUST COMPANY OF
NEW YORK *et al.*

DANA A. ROSE, *Petitioner*,

v.

CONTINENTAL TRUST COMPANY OF
NEW YORK *et al.*

(See S. C. Reporter's ed. 219-221.)

*Certiorari—certifying transcript as printed
by clerk's direction.*

A printed copy of the transcript of record from a circuit court, which was printed under the supervision, direction, and control of the clerk of the circuit court of appeals, under and pursuant to the rules of that court, may be used without being reproduced in manuscript by the clerk, in furnishing a certified copy of the record of the case as required by rule 37 of the Supreme Court in case of an application for certiorari under the judiciary act of March 3, 1891, § 6.

[Nos. 500, 501.]

Submitted January 22, 1900. Decided January 29, 1900.

ON PETITIONS for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, accompanied by a motion for an order dispensing with the authentication and certification of the transcript of the record of the Circuit Court. *Petitions denied.*

See same case below, 95 Fed. Rep. 497, 36 C. C. A. 155.

The facts are stated in the opinion.

Messrs. James D. Springer and John Ford submitted the cause for petitioners in No. 500. *Mr. F. Spiegelberg* was with them on the brief.

Mr. John S. Miller submitted the cause for petitioners in No. 501.

Messrs. E. C. Henderson, Willard Parker Butler, and Henry Crawford submitted the cause for respondents.

Messrs. Cary & Whitridge filed answers to petitions for certiorari.

**Mr. Chief Justice Fuller* delivered the[219] opinion of the court:

These petitions for certiorari were accompanied by a motion for an order dispensing with the authentication and certification by the clerk of the circuit court of appeals for the sixth judicial circuit of the transcript of the record of the circuit court of the United States for the northern district of Ohio,

on which the appeals mentioned in the petitions were heard and submitted to and decided by said circuit court of appeals. The clerk of the circuit court of appeals has certified the transcript of the record and proceedings in that court, "except the transcripts from the circuit court, and except [220] *also the printed briefs of counsel filed in my office in said causes." It appears that the transcript of record from the circuit court was duly certified by the clerk of the circuit court, was filed in the circuit court of appeals, and thereafter was printed under the supervision, direction, and control of the clerk of the circuit court of appeals under and pursuant to the rules of that court, and that after the decision of the cases there, which had been heard and decided on one record, petitioners requested the clerk to certify, for the purpose of these applications, the transcript so printed under his supervision without requiring petitioners to pay the entire cost of a reproduction of the same in manuscript, but that the clerk refused to make any deduction by reason of the premises, and insisted that he had no power or authority so to do.

Under the third subdivision of rule 37 of this court, where application is made for certiorari under § 6 of the judiciary act of March 3, 1891, it is provided that "a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application."

The table of fees and costs in the circuit court of appeals, established by this court in pursuance of the act of Congress of February 19, 1897 (169 U. S. 740, 42 L. ed. 1224, Appx. IV, 18 Sup. Ct. Rep. XLIX.) provides that the clerks of the circuit courts of appeals may charge, among other items, for:

Affixing a certificate and a seal to any paper	\$1 00
Preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index.	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing).	20

The record in these cases having been prepared for the printer, indexed, the printing supervised, and copies thereof distributed by the clerk of the circuit court of appeals, and the clerk having been paid therefor, we are [221] of opinion that *our rule would have been fully complied with by the certificate of that clerk to one of the printed copies which he had so prepared, indexed, supervised, and distributed, and which he therefore knew was an accurate transcript of the record from the circuit court; and, as it is shown, and is not denied, that the printed copies furnished us are in fact correct copies of the circuit court record, we have treated

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them as if that record had been duly certified to us by the clerk of the circuit court of appeals.

The applications for certiorari are denied.

ELLIS H. ROBERTS, Treasurer of the United States, *Petitioner*,

v.

UNITED STATES *ex rel.* MARIE A. VALENTINE.

(See S. C. Reporter's ed. 219-221.)

Board of audit certificates of District of Columbia—redemption of, by payment of judgment—assignee of—mandamus—ministerial act—construction of statute by officer.

1. Certificates of the board of audit of the District of Columbia, issued pursuant to the act of Congress of June 20, 1874, § 6, were redeemed, within the meaning of the act of August 13, 1894, providing for the payment of additional interest thereon, when a judgment of the court of claims based solely on such instruments was paid by the Treasurer of the United States.
2. A judgment roll of record in the court of claims, showing precisely the claim for which the judgment was recovered, is record evidence to the Treasurer of the United States, when he pays the judgment, that he has paid the claim for which it was rendered.
3. Assignees of audit certificates, who are entitled under the act of Congress of August 13, 1894, to a residue of unpaid legal interest thereon, include an assignee who became such after the payment of the certificates.
4. The duty of the Treasurer of the United States to pay interest on audit certificates pursuant to the act of Congress of August 13, 1894, is plain, imperative, and entirely ministerial, and therefore may be enforced by mandamus, although it requires in some degree a construction of a statute by the officer.

[No. 86.]

Argued December 15, 1899. Decided February 5, 1900.

ON WRIT OF CERTIORARI to the Court of Appeals of the District of Columbia to review a decision affirming a judgment of the Supreme Court of the District ordering a writ of mandamus to the Treasurer of the United States. *Affirmed.*

See same case below, 13 App. D. C. 38.

The facts are stated in the opinion.

Mr. Robert A. Howard argued the cause and, with Solicitor General John K. Richards, filed a brief for petitioner.

Mr. B. E. Valentine argued the cause and filed a brief for respondent.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Peckham delivered the opinion of the court: [222]

A writ of certiorari was issued in this case to the court of appeals of the District

of Columbia, for the purpose of reviewing a judgment of that court affirming a judgment of the supreme court of the District, which awarded to the relator, Marie A. Valentine, a writ of mandamus to compel the petitioner, who is the Treasurer of the United States, to pay her, as assignee, a residue of 2.35 per centum interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to the provisions of § 6 of the act approved June 20, 1874, entitled "An Act for the Government of the District of Columbia, and for Other Purposes." 18 Stat. at L. 116, 118, chap. 337.

The facts upon which the controversy arises are uncontradicted, and are as follows: One Charles E. Evans, who, previous to 1874, had done a large amount of work for the District in laying concrete and brick pavements in the city of Washington, duly presented his claims on that account to the board of audit constituted under the act above mentioned, which board, after an examination of such claims, executed on the 1st of August, 1874, the two certificates which form the basis of the claim of the relator, each certificate being dated on that day, one of which acknowledged an indebtedness to him on the part of the District of Columbia of \$19,616.25 and the other \$909.40. They were not, however, delivered to Evans, because at the time they were made a claim had been set up by the authorities of the District that Evans was liable for the expense of repairs which were needed on pavements laid by him (which claim, however, as it afterwards appeared, was not well founded), and the board of audit, instead of delivering the certificates to Evans, withheld them from him, and at or about their date delivered them to the commissioners of the District, who held them as collateral security for the payment of any liability of Evans for the repairs mentioned. They remained from August, 1874, until June 9, 1890, in a [223] tin box in the office of the Treasurer of the United States, who held it and its contents subject to the control of the commissioners of the District.

By reason of this refusal to deliver the certificates and their retention in the hands of the Treasurer, Evans was unable to avail himself of the right given by the act of 1874 to exchange such certificates for the 3.65 bonds mentioned in that act, and for the same reason he was unable to avail himself of the provisions of § 9 of the act approved June 16, 1880 (21 Stat. at L. 284, chap. 243), providing for the redemption of the certificates created by the act of 1874. An action was therefore commenced in December, 1880, in the court of claims by the assignee of Evans to recover judgment against the District of Columbia upon those certificates, under the provisions of § 1 of the above act of 1880. In this action, in addition to the claims upon the certificates already mentioned, Fisher, the assignee, included a large amount of other claims against the District, which had also been assigned to him by Evans.

In 1884, Congress passed an act, approved 444

July 5, 1884 (23 Stat. at L. 123, 131, chap. 227), providing that no payment should be made of any certificate issued under the act of 1874 that should not be presented for payment within one year from the date of the approval of the act of 1884.

After its commencement (the certificates still remaining in the custody of the Treasurer) the action above mentioned continued pending until some time during the December term, 1889, of the court of claims, when the executors of the will of Fisher, the assignee, were substituted as parties plaintiff in the action upon the suggestion of the death of Fisher having been duly made upon the record, and the action was revived in the names of the executors of Fisher's will.

In June, 1890, a settlement of that action was agreed upon, by the terms of which the two certificates were to be delivered to the plaintiffs, and the other matters in dispute therein were to be withdrawn from the court by the discontinuance of the action. Pursuant to that settlement and on June 9, 1890, under the advice of the Assistant Attorney General in charge of the case, the certificates were delivered to the plaintiff's attorney, [224] who thereupon presented them to the Treasurer and requested him, in his capacity as *ex officio* commissioner of the sinking fund of the District of Columbia, to issue in exchange for them the 3.65 bonds authorized by the act of Congress of 1874. The Treasurer refused to redeem the certificates or to issue bonds for the payment thereof, or in any way to pay the same, until the parties had obtained a judgment in the court of claims in the action already mentioned, which should provide for their payment. Accordingly the plaintiffs in that action asked and obtained leave to amend their petition by striking out all reference to any other causes of action than those upon these two certificates. The amendment was consented to by the Assistant Attorney General, and on June 12, 1890, a judgment was duly obtained in favor of plaintiffs and against the District of Columbia for the recovery, "in the manner provided by the act of June 16, 1880, chapter 243," of the sums mentioned in the certificates. The judgment roll in the case contained the petition in which these particular certificates were set out in full, and it showed that the judgment entered by the court of claims was recovered on those certificates and on them alone. There was thus evidence on record which showed the cause of action on which the judgment was based. On September 12, 1890, the Treasurer paid these certificates with interest from their date, August 1, 1874, to September 11, 1890, at 3.65 per centum, by paying the judgment entered by the court of claims. Subsequently to that time the executors of Fisher, the assignee of Evans, assigned to one Robinson all interest in the claims and demands against the District, and Robinson subsequently assigned the same to the relator. Thus, some sixteen years after the certificates had been duly made under the authority of the act of 1874 they were finally redeemed, the delay having 176 U. S.

been caused by their retention as above stated and by the refusal of the Treasurer to deliver them to their owner.

On August 13, 1894, Congress passed an act (28 Stat. at L. 277, chap. 279), the first section of which reads as follows:

[225] "That the Treasurer of the United States is hereby directed to pay to the owners, holders, or assignees of all board of audit *certificates redeemed by him under the act approved June 16, 1880, the residue of two and thirty-five hundredths per centum per annum of unpaid legal rate interest due upon said certificates from their date up to the date of approval of said act providing for their redemption."

The relator as assignee, by her attorney, made demand upon the Treasurer for the payment of the balance of the interest as provided for in the above act, and on November 3, 1897, the Treasurer refused such demand, and wrote the following letter to the attorney:

Sir: Your letter of the 27th ultimo, inclosing a petition for the payment of interest on certain board of audit certificates, under the act of Congress approved August 13, 1894, is received.

You will note that the act referred to provides for additional interest to be paid only upon board of audit certificates redeemed by the Treasurer under the act of June 16, 1880. Neither of the certificates recited in your petition was redeemed by the Treasurer, and they are not in his possession.

You state that certain judgments of the court of claims were issued in lieu of these certificates. These judgments were paid by this office in the manner prescribed by law, but neither of them states that they were issued in lieu of or upon debts of the District of Columbia represented by board of audit certificates.

The Treasurer has therefore no authority to pay the additional interest you demand.

The foregoing facts were set forth in the petition of the relator to the supreme court of the District of Columbia asking for a mandamus to compel the Treasurer to make the payment demanded.

[226] In answer to the petition the Treasurer alleged "that the certain board of audit certificates, so called, in the said petition mentioned, namely, the certificates numbered 8879 and 19,429, were not redeemed by him or any person holding the office of *Treasurer of the United States at any time, and that the only moneys paid by any Treasurer of the United States on account of any of the matters or things in the said petition mentioned as having relation to the said certificates, or either of them, were paid upon certain judgments of the court of claims of the United States, as appears by the transcript from the records of the Treasury Department of the United States, hereto annexed and made part hereof, and that the defendant has no official knowledge, nor has he any official record in his office, showing or tend-

ing to show upon what claim or claims either of the said judgments was based."

Nothing but a transcript of the decree contained in the judgment roll was annexed to the return. The relator demurred to the return, and upon these pleadings the cause came on for hearing before the supreme court, which ordered a writ of mandamus to issue as prayed for. Upon appeal to the court of appeals that court affirmed the judgment, and the Treasurer applied for and obtained a writ of certiorari for the purpose of procuring a review of the judgment by this court.

Upon reading the return made by the Treasurer to the petition for the writ it will be seen that the facts upon which he bases his defense are that he did not redeem the certificates in question, and that the only moneys paid by any Treasurer of the United States were paid on this judgment of the court of claims already mentioned, and that it did not appear in any official record in his office upon what claim or claims the judgment of the court of claims was based.

The first question which arises, therefore, on this record is whether the Treasurer did redeem these certificates within the meaning of the act of 1894. The act of 1884 (23 Stat. at L. 131, chap. 227, *supra*) did not prohibit their redemption, for they were in suit under the provisions of § 1 of the act of 1880, long before the passage of the act of 1884, and provision was made in the act of 1880 for the payment of the judgments rendered by the court of claims upon presentation to the Secretary of the Treasury of a certified copy of such judgments. That they might be founded upon certificates was immaterial, for it *can- [227] not be supposed that Congress by the act of 1884 meant to prohibit the payment of certificates which were in suit under the act of 1880, and upon which judgment might thereafter be rendered by the court of claims. Full effect can be given to the act of 1884 by confining it to the prohibition of payment of certificates which might, after the year, be presented in that form for payment, leaving the provisions for payment on suit brought under the act of 1880 in full force.

Taking this case as made by the record, we find that it is not disputed that the certificates were issued under the act of 1874, duly signed by the board of audit therein provided for, and delivered (without the consent of Evans) to the authorities of the District upon their unfounded claim that they were entitled to their possession as collateral security as already stated. It is not disputed that an action was commenced in the court of claims under the act of 1880 to recover against the District of Columbia upon the certificates, as well as upon other claims against the District. It is not disputed that upon a compromise made, all other causes of action were stricken from the petition, that the petition as amended contained a full description of the certificates, and an allegation that they were issued by the board of audit under the act of 1874, and that judgment was recovered upon such cer-

tificates, and upon them only, and for their payment pursuant to the act of 1874, and that pursuant to that judgment the Treasurer paid the amount thereof, together with interest on the certificates from the date of their issue in 1874 to September 11, 1890, the day before their payment.

Upon these facts we have no doubt that the certificates were redeemed within the meaning of the act of 1894. At the time of the judgment in the court of claims they were in the hands of the plaintiff in the action mentioned, and were valid instruments in his hands, and his sole cause of action was based upon them, and the judgment entered by the court of claims necessarily declared their validity and the right of plaintiff to have the same paid as stated in the judgment. When the Treasurer subsequently paid that judgment, did he not therein and thereby redeem these [228] certificates? If the certificates *themselves had been presented to the Treasurer and he had paid them, they would then, of course, have been redeemed. Were they any the less redeemed because an action had been brought upon them and the court had declared their validity and directed their payment, by a judgment duly entered to that effect, which judgment was subsequently paid by the Treasurer? Such payment, it seems to us, was a redemption of the certificates within the meaning of the act.

The evident purpose of the act of 1894 was to give the balance of interest between 3.65 and 6 per centum to those persons, or their assignees, to whom certificates had been given and the interest upon which had been paid only at the former rate. In all such cases where the certificates had been redeemed by the Treasurer, the additional interest was to be paid, and we cannot doubt that under this act the certificates were redeemed when paid by the Treasurer by virtue of the judgment which had been recovered on them and which was directed to be paid pursuant to the act of 1874. The act of 1894 did not limit the payment to those who had succeeded in exchanging their certificates for bonds bearing interest at the rate of 3.65 per centum. It was through no fault of the holders of these particular certificates that they had not been exchanged for such bonds, but the exchange had not been effected because the authorities of the District improperly retained custody of them, and refused to deliver them to their rightful owner.

The act of 1894 plainly relates to and speaks of the certificates which had been redeemed under the act of 1880, and these certificates had been so redeemed.

The further objection made by the Treasurer, that he had in his office no official record showing or tending to show upon what claim or claims the judgment of the court of claims was based, is, under the admitted facts in this case, wholly immaterial.

The judgment roll in the action is of record in the court of claims, and that roll showed precisely and in detail that the judg-

ment was recovered upon those specific certificates, and upon nothing else, and when the Treasurer pays such judgment there is thus record evidence that he has paid the certificates *mentioned in the judgment roll, [229] upon which certificates the judgment itself was recovered.

This is all the defense upon the facts that is made to the issuing of the writ so far as appears by the return made by the Treasurer to the application for mandamus, but upon the argument in this court the further objection was taken that the relator was not such an assignee as was within the contemplation of the act of 1894, because, as was stated, she was not such assignee at the time of the payment of the certificates made by the Treasurer.

It is somewhat late to raise this defense, but we think there is nothing in the objection. These certificates had been paid at the rate of interest of 3.65 only, and the act of 1894 intended to give to those people who were their original owners, or who had become assignees of such owners, although subsequent to the payment of the certificates, the right to recover this additional interest. But if the act were construed as intending to provide for the payment of interest to those persons who were the owners of the certificates at the time when they were redeemed, it could not with any force be argued that such persons might not assign their claim to the balance of the interest provided for in the act of 1894 after the passage of that act. Hence if the defendant had set up in his return any such objection, it might have been obviated by proof that the owners of the certificates when redeemed had, after the passage of the act of 1894, assigned their right to the interest mentioned therein to the relator. The Treasurer made no such objection to payment, either in his letter to the attorney for the relator before this proceeding was commenced, or in his return herein. The right of relator, as assignee, has been admitted, and the Treasurer placed his objections on grounds altogether different.

The remaining and most important objection is that this is not a case in which the writ of mandamus can properly be issued to one of the executive officers of the government.

The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within *the law which permits the writ to [230] issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12, and upon the authority of that case the defendant claims that no mandamus can be issued against him.

The writ was refused in the *Black Case*, because, as the court held, the decision which

was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction, and the effect which the later acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus. The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within the meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

This case comes within the exception stated in the *Black Case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers

[231] of the government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead

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that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand.

The judgment of the Court of Appeals must be affirmed.

*BALTIMORE & POTOMAC RAILROAD[232]
COMPANY, Plff. in Err.,
v.

CHARLES EMMET CUMBERLAND.

(See S. C. Reporter's ed. 232-241.)

Railroads—duty to fence track in street under act of Congress—road approximately even with the surface of the street—sufficiency of light on tender of engine running backward—variance—trespasser on track.

1. The question whether a steam-railroad track is "approximately even with the adjacent surface" of a street in which it is laid, within the meaning of the act of Congress of January 26, 1887, and joint resolution of February 26, 1892, requiring fences on both sides of a track approximately even with the surface, must be submitted to the jury, where the track was not more than 2 feet 2 inches higher than the level of the street.
2. An averment that there was no light on the rear part of an engine is satisfied by proof that there was no such light as the law required.
3. A person is not *ipso facto* a trespasser in crossing railroad tracks laid through the streets of a city upon, or substantially upon, the level of the street, although he crosses at any point where it is convenient for him to do so, instead of going to a regular street crossing.

[No. 87.]

Argued December 19, 1899. Decided February 5, 1900.

ON WRIT OF ERROR to the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court in fa-

NOTE.—As to duty of railroad companies towards persons or trespassers on their tracks,—see note to *Mitchell v. New York, L. E. & W. R. Co.* 36 L. ed. U. S. 1064.

vor of plaintiff in an action for damages. *Affirmed.*

See same case below, 12 App. D. C. 598.

Statement by Mr. Justice Brown:

This was an action begun in the supreme court of the District of Columbia by the plaintiff Cumberland, suing by his next friend, against the Baltimore & Potomac Railroad Company, to recover damages for personal injuries inflicted upon him by the alleged negligence of the defendant company.

The undisputed facts were that the plaintiff, who was twelve years and four months of age at the time of the accident, was a street lamplighter by occupation, and for more than a year prior thereto had been engaged, under his father's direction, *in lighting street lamps in the vicinity of the company's tracks on Maryland avenue in the city of Washington.

The accident occurred about dark on the evening of December 10, 1894. The weather was misty, according to some of the witnesses: rainy, foggy, and very cold, according to others. The plaintiff, having lighted a lamp on the south side of Maryland avenue, between Thirteenth-and-a-half and Fourteenth streets, started across Maryland avenue and the tracks of the company, for the purpose of lighting a lamp directly opposite on the north side of the street. There was a curve in the tracks at this point, made by a turn in the railroad from Long Bridge into Maryland avenue. There was no crossing for persons or vehicles between Thirteenth-and-a-half and Fourteenth streets, and the street on either side of the right of way was separated therefrom by curbs which projected 8 inches above the adjacent roadway. These curbs were about 5 feet from the outer rails on either side, and the tracks were carried upon ties, elevated about 18 inches above the level of the curbs and about 2 feet higher than the surface of the street. The plaintiff, having lighted a lamp on the south side, started across the street, mounted the elevated roadway in front of a train coming up from Long Bridge with the tender ahead of the engine, and just as he stepped upon the track was struck by the tender, knocked down, and run over. There was a hand signal lantern swung on the advancing end of the tender, and at the time of the accident it appeared to have been burning.

At this part of the avenue there are four or five railway tracks—two main tracks on the north side, used for passenger trains; a third to the south of these two, used for freight trains, which was the one on which the accident occurred; south of that a track diverging eastwardly into the freight station of the Richmond & Danville Railroad Company to the south of the avenue; and still further south, and south even of the gas lamp which the boy had lit, a switch diverging from the east into a private coal yard. About the place of the accident, and thence westward towards Fourteenth street, the tracks begin a curve so as to reach the Long Bridge *at the foot of that street, and to the south, upon the inner side of this curve and

about the line of Fourteenth street, there was a switchman's box which to some slight extent obstructed the view from the east of trains coming to the avenue from the bridge.

As the boy had passed or was passing the Richmond & Danville track, and was approaching the freight track, his attention was directed to a passenger train going out on the northernmost track towards the bridge. When this had passed he proceeded on his way across, and having stepped on the freight track, he was struck, knocked down, and injured by the tender attached to an engine drawing the work train, which he states he had not seen, although he testifies that he had looked in that direction, had listened for approaching trains, and had neither seen nor heard any.

The engineer testified that, when he was between Fourteenth street and the place where the accident happened, he saw the form of a person moving at a brisk walk in the direction of the tracks, about 15 feet away from them and about 50 or 60 feet in front of the train. He could not tell whether it was a man or boy. When in the neighborhood of 30 feet away, he saw he was coming so near the track that he thought probably he was going to walk on it. He then reversed the engine, applied the brake to stop, and the train was brought to a standstill within the distance of 80 or 90 feet.

The fireman testified that when he first saw the boy he was approaching the track at a brisk walk, and was about 15 or 20 feet from it, making his way north. He appeared to be looking across towards the moving train on the southbound main track. He was carrying some object (a ladder). He saw him put his foot on the end of the ties, and he (witness) called the engineer's attention by "hollering."

The defense rested chiefly upon the contributory negligence of the plaintiff in crossing the track at this point without sufficient care in looking out for the approach of trains.

The trial resulted in a verdict for the plaintiff in the sum of \$8,000, upon which judgment was entered. The case was carried *by the defendant to the court of ap[235] peals, and the judgment of the supreme court affirmed. 12 D. C. App. 598. Whereupon defendant sued out a writ of error from this court.

Messrs. Frederick D. McKenney and Wayne McVeagh argued the cause and, with **Mr. John Spalding Flannery**, filed a brief for plaintiff in error:

Negligence of the company's employees was no excuse for negligence on the part of defendant in error.

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; *Cullen v. Baltimore & P. R. Co.* 8 App. D. C. 69.

Except at street crossings where the public has a right of way, a railroad company has the right to a clear track and owes no

duty to trespassers, whether they be adults, minors, or children of tender years.

Johnson v. Boston & M. R. Co. 125 Mass. 75; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Mason v. Missouri P. R. Co.* 27 Kan. 83; *Union P. R. Co. v. Rollins*, 5 Kan. 168; *Baltimore & O. R. Co. v. Depeu*, 40 Ohio St. 121; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664.

This rule is applicable to trespassers upon railroad tracks within city limits which are not imbedded in or level with the city streets.

Glass v. Memphis & C. R. Co. 94 Ala. 582, 10 So. 215; *Montgomery v. Alabama G. S. R. Co.* 97 Ala. 305, 12 So. 170; *Louisville & N. R. Co. v. Hairston*, 97 Ala. 351, 12 So. 299; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 70; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Tennenbrock v. South Pacific Coast R. Co.* 59 Cal. 269; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L. R. A. 139, 24 Pac. 1074; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Illinois C. R. Co. v. Hetherington*, 83 Ill. 510; *Lake Erie & W. R. Co. v. Zoffinger*, 10 Ill. App. 252; *Moore v. Wabash, St. L. & P. R. Co.* 84 Mo. 481; *Dahlstrom v. St. Louis, I. M. & S. R. Co.* 96 Mo. 99, 8 S. W. 777; *Barker v. Hannibal & St. J. R. Co.* 98 Mo. 50, 11 S. W. 254; *Candelaria v. Atchison, T. & S. F. R. Co.* 6 N. M. 266, 27 Pac. 497; *Baltimore & O. R. Co. v. State use of Allison*, 62 Md. 479, 50 Am. Rep. 233; *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Wright v. Boston & M. R. Co.* 129 Mass. 440; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Mugford v. Boston & M. R. Co.* 173 Mass. 10, 52 N. E. 1078; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 Atl. 27; *Cauley v. Pittsburgh, C. C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Beers v. Housatonic R. Co.* 19 Conn. 566; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385, 12 S. E. 553; *Christy v. Chesapeake & O. R. Co.* 35 W. Va. 117, 12 S. E. 1111; *State use of Ricketts v. Baltimore & O. R. Co.* 69 Md. 494, 16 Atl. 210; *John v. Louisville & N. R. Co.* 10 Ky. L. Rep. 757, 10 S. W. 417; *May v. Central R. & Bkg. Co.* 80 Ga. 363, 4 S. E. 330.

It is immaterial whether the person injured while trespassing upon railroad tracks be an adult or infant of tender years. The rule applies with equal force in either case and as certainly bars a recovery.

Moore v. Pennsylvania R. Co. 99 Pa. 301, 44 Am. Rep. 106; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Baltimore & 176 U. S.* U. S., Book 44.

O. S. W. R. Co. v. Bradford, 20 Ind. App. 348, 49 N. E. 388; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866; *Mugford v. Boston & M. R. Co.* 173 Mass. 10, 52 N. E. 1078; *McMahon v. Northern C. R. Co.* 39 Md. 438; *Ex parte Stell*, 4 Hughes, 157, Fed. Cas. No. 13,358; *Wendell v. New York C. & H. R. R. Co.* 91 N. Y. 420; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 32 Am. Rep. 472; *Cauley v. Pittsburgh, C. C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106.

Whether the light carried was sufficient or such a one as was necessary to give a proper warning of the approach of the train was a question of law and not of fact, and before the jury should have been allowed to pass upon the question there should have been some competent evidence offered upon that subject.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Grand Trunk R. Co. v. Ives*, 144 U. S. 427, 36 L. ed. 492, 12 Sup. Ct. Rep. 679; *Springman v. Baltimore & P. R. Co.* 5 Mackey, 1; *Baltimore & P. R. Co. v. Golway*, 6 App. D. C. 143; *Eckington & S. H. R. Co. v. Hunter*, 6 App. D. C. 287; *Baltimore & O. R. Co. v. Adams*, 10 App. D. C. 97; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Beisiegel v. New York C. R. Co.* 40 N. Y. 9; *State use of Foy v. Philadelphia, W. & B. R. Co.* 47 Md. 76; *Haas v. Grand Rapids & I. R. Co.* 47 Mich. 401, 11 N. W. 216.

Mr. A. S. Worthington argued the cause and filed a brief for defendant in error:

The court did not err in refusing to hold as a matter of law that the plaintiff was bound to exercise the same degree of care and prudence that an adult would have been bound to exercise under like circumstances.

Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 660, 21 L. ed. 748; *Metropolitan R. Co. v. Falvey*, 5 App. D. C. 176; *Reiners v. Washington & G. R. Co.* 9 App. D. C. 19; *Baltimore & P. R. Co. v. Webster*, 6 App. D. C. 182; *McMahon v. Northern C. R. Co.* 39 Md. 451; *Crane Elevator Co. v. Lippert*, 24 U. S. App. 186, 63 Fed. Rep. 942, 11 C. C. A. 521; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645.

The court did not err in refusing to direct the jury to render a verdict for defendant.

Grand Trunk R. Co. v. Ives, 144 U. S. 429, 36 L. ed. 493, 12 Sup. Ct. Rep. 679; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104. See also *Baltimore & P. R. Co. v. Carrington*, 3 App. D. C. 112; *Baltimore & P. R. Co. v. Webster*, 6 App. D. C. 182.

The objection as to the variance between the proof and the pleadings was properly overruled, as the differences, if any, "were not of a character which could have misled the defendants at the trial."

Nash v. Towne, 5 Wall. 689, 18 L. ed. 527;

Grayson v. Lynch, 163 U. S. 476, 41 L. ed. 233, 16 Sup. Ct. Rep. 1064; *Eckington & S. H. R. Co. v. Hunter*, 6 App. D. C. 288; *Wiley v. Boston Electric Light Co.* 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395.

[235] *Mr. Justice **Brown** delivered the opinion of the court:

Upon the trial the court left it to the jury to say whether the defendant was guilty of negligence in either of four particulars: (1) In failing to protect the tracks by a fence at the point where the accident occurred; (2) in failing to provide a proper light to give warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff and before it was brought to a stop, as bearing upon the question of speed; (4) and whether the persons in charge of the engine were keeping a proper lookout. These questions were all left to the jury, and presumptively, at least, determined against the defendant.

1. The regulations of the Commissioners of the District, adopted in pursuance of an act of Congress, approved January 26, 1887 (24 Stat. at L. 368, chap. 49), and a joint resolution of February 26, 1892 (27 Stat. at L. 394), require that "whenever the grade of a steam railroad track is approximately even with the adjacent surface" of the street, road shall be securely closed on both sides with a substantial fence," etc. There was no fence upon either side of the track where the accident occurred. The facts were that the track, at the point where the plaintiff was attempting to cross at the time of the accident, was not over 2 feet 2 inches higher than the level of the street, and was probably considerably less than that. The argument of the defendant is that, under this state of facts, the court had no right to submit the question to the jury, whether, within the meaning *of the regulations, the grade of the track at this point was "approximately even with the adjacent surface, the line of the [236] There was also some testimony tending to show that it was impracticable to build a fence there consistently with the proper management of the road.

Had the sole design of the fence been to prevent the crossing of vehicles at this point, it would be difficult to say that an elevation of 2 feet 2 inches above the surface of the street made the track approximately even with the adjacent surface; but evidently more than this was contemplated by this regulation, which looked to the protection of pedestrians as well as vehicles. The object of the fence is to prevent all crossing of the tracks, and unless the elevation be such as to render it practically impossible to cross, it is a question for the jury whether the track is not approximately even with the surface of the street. An elevation of 2 feet would afford no serious obstacle to the crossing of foot passengers, and apparently presented no difficulty to the plaintiff, as he had already mounted the track when he was struck by the tender. Had there been a fence upon either side of the track between Thirteenth-and-a-half and Fourteenth streets, the plain-

tiff would have been obliged to cross the track at one of the street crossings, in order to reach the lamp which he intended to light, and the accident would probably not have occurred. As bearing upon the practicability of a fence at this point, it is pertinent to note that, after the accident occurred, a fence was erected along the north side of the track between these two streets, and still remains there. It was proper to leave the question of the fence to the jury, and we have no criticism to make of the charge upon that point.

2. It is also insisted that there was a material variance between the declaration and the proof with respect to the light on the advancing end of the tender, and, hence that the sufficiency of such light was improperly submitted to the jury. The regulations of the Commissioners require that "between sunset and sunrise of each day, a headlight or other equivalent reflecting lantern, to give due warning to persons near or crossing steam railroad tracks of the approach of *trains, locomotives, or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, in the District of Columbia. It shall be unlawful for any person to set in motion, or run, or operate any train of railroad cars, single railroad cars, or locomotives, without the said display of such lights or lanterns." [237]

The declaration averred that "there was no light upon the rear part of said engine to indicate its approach," and that, "by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine in failing to place any light upon the rear part of said engine," plaintiff was injured. The plaintiff showed that there was no regular headlight on the tender, but that there was a signal lantern hanging on a hook on the rear or advancing end of the tender, and that such light was visible at a considerable distance.

The court left it to the jury to say whether the light was substantially such an one as was required by the regulations, or such as was requisite to give proper warning of the approach of the train.

As the light was clearly not an ordinary headlight, or other equivalent reflecting lantern, shedding a dazzling light which could scarcely fail to be noticed by a person crossing in front of an engine, but an ordinary lantern which might readily be mistaken for a lantern carried by a foot passenger, or even a street lamp or other smaller light, it is impossible to say that there was error in submitting the question of the sufficiency of the light to the jury. The averment of the declaration, that there was no light, is satisfied by proof that there was no such light as was required by law. An insufficient light is, from a legal point of view, no light at all. The distinction between a powerful headlight, such as is ordinarily carried upon locomotives, and an ordinary lantern, is by no means a fanciful or immaterial one; and it would unquestionably have been error to re-

use to submit to the jury the question whether the light in question was such as gave sufficient warning to persons of the approach of trains. Although the regulations [238] *of the Commissioners are satisfied, not only by a locomotive headlight, but by an equivalent reflecting lantern of sufficient power to give warning that a train of steam cars is approaching, it was at least a question for the jury whether an ordinary lantern which railway employees carry in their hands answered the requirement. It is very clear that the variance between the declaration and the proof was not of a character to mislead the defendant at the trial. *Nash v. Towne*, 5 Wall. 689, 700, 18 L. ed. 527, 529; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Grayson v. Lynch*, 163 U. S. 468, 476, 41 L. ed. 230, 233, 16 Sup. Ct. Rep. 1064.

3. The case turned mainly, however, upon the question of contributory negligence, and upon the refusal of the court to direct a verdict for the defendant upon that ground. The defense of contributory negligence is one which admits, or at least presupposes, negligence on the part of the defendant, and the party in fault thereby seeks to cast upon the plaintiff the consequence of his own failure to observe the precautions which the circumstances of the case demanded. In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. The defendant is primarily liable for his own negligence, and can only escape liability for a nonobservance of such precautions as his observation or the experience of others teaches him to be necessary, by proving that the accident would not have occurred if the plaintiff had taken such precautions as his own observation and experience had taught him to be necessary. Hence the plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances. To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris* and totally ignorant of danger, still [239] *another. *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 660, 21 L. ed. 745; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 281, 38 L. ed. 436, 443, 14 Sup. Ct. Rep. 619. Indeed in the last case the only contributory negligence with which he is chargeable is that of his parent or custodian who permits him to stroll into a place of danger.

Had the plaintiff in this case been a man of mature age and average intelligence, it

would be difficult to escape the conclusion that he was guilty of negligence in crossing this track without taking more careful observations of incoming and outgoing trains. But he was not. He was a boy of twelve years, apparently dull for his age, as he had attended school four or five years without having learned to read or write. There was testimony tending to show that he had only the capacity of a child of six or seven. Certain answers given by him upon his examination indicated that his powers of observation were limited or his memory defective. He was employed by his father, who was a city lamplighter, to light about thirty lamps upon or near Maryland avenue; had started shortly before 5 o'clock on the evening in question, which was dark and misty, to make his accustomed rounds, and had just lighted a lamp on the south side of the avenue, when he started across to light a lamp on the north side, almost immediately opposite the one he had just lighted. He says he looked both ways, up and down Maryland avenue, for trains, waited for the passing of an outgoing passenger train, but failed to notice an incoming train which was being drawn by a locomotive running backward. The light on the tender was obviously not powerful enough to illuminate the tracks in front of the locomotive, since the engineer and fireman, who were looking at him as he stepped on the track in front of the locomotive, could not tell whether he was a man, woman, boy, or girl, and could not see the ladder he carried. It is probable that he was somewhat confused by the noise of the outgoing train, by the ringing of the engine bell, and by a number of vehicles which had just come over the bridge from the Virginia side, and were rumbling and rattling over the cobblestone pavement. It may be that these [240] noises prevented *his hearing the shouting of the engineer and fireman, and of two men at a switch lower down the track toward the bridge, who were calling to him to keep away. It is by no means improbable that, if there had been a strong reflecting light on the tender, as the regulations required, it would have compelled his attention, when an ordinary signal lantern might easily pass unnoticed. Indeed, a witness who was standing on the corner of Thirteenth-and-a-half street and Maryland avenue, and saw the plaintiff going from the lamp toward the railroad track, saw no train coming up from the bridge, although he was looking in that direction.

We do not think that under these circumstances plaintiff could be considered a trespasser in crossing the tracks. This term is doubtless applicable to those who unnecessarily loiter upon, or walk along, a railway track as a convenient path. But to say that the plaintiff, who was lighting lamps on both sides of Maryland avenue, was bound every time he crossed the track to do so at a street crossing, is to apply too stringent a rule. The lamp which he had lighted and the one which he had started to light were upon op-

posite sides of the street, at a distance of from 100 to 150 feet from the crossing of Thirteenth-and-a-half street. The rule contended for would require the plaintiff, after having lighted the lamp on the south side, to return to Thirteenth-and-a-half street, cross the avenue at that point, and then go about half a block to a point opposite the other, nearly double the distance required to cross the tracks directly. This method would have to be repeated every time he had occasion to cross the avenue. Of course, if a fence had been built this would have been necessary, but in the absence of such fence we do not think that the mere crossing of the track in the convenient performance of his duties made him a trespasser *per se*. We have examined the many cases cited by the plaintiff in error upon this point, and find that nearly all of them either turned upon the question whether loitering upon, playing upon, or walking along a railroad track made a person a trespasser, or, whether in crossing a track, sufficient care was used to avoid approaching trains. We are not prepared to give our adherence to the doctrine announced in a very few cases, that a man who steps his foot upon a railroad track, except at a crossing, does so at his peril, though such doctrine when applied to the facts of the particular case may not have been an unjust one. We are rather disposed to say that, where tracks are laid through the streets of a city, upon or substantially upon the level of the street, a person is not limited in crossing such tracks to the regular street crossings, but may cross them at any point between such streets in the convenient performance of his daily duties. We cannot say that there was such danger to an active boy crossing the track at this point as to authorize the case to be taken from the jury upon the ground that he was *ipso facto* a trespasser.

We have no desire to limit or qualify anything said by us in *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542, or in *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763, both of which involved the question of care at a regular highway crossing, and we have no doubt that in the case under consideration such care should have been used as the nature of the case required and the intellectual capacity of the plaintiff admitted. But these were all questions for the jury, and were conclusively answered by the verdict. We cannot say that the court should have taken the case from the jury, or that it erred in any material particular. We cannot even say that we should have come to a different conclusion upon the facts.

The judgment of the Court of Appeals was right, and it is therefore affirmed.

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

UNITED STATES, *Appt.*,

[242]

v.

TENNESSEE & COOSA RAILROAD COMPANY, Hugh Carlisle, *et al.*

(See S. C. Reporter's ed. 242-257.)

Forfeiture of land grant—necessity of affirmative action—lands opposite completed road—right to notice error not assigned—forfeiture of part of grant on bill for forfeiture of all.

1. Some affirmative action, legislative or judicial, is necessary for the forfeiture of the grant of lands by the act of Congress of 1856 to the state of Alabama for aid to railroads, which provides that "If any of said roads are not completed within ten years . . . the lands unsold shall revert to the United States."
2. Lands opposite completed road are not forfeited or resumed by the act of Congress of 1890 (26 Stat. at L. 496), forfeiting lands theretofore granted to aid "In the construction of a railroad, opposite to and continuous with the portion of any such railroad not now completed and in operation."
3. An assignment of error is not necessary to give the court on appeal authority to notice a plain error.
4. A prayer in a bill for a forfeiture of an entire land grant does not preclude a forfeiture of a part of it.

[No. 53.]

Argued December 12, 13, 1899. Decided February 5, 1900.

APPEAL from a decree of the Circuit Court of Appeals for the Fifth Circuit affirming a decision of the Circuit Court dismissing a bill for the forfeiture of a land grant. *Reversed.*

See same case below, 52 U. S. App. 171, 81 Fed. Rep. 544, 26 C. C. A. 499.

Statement by Mr. Justice **McKenna**:

This suit was brought under the act of September 25, 1890, to forfeit a land grant made to the state of Alabama in aid of the construction of a railroad from the Tennessee river at or near Gunter's Landing to Gadsden, on the Coosa river, conveyed by the state to the Tennessee & Coosa Railroad Company.

The bill alleges that Congress by an act approved the 3d of June, 1856, granted to the state of Alabama in trust for certain railroads, of which the respondent, the Coosa Railroad, was one, every alternate odd-numbered section for 6 sections in width on each side of the road, with the right of selection of others if rights had attached to such alternate sections, within 15 miles of the line of the road, as follows: [243]

"That a quantity of land not exceeding 120 sections, for each of the roads named in said act, and included within a continuous

NOTE.—As to land grants to railroads,—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

length of 20 miles of each of said roads named therein, may be sold, and when the governor of Alabama should certify to the Secretary of the Interior that any 20 continuous miles of any of said roads were completed, then another quantity thereby granted, not to exceed 120 sections for each of said roads having 20 continuous miles completed as aforesaid, and included within a continuous length of 20 miles of each of said roads, may be sold—and so from time to time until said roads were completed, and if any of said roads were not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States.”

That the state accepted the grant by an act of its legislature approved January 20, 1858, upon the terms and conditions expressed in the act of Congress, and granted a portion of the lands to the Coosa Railroad.

That the railroad constructed 10 and 22-100 miles of road along the line of definite location of survey, to wit, from Gadsden northward toward Gunter's Landing, but did not construct any portion thereof prior to June 3, 1866, and never constructed or completed 20 miles of railroad prior to September 29, 1890.

That by virtue of the act of Congress all the lands unsold at the expiration of ten years from its date reverted to the United States, and that the railroad company did not sell any lands prior to June 3, 1866, and never became entitled to any of the land or to the possession thereof, but that the railroad company selected the lands described in the bill within the 6-mile limit and those within the 15-mile limit, which selections were approved by the Secretary of the Interior. Exhibits were attached to the bill giving detail descriptions.

[244] That the selections and approval were made upon the filing of a map of definite location, and not upon the certificate of the governor of the state showing that 20 continuous miles *of road had been constructed, for no section of 20 miles had been constructed before the passage of the act of Congress of September 29, 1890.

That the United States became entitled to the possession of the lands on the 4th of June, 1866, and the right to recover both the title to and the possession of them.

That by the act of September 29, 1890, the United States resumed the title to all the lands which were opposite to and conterminous with any portion of such railroad not completed and in operation at the date of the passage of the act; and that none of the lands described in paragraph 1 and Exhibit A were opposite to and conterminous with road constructed and completed at that date.

That the railroad company on the 4th of April, 1887, executed and delivered to Hugh Carlisle an instrument purporting to be a quitclaim deed, by which the company pretended to convey to him 17,010³³/₁₀₀ acres of the land granted to it for the consideration of \$21,790; and on the 7th of February, 1887, executed another instrument to

Carlisle, by which it attempted to convey to him 23,739⁵¹/₁₀₀ acres, and which recited a payment of \$59,348.70.

That said instruments were executed more than twenty years after the expiration of the time required for the construction of the railroad; that the company had no right or power to convey any title or right; that its officers and Carlisle knew the fact, and for the purpose of preventing the reversion of the lands to the United States the company executed and Carlisle accepted the conveyances. That, while they recite a valuable consideration paid by him, no money or valuable thing was paid, but that the whole transaction was merely a device to mislead and deceive for the purpose of enabling Carlisle to set up a claim that he held the lands as a purchaser for value and in good faith from the railroad company. That he is a purchaser *mala fide*, well knowing that the purchase was in violation of the act of 1856; that he holds them under a secret trust for said company and its stockholders, and that he and his relatives are the largest stockholders, and elected themselves and others subject to *their control directors, and [245] by directors so composed the conveyances to him were executed.

That there is valuable timber on the lands which the company and other persons are cutting and carrying away, and valuable mines which they are working, and that the company is collecting the purchase money for lands sold by them, and is alienating other lands, and it is therefore necessary to have a receiver appointed.

A number of persons beside Carlisle are made defendants on the grounds that they are in possession of some of the lands, and the Nashville, etc., Railway Company and the Manhattan Trust Company are also made defendants on the ground that they claim an interest in a large part of the lands under contract with the Tennessee & Coosa Railroad Company, which it is averred were taken with knowledge of the rights of the United States.

The prayer is for a receiver and an injunction and cancelation of the selections made by the company, the conveyances and contracts made by it, and for general relief.

The Exhibits A and B contain a list of lands respectively within the 6 and 15-mile limit, and Exhibits D and E are the conveyances to Carlisle.

A receiver was appointed upon the bill without notice, and an injunction *pendente lite* issued. The injunction was subsequently modified to exclude from its operation certain of the lands.

Carlisle filed a demurrer and answer to the bill. The answer admitted all the allegations of the bill material to the propositions presented on this appeal, except those charging deception and fraud in the conveyances to him, but specifically alleged that they were executed in good faith and for valuable consideration, and that the lands included in the deed from the company to him (Exhibit D of original bill) are all opposite and conterminous with the 10 and 22-100 miles

of completed road. By an amendment to the answer it was alleged that said lands were within 6 miles of the line of definite location of the road and within the primary granted limits.

[246] *It was further alleged that he contracted with the railroad company in 1859 to build the road; that in 1860 the company executed a mortgage upon its franchises and other property, especially upon the lands granted by Congress, to secure 400 bonds, each of the value of \$1,000, issued by the company, and eleven of them were pledged with him to secure the amount due him for work done prior to 1861, and that at the time the Civil War broke out he had 400 hands working on the road, and was progressing rapidly with the building of the same. That during the war and after the war his and the company's financial condition prevented further construction. In 1871 the company made a conditional sale of the road to the East Alabama & Cincinnati Railroad Company to complete the road, but that company only built 5 miles of it between Gadsden and Attalla; that in 1883 the Coosa company resumed possession; and passed a series of resolutions approving and ratifying what he had done, constituting him its financial agent with power to construct, equip, and put in running order the road from Attalla to Gunter'sville, and empowered him to use all the assets of the company; and agreed to pay him out of the assets the original cost and expenses that he should incur in the construction, equipment, and putting the road in running order, together with 20 per cent in addition for superintendence and advances made by him; and that he retain a lien on the railroad and its franchises, both real and personal, until the costs and expenses incurred by him be fully paid off, together with said 20 per cent in addition. The said resolutions also revived and renewed the indebtedness due to him for work done prior to 1860.

That he put forth every energy to build the road, and expended in the work under a contract with the company large sums of his private resources; that the company had no money and no other resources except said lands, and no means except as supplied by him.

That in 1886 the road was completed as far as Littleton, a distance of 10 and 22-100 miles; that during all this time the money due him for work done prior to 1861 had not been paid, and that sum, amounting to \$47,-
[247] 000, and the money *expended afterwards by him, amounted to \$85,750.92, and that his account was submitted to the board of directors of the company and was credited and approved.

That in February, 1887, the directors, desiring to pay him, and having no assets, offered to convey the lands described in Exhibit E to the bill in payment *pro tanto* of his account at \$2.50 per acre; that he finally agreed to accept 23,739 and 57-100 acres at said price, and the company conveyed the same to him absolutely, without any trust or reservation whatever, and that after receiv-

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ing such conveyance there still remained due him \$26,401.27.

That on the 2d of April, 1888, the company conveyed to him about 16,400 acres of land, described in Exhibit D attached to the original bill, at the price of \$1.25 per acre, which was the full value of the interest of the company in the lands, because they lay within the conflicting limits of the grants to the company and the Alabama & Chattanooga Railroad Company, and the Coosa company only owned an undivided moiety; that the consideration was money due the respondent as aforesaid, and the conveyance was absolute and without any trust or reservation.

That all the lands described in Exhibit E are a part of the first 120 sections of the grant, and are opposite to and conterminous with the first 20 miles of the railroad as shown by the map of the definite location, which was duly filed in accordance with the act of Congress, and are included in the lands which the company was authorized to sell in advance of the construction of any portion of the road. And it was alleged in an amendment to the answer that the company sold lands within the first 120 sections at divers times to divers persons for 2 and 50-100 dollars per acre, usually on credit and notes taken and placed in his, Carlisle's, hands as collateral security for the money due him, and most of the notes still remain in his hands, and only a small amount has been paid thereon; that the vendees of the company are in possession, and that he *during [248] the years 1887 and 1888, sold for a valuable consideration the lands described in Exhibit E of the original bill to purchasers in good faith, who paid for the same and received his warranty deed. A list of the purchasers is attached to the answer.

The answer of the railroad company was substantially the same as that of Carlisle, and the answers of the other respondents allege their respective relations to the lands, but are not otherwise material to the propositions in controversy.

Upon the testimony submitted, oral and documentary, the circuit court found as follows:

"First. That prior to the 29th day of September, 1890, the Tennessee & Coosa Railroad Company had sold to bona fide purchasers all the lands embraced in the first 120 sections which by the terms of the granting act it was authorized to sell in advance of the construction of the road. That these sales were bona fide and made to aid in the construction of the road. That the allegations of the bill that the sale to Carlisle was without consideration and colorable are not sustained by the evidence, but the sale to Carlisle was bona fide and based on good consideration, and the proceeds of the sale used in the construction and equipment of the road.

"Second. The court finds that the Tennessee & Coosa Railroad from Gadsden to Littleton, a distance of 10 and 22-100 miles, was completed and in operation on and before the 29th day of September, 1890, and that

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the lands described in Exhibit D to the original bill, to wit, the lands embraced in and conveyed by the deed from the Tennessee & Coosa Railroad Company to Hugh Carlisle, bearing date the 4th day of April, 1887, are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and therefore not within the lands forfeited by the act of September 29, 1890.

"The court is therefore of the opinion that there has been no forfeiture of the lands as to which a judicial declaration of forfeiture is sought by the bill, and it is accordingly ordered and decreed that the relief sought by the bill be denied and the bill dismissed."

[249] *In the opinion of the court it was said, "that the lands embraced in the first 120 sections of the granting act the railroad company was authorized to sell in advance of the construction of the road, and that the parties to whom such sale was made, took good title, and there can be no recovery or restitution of any of these lands to the public domain in this case. 2. That the lands described in Exhibit D to original bill are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and are not within the lands covered by act of September 29, 1890." 71 Fed. Rep. 71.

The decree of the circuit court was affirmed by the circuit court of appeals (52 U. S. App. 171, 81 Fed. Rep. 544, 26 C. C. A. 499) and the United States took this appeal.

Mr. Charles W. Russell argued the cause and, with *Solicitor General John K. Richards*, filed a paper for appellant.

Mr. Amos E. Goodhue argued the cause and filed a brief for appellees:

The condition in the act of June 3, 1856, is a condition subsequent, is not self-operative and does not take effect until the United States takes some action to enforce the condition. Until such action is taken, the title to the land, together with the right to sell the land, remains in the land grant company.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; *Railroad Land Co. v. Courtright* 21 Wall. 310, *sub nom. Cedar Rapids & M. River R. Co. v. Courtright*, 22 L. ed. 582; *United States v. Willamette Valley & C. M. Wagon Road Co.* 55 Fed. Rep. 712; *Bybee v. Oregon & C. R. Co.* 139 U. S. 675, 35 L. ed. 307, 11 Sup. Ct. Rep. 641; *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 25 L. ed. 198.

The doctrine laid down in the leading cases of *Schulenberg v. Harriman* and *Railroad Land Co. v. Courtright*, cited *supra*, has been frequently reaffirmed by the Supreme Court of the United States.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168.

The construction contended for by appel-

lees is the construction uniformly given to such granting acts by the Department of the Interior.

Re Wisconsin R. Co. 6 Dept. Dec. 190; *Re Wisconsin R. Mortgage Land Co.* 6 Dept. Dec. 81; *Re Oregon Central R. Co.* 5 Dept. Dec. 549; *Re Chicago, St. P. M. & O. R. Co.* 5 Dept. Dec. 511.

As to the first 120 sections the grant was by the terms of the granting act an absolute unconditional grant and therefore not subject to forfeiture, and as the lands in controversy had been lawfully certified to the state and by the state conveyed to the railroad company in 1860, the forfeiture act has no reference to these lands and refers only to land that had not been so certified.

Railroad Land Co. v. Courtright, 21 Wall. 310, *sub nom. Cedar Rapids & M. River R. Co. v. Courtright*, 22 L. ed. 582.

In order that an act of Congress should work reversion to the United States for condition broken of lands granted by them to the state to aid in internal improvement, the legislation must directly, positively, and with freedom from all doubt or ambiguity, manifest the intention of Congress to reassert the title and resume possession.

St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123.

*Mr. Justice **McKenna** delivered the opinion of the court: [249]

The questions which primarily arise on this appeal are based on the provisions of the granting act of 1856 and the forfeiting act of 1890.

The United States contend that the provisions of the former caused a reversion of the title in 1866; the contention of appellees is that some affirmative action, legislative or judicial, on the part of the grantor, was necessary for the forfeiture of the grant, and that until such action the title and all the powers conferred by the act of 1856 continued and could be exercised. And further, that the act of 1890 was the measure of forfeiture.

By the act of 1856 it is enacted—

"That there be and is hereby granted to the state of Alabama, for the purpose of aiding in the construction of railroads, from the Tennessee river, at or near Gunter's Landing to Gadsden, on the Coosa river, . . . every alternate section of land designated by odd numbers for six sections in width on each side of said road."

*§ 3. And be it further enacted, That the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other. [250]

"§ 4. And be it further enacted, That the lands hereby granted to said state shall be disposed of by said state only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said state shall certify to the Secretary of the Interior that any twenty

continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States." 11 Stat. at L. 17, chap. 41.

The material part of the act of 1890 is as follows:

"Be it enacted, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands hertofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and conterminous with the portion of any such railroad not now completed and in operation for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain." 25 Stat. at L. 496, chap. 1040.

These principles are established: That acts like that of 1856 convey a present title, that the conditions expressed in them are subsequent, not precedent, and the rights and powers of the grantee continue until the grant is directly forfeited by legislative or judicial proceedings. If the cases were less certain, less directly applicable to the case at bar, we might attend in detail to the able argument of the counsel for the United States.

[251] In *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, the leading case, the road in aid of which the grant was made was not constructed, *the ten years' limitation upon the sale of the land had expired, and of the provision that the lands should revert to the United States it was said that it was "no more than a provision that the grant shall be void if a condition subsequent be not performed." Sheppard's Touchstone was cited and applied as follows:

"In Sheppard's Touchstone it is said: 'If the words in the close or conclusion of a condition be thus, that the land shall return to the enfeoffor, etc., or that he shall take it again and turn it to his own profit, or *that the land shall revert*, or that the feoffor shall *recipere* the land, these are, either of them, good words in a condition to give a re-entry—as good as the word "re-enter"—and by these words the estate will be made conditional.' The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale prescribed in the act.

"In what manner the reserved right of the

grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an interest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, *or by taking [252] possession directly under the authority of the government without these preliminary proceedings.' In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

The power of sale of 120 sections in advance of the commencement of the construction of the road was impliedly decided. That power, however, came more explicitly into consideration in *Iowa R. Land Co. v. Courtright*, 21 Wall. 310, 22 L. ed. 582, where again a similar granting act was passed on. The court reaffirmed the principles expressed in *Schulenberg v. Harriman*, and said again by Mr. Justice Field:

"It is contended by the defendants, *first*, that under the act of Congress of May 15, 1856, no lands could be sold by the state until 20 continuous miles of the road were constructed; *second*, that if 120 sections could be sold in advance of such construction, they could only be taken from lands adjoining the line of the road from its commencement on the east; and, *third*, that the grant by the state to the first company was upon conditions precedent, which not having been complied with the title did not pass. Neither of these positions can, in our judgment, be maintained. The act of Congress by its express language authorized a sale of 120 sections in advance of the construction of any part of the road. It was only as to the sale of the remaining sections that the provision requiring a previous completion of 20 miles applied. It is true it was the sole object of the grant to aid in the construction of the railroad, and for that purpose the sale of the land was only allowed, as the road was completed in divisions, except as to 120 sections.

"The evident intention of Congress in making this exception was to furnish aid for

such preliminary work as would be required before the construction of any part of the road. No conditions, therefore, of any kind [253] were imposed upon the state "in the disposition of this quantity, Congress relying upon the good faith of the state to see that its proceeds were applied for the purposes contemplated by the act."

Counsel for the United States attempts to distinguish the *Courtright Case* from the case at bar, and asserts that in *Schulenberg v. Harriman* the power of the state to sell, subject or not subject to the grantor's rights after the expiration of ten years, although the road had not been finished, was not at issue, and any expressions on that topic were mere *dicta*. We do not assent to this view. Such power was a necessary consequence of the principles announced, and they have a more extensive authority and application than to the instance in that case.

The title passed to the state, it was decided, continued in the state with all its attributes and power, except as expressly limited, until it should be resumed by the grantor by appropriate proceedings for breach of conditions. Hence the logs in that case, though cut upon land to aid a railroad which had not been constructed, and after the time designated for its construction, and after which all unsold lands should revert to the state, were held to belong to the state. And in the *Courtright Case*, upon the same principles, it was held that lands sold by the railroad without constructing the road carried title to the vendee. There was a reassertion and an application of the same principles in *United States v. Loughrey*, 172 U. S. 206, 43 L. ed. 420, 19 Sup. Ct. Rep. 153.

It follows that by the act of June 3, 1856, the state of Alabama took the title to the lands in controversy upon conditions subsequent, and conveyed such title upon the same conditions to the Coosa Railroad; and that it continued in the railroad until determined by proceedings, legislative or judicial, for such forfeiture, and until such termination all the rights and powers conferred by the act continued and could be exercised.

Those rights and powers were (1) to sell 120 sections of land in advance of the construction of any part of the road; (2) to sell a like quantity upon the completion of any 20 miles of road.

[254] *The first power, it is claimed, was exercised by sales to bona fide purchasers. The condition of the second power was not performed—20 continuous miles of road were not completed at the time of the passage of the act of 1890. But it is not denied that 10 and 22-100 miles were completed before the passage of that act.

1. The circuit court found that the first power was exercised as claimed. In other words, that the lands embraced in the first 120 sections were sold to bona fide purchasers in aid of the construction of the road, and "that the allegations of the bill, that the sale to Carlisle was without consideration and colorable, are not sustained by the evi-

dence, but the sale to Carlisle was bona fide and based on good consideration, and that the proceeds of the sale were used in the construction and equipment of the road." We think that the findings are sustained by the evidence.

2. By the act of 1890 the United States forfeits, and "resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and conterminous with the portion of any such railroad not now completed and in operation for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain."

The necessary implication of these provisions seems to be that lands opposite completed road are not forfeited or resumed. But the counsel for the United States contests, or seems to contest, the implication. He says: "The general forfeiture act of September, 1890, intends to forfeit lands opposite unconstructed portions of road. It intends to forfeit them *for that reason*. It intends by no means to say that no lands are to be otherwise and for other reasons forfeited; that all conditions precedent in all cases of land grants are waived. It purports to waive nothing, but to forfeit for a cause common to all the old grants of lands for railroads—failure to construct prior to September, 1890." And again: "That act of 1890 was intended to take away lands, and not to grant them, and it is too well settled to need discussion that lands and rights of the public cannot be granted away except in *the most *explicit, affirmative* terms." This, [255] perhaps, is but another form of the contention which we have considered and refuted, but we may further say that its error is in assuming that the act of 1890 is claimed to be a grant. The act of 1856 was the grant. The title it conveyed continued until resumed, and as to what lands it was resumed the act of 1890 defines.

These considerations dispose of the contentions as to the 120 sections and the lands opposite completed road, but it is assigned as error that the court of appeals omitted to direct "a decree in favor of the United States as to lands not within either the said 120 sections or the 17,410.33 acres [lands opposite completed road], whether sold or not." And it is said: "The road being 36 miles and a fraction long, and the 120 sections absolutely required to be along 20 consecutive miles, and being in fact, as certified before the war of 1861, at and near the Gunterville end, 16 miles and a fraction of road, at least, remain to be considered. Ten miles, beginning at the Gadsden end, were constructed before the act of 1890, leaving at least 6 miles; so that, obviously, the easy method resorted to by the lower courts of dividing all the lands into 120-section lands and lands opposite constructed road ignores our rights along 6 miles, to say nothing of the large body of lands along the 20 miles referred to, but *not* in the 120 sections of place and indemnity certified before the war, and opposite *uncompleted* road in 1890."

This, it is replied, is contradicted by the findings of the circuit court, and that the record affords no evidence to dispute the findings. The findings were, as we have seen, that the lands embraced in the first 120 sections were sold to bona fide purchasers; that Carlisle was such; that the road from Gadsden to Littleton, a distance of 10.22 miles, was completed and in operation on or before the 29th of September, 1890, and that the lands conveyed to Carlisle by deed dated April 4, 1887, were opposite to that part of the road. The conclusion was that "there has been no forfeiture of the lands as to which a judicial declaration of forfeiture is sought by the bill, and it is accordingly ordered *and decreed that the relief sought by the bill be denied and the bill dismissed."

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Manifestly this decision is dependent upon the identity of the lands described in the bill with those embraced in the first 120 sections and those opposite the 10 miles of completed road. But this does not seem to be the fact. The bill gives a description of the lands by townships, ranges, and sections, and at the argument a map was used showing them, their relation to the railroad, and its location and termini. It also showed the end of the first 120 sections. Assuming the map to be correct (and it is not questioned), some judgment may be formed of the length and location of the road, the relative situation of the lands described in the bill to the road—to its completed and uncompleted part; and it appears that there are a number of acres of land south of the first 120 sections, and between them and Littleton (a distance of 6 miles), of which a forfeiture should have been declared. In other words, it appears from the evidence and admissions that the road is 36 miles long, that the first 120 sections were selected along a continuous length of 20 miles of the road from Gunter's Landing southward, and that the part of the road which was completed at the date of the forfeiting act was from Gadsden northward 10 and $\frac{22}{100}$ miles, and terminated at Littleton. It is evident, therefore, that lands opposite the road from Littleton, northward 6 miles, are not embraced in the first 120 sections and were not opposite completed road September 29, 1890, and hence were forfeited by the act of Congress of that date (*supra*), and if included in the description of the bill should be declared forfeited.

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It is urged, however, by appellees that the decree should not be reversed, because the bill was framed to procure a forfeiture of the grant, not to adjust its limits, and because the question was not raised by the assignment of errors on the appeal to the circuit court nor on this appeal. Neither reason is sufficient. We may notice a plain error, though not assigned, and the prayer in the bill for a forfeiture *of the entire grant did not preclude a forfeiture of a part of it.

We think, therefore, a further investigation on the particular point indicated is required by the circuit court, and return the case for such investigation.

The decree of the Circuit Court of Ap-

peals is reversed, and the case remanded to the Circuit Court, with directions to proceed in accordance with this opinion.

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v.

SOUTHERN RAILWAY COMPANY. *Appt.*,
CARNEGIE STEEL COMPANY, Limited.

(See S. C. Reporter's ed. 257-297.)

Receivers—priority of claims to current income—claims for current debts preceding receivership—debt for rails needed for making railroad safe—claim more than six months preceding receivership.

1. The right to assert a claim against the property of a railroad company or its income, in preference to mortgage debts, is not at all affected by the sale of the property held by receivers, or by the fact of its transfer to a purchaser, where the rights of such claimant are expressly reserved by the court in the decree of sale and the order confirming the sale.
2. A debt for rails bought by a railroad company shortly before the appointment of receivers, and needed to operate the road properly and for the safety of persons and property transported, is as much a current debt in the ordinary course of the business of the railroad company, which has a preference over a mortgage debt in respect to the current income of the road, as if it were a debt incurred by the receivers under order of the court.
3. The equities, in respect to railroad income, of a creditor furnishing that which protects and preserves the mortgage security and materially increases its value, are none the less because the original debt was evidenced by notes of the railroad company taken for its convenience and renewed for its accommodation.
4. The use of a part of the rails bought by a railroad company to keep its lines in safe condition, to repair other roads under its control and in its possession, whose preservation in proper condition is vital to its successful operation, will not preclude a right to a preference in payment of that claim over the mortgage debt, out of the current income of the railroad.
5. A claim accruing back of the six months immediately preceding the appointment of a railroad receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. (In this case such priority was given to claims preceding the receiver's appointment by from nine to eleven months.)
6. A diversion of railroad income from the payment of a current debt, such as the price of rails needed to keep the road in proper repair, by using the money for the benefit of mortgage creditors in paying for permanent improvements, rentals, and interest on the mortgage debt, entitles those who have claims for such current debts to have their claim of priority over the mortgage creditors in the distribution or application of the net earnings.

ings of the company enforced against the mortgaged property or its proceeds.

[No. 8.]

Argued October 13, 14, 1898. Decided January 29, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a decision approving the action of the Circuit Court allowing claims against a railroad receiver. *Affirmed.*

See same case below, 42 U. S. App. 145, 76 Fed. Rep. 492, 22 C. C. A. 289.

Statement by Mr. Justice **Harlan**:

[258] *This case is here upon a writ of certiorari for the review of a final decree of the United States circuit court of appeals for the fourth circuit allowing certain claims of the Carnegie Steel Company, Limited, as preferential debts chargeable upon current receipts arising from the operation of certain railroad properties in the hands of receivers.

On the 15th day of June, 1892, William P. Clyde, John C. Maben, and William H. Goadby, citizens of New York, suing for themselves and other creditors and stockholders of the Richmond & Danville Railroad Company and of other defendant corporations, exhibited in the circuit court of the United States for the eastern district of Virginia a bill of complaint against the Richmond & Danville Railroad Company and the Richmond & West Point Terminal Railway & Warehouse Company, Virginia corporations. The bill made the following case:

The Richmond & Danville Railroad Company (hereafter called the Danville Company), in addition to its own line extending from Richmond to Danville, with a 12-mile branch, being 152 miles of road, through the purchase or the acquisition of stock, or by written lease or operating contracts, obtained the possession and control of more than twenty other railways built under the respective charters of and owned by the corporations named in the bill. It also owned the entire capital stock of the Baltimore, Chesapeake, & Richmond Steamboat Company, and through it operated a line of steamers between Richmond, West Point, and Baltimore. Its authorized and out-
[259] standing capital stock was \$5,000,000,* the larger part being owned by its codefendant company.

The lines of railway comprising this system, known as the Danville system, were in Virginia, North Carolina, South Carolina, Georgia, Alabama, and Mississippi, and reached many of the most important trade centers of those states.

For more than five years prior to the institution of that suit the Danville Company had held in possession and substantial control all the railways of the other companies in connection with its own road as a single system. Over a large portion of the mileage the engines and cars in traffic service were used without any fixed apportionment
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thereof to any specific portion of the system, and the income derived from the operations of the parent and auxiliary, leased and operated lines was received and distributed through a common treasury with no separation of the earnings and expenses of the several properties, except by entries in books of account apportioning the gross income and expenses on some approximate but arbitrary basis of division as between the different lines over which the traffic yielding the revenue had passed.

The total mileage of the auxiliary portion of the Danville railroad, added to its own mileage, aggregated 3,320 miles, exclusive of its steamer service.

The aggregate outstanding capital stock of the lines constituting the system, together with the stock of the steamboat company, amounted to \$43,482,950, of which \$10,707,354 was neither owned nor controlled by the defendant companies.

Through the ownership of all or a majority of the stock thereof, some of the roads were operated by the Danville Company as proprietary lines. Others were operated upon the basis of a fixed rental or payment of net earnings, or a guarantee of interest on bonds or dividends of stock, or both.

In consequence of the absorption of such roads in its system by lease or contract, the bonded debts and rental obligations which the Danville Company had assumed and became liable for amounted to \$71,128,126. Its own direct bonded debt was \$16,136,000, making the total bonded and rental debt of the Danville system \$87,314,126.

*The bonded debt resting on the Danville [260] road proper and equipments was in five separate issues of securities; that resting on its auxiliary and operative lines was embraced in fifty-nine different classes of securities issued by the several companies, secured by separate mortgages or deeds of trust covering different sections of the controlled roads or their equipment, capable of separate default or foreclosure, besides five stock guaranties, representing certain of its rental obligations, also secured by provisions for re-entry on default.

The Danville Company also had outstanding car trust obligations of its own and leased lines amounting to \$1,542,824, and a floating debt of over \$5,000,000; also an emergency loan of \$600,000, advanced by those interested in the property to prevent default on April 1, 1892.

Besides all such outstanding fixed liabilities on account of its own road and controlled lines, the directors of the Danville Company had pledged its credit and subjected it to other heavy liabilities, to enable its codefendant, the Richmond & West Point Terminal Railway & Warehouse Company (to be hereafter referred to as the Terminal Company) or certain of its controlled companies, to acquire the stock control of other lines of railroads not directly connected with or operated by the Danville Company and in which it had no interest whatever. Its board of directors had issued \$6,000,000 of
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bonds of the Danville Company, executed jointly and severally with the East Tennessee, Virginia, & Georgia Company, and guaranteed by the Terminal Company "Cincinnati Extension Bonds," which were secured by a trust pledge of preference and ordinary shares of the Alabama & Great Southern Railway Company, Limited. Those bonds had been sold in open market, and apparently constituted an outstanding liability of the Danville Company, but for which it received no valuable consideration whatever. It had executed the same as mere accommodation paper and as a partnership adventure, and was only protected against loss by the above pledge of corporate stock of uncertain value, because it was subject to heavy prior mortgage debts, and the line of road of the particular corporation issuing such stock was a

[261]*central link in the system of the East Tennessee Railway system over which the Danville Company had no control whatever.

By reason of the absolute stock control which the Terminal Company had over the Danville Company it compelled the latter company about June 1, 1891, to become the assignee and guarantor of a written lease executed by the Central Railroad & Banking Company of Georgia, of all its system of railroads and steamer lines for a long term of years to the Georgia Pacific Railway Company, whereby the Danville Company became bound to operate the Central System and to assume and pay all the interest on the bonded debts and all the rental obligations of the Central Railroad & Banking Company; and the Danville Company was compelled to execute and deliver a bond of \$1,000,000 to faithfully perform all the covenants in such lease. The result of the operation of the Central-Georgia system of roads had been a constant and heavy loss to the Danville Company.

The bill next set out the relations between the Danville Company and the Terminal Company, and also describes what is known as the Tennessee system, having 2,318 miles in length of proprietary, leased, and operated roads.

It then stated that the five several issues of bonds of the Danville Company were secured by mortgages to divers trustees, and constituted liens of varying rank upon some portion of its road, franchises, and equipment; that the bonds issued by the Danville and Terminal Companies, as well as a large majority of the several issues of bonds resting on the different separately mortgaged sections of the Danville system, were owned by a large and constantly shifting number of persons and corporations, who were scattered in many different states and countries and had no organization or registration; that what was known as the emergency loan, for which the income of the Danville system was pledged, was advanced in equal sums by a considerable number of persons, many of whom preferred not to have their names or advances disclosed; that the plaintiff, Ma-ben, was a registered stockholder of the Danville company; that the plaintiffs were

[262]*owners of a large amount of the common

preferred stock of the Terminal Company and of its 6 and 5 per cent bonds, of the Danville Company's debenture and 5 per cent bonds, and of different classes of bonds resting on parts of the Danville system, and some of them were creditors of the Danville Company on account of advances made to the emergency loan, and entitled to the security given therefor; that while nominally distinct corporations, the actual transactions and financial arrangements between the Terminal Company, conducting no active business as a security company, with no assets except stocks and bonds (but holding nearly the entire capital stock of the Danville Company) and the Danville Company, as a corporation operating a large system of railroads, separately organized and mortgaged, had resulted in serious complications; that such community of heavy and extra hazardous liability and hypothecation indissolubly connected the financial operations of the Danville and Terminal Companies, so that the unrelieved embarrassment of either company would necessarily force the insolvency of the other, "and produce a disruption of the system of roads;" that the then financial condition of the two defendant corporations was alarming to the holders of their stocks and bonds; that in the latter part of 1891 the large and increasing floating debts of the several properties in which the Terminal Company was interested and the heavy losses incurred in the operations of some of the roads created much uneasiness among the stockholders and creditors; that by reason of such condition of things the management had invited prominent financiers to investigate the several systems and aid in perfecting the best plan for permanently adjusting the affairs of the companies in question and secure them the credit necessary for their successful operation; that two movements to that end had failed, when about the last of May, 1892, "a large number of security holders joined in a request to an eminent banking firm of New York city that it should investigate the property and its financial condition, and undertake to rescue it from the bankruptcy, shrinkage in value, and disruption with which the system was threatened;" that such bankers consented to cause an examination *to be made, and the

[263] plaintiffs were advised that the same was in progress, but that no conclusion had been reached or report made, and necessarily the creditors and security holders were so numerous, scattered, and unknown, and the classes of liens so varied in character and value, that to perfect any satisfactory plan to reorganize the system and secure the necessary creditors' assent would require considerable time; and that in the meantime the financial embarrassments continued to be urgent and threatening, and the possible consequence thereof might "result in the disruption of the system, and the depreciation of millions of dollars in the value of the securities."

The bill further alleged that the enormous floating debt of the Danville Company was wholly beyond its financial ability to carry out of its ordinary revenues, over \$4,500,000

of such debt standing in demand loans subject to summary enforcement; that by reason of the depreciation in the market value of its securities, and the failure of the several efforts to reorganize the property, its credit had been much impaired; it was not able to pay its obligations as they matured, but had been forced to ask renewals; it had no available collaterals to enable it to negotiate such a loan as was necessary to adequately protect it against open default; it had been forced to postpone payment of usual operating expense vouchers for supplies, and was allowing heavy arrears of such debts to accrue; many creditors had brought suits and attached cars and funds forwarded to pay employees; besides its floating debt, mortgage coupons on seventeen sectional mortgages, aggregating \$989,000, would fall due on July 1, 1892; it had no available money or assets wherewith to pay the debts which would soon mature and no reasonable hope of financial assistance from any quarter to enable it to do so; its directors had had no meeting for over two months, and had practically abdicated their trust and power of management and confessed their utter inability to devise means to divert the insolvency and disruption of the system in their charge.

[264] Plaintiffs charged that the corporation was insolvent and *this vast trust property was substantially derelict; that the unity of the property, as held and operated as an important trunk line, constituted one of the most important ingredients of its value, and that to permit its severance would result in a ruinous sacrifice to every interest in the property; that the owned and operated lines of road lie in six states, and were subject to the jurisdiction of the courts in each of the many counties in which the property was situated; that unless the court, in view of the impending and inevitable defaults as aforesaid, would deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors, immediately upon default, would assert their remedies in different courts in the several states; that a race of diligence would result, and judgments and priorities attempted; that levies and attachments would be laid upon the engines and cars of the company, and upon the fuel, material, and supplies indispensable to the operations of the road, and which would greatly interfere and ultimately prevent the company from properly discharging its duties as a public carrier and seriously diminish the earnings of the road; that lessors of the roads now owned would enforce the re-entry covenants of their leases; that the continued default of the mortgaged debts would produce the immediate maturity of the bonds; and that "a vast and unnecessary multiplicity of suits will result, and a most important and valuable trust property will be dismembered by the clashing decrees of the many courts exercising jurisdiction at the suit of separate creditors, which might be shielded and preserved as a valuable single trust property by adequate judicial

protection until such time as a satisfactory financial reorganization could be perfected."

The plaintiffs also averred "that the Central Trust Company is not only the trust depository in the said pledge of income, but is the trustee in over twelve trust deeds executed by the Danville Company and divers roads in its system, and also trustee for the preferred stockholders and 6 per cent and 5 per cent trust deeds of the Terminal Company. That the trusts and duties in said different deeds as to property, equipment, and income *are variant, and in some respect[1 65] antagonistic. In case of default and judicial enforcement, their reciprocal rights will have to be construed and decreed by the court, and such common trustee cannot properly represent such variant trusts; and the bondholders have the equity to apply in their own names to protect the trust estate."

The relief asked was—

That the court would decree that the plaintiffs as holders of aliquot portions of the emergency loan to the Danville Company, guaranteed by the Terminal Company, had a fixed and specific lien upon all and singular the income, tolls, and revenues of the Danville Company and its leased, operated, and controlled railroads, and each of them, and that the condition of such pledge of income had been broken, entitling the holders of such indebtedness to enforcement thereof;

That the court would also administer the trust fund in which the plaintiffs were interested, constituting the entire railroad and assets of the defendant corporations, and would for that purpose marshal all their assets and ascertain the respective liens and priorities existing upon every part of such system of railways, the amount due upon mortgages and other liens, and enforce and decree the rights, liens, and equities of each and all of the stockholders and creditors of the Danville and Terminal Companies as the same were finally ascertained and decreed, in and to not only those lines of railroads, appurtenances, and equipments, but also to and upon every portion of the assets and property of each of those corporations; and—

That for the purpose of enforcing a lien and equity upon the income of the railroad system aforesaid, to which the holders of the emergency loan were by contract entitled, "as well as to preserve the unity of said system," as it had been for years maintained and operated, and preventing the disruption thereof by separate executions, attachments, or sequestrations, the occurrence of which would be inevitable in view of the defaults in interest payments which would presently occur, the court would forthwith appoint one or more receivers of the entire system of railroads and steamers held and operated by the Danville Company, together with all equipment, *material, machinery, supplies,[266] moneys, accounts, choses in action, and assets of every description and wherever situated, together with all leasehold rights and contracts, with authority to manage and operate the same as the officers of and under the

direction of the court, and that all the officers, managers, superintendents, and employees of the Danville Company be required to forthwith deliver up the possession of all and singular each and every part of the property, over which the receivers were thus appointed, wherever situate, and also all books of accounts, offices, vouchers, and papers in any way relating to the business or operation of such system of railways and steamers, and for injunctions restraining each and every of the officers, directors, managers, superintendents, agents, and employees of the Danville Company from interfering in any way whatever with the possession and control of the receivers over any part of the property.

Upon hearing and considering the bill, with the exhibits and answer in support thereof, and on motion of the complainants, Frederic W. Huidekoper and Reuben Foster were appointed by the court receivers of the property and assets of the Danville Company, namely, the system of railways then in the possession of and owned and controlled by that corporation, situated in the District of Columbia and in the states of Virginia, North and South Carolina, Georgia, Alabama, and Mississippi, together with all the equipments, shops, appurtenances of every kind, machinery, material, and supplies owned, held, or in the possession and use of such corporation, wherever situate, including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind, owned, held, or possessed by the Danville Company, together with all steamers, wharves, and other properties held in connection therewith, and all moneys, choses in action, credit, bonds, stocks, leasehold interests, or operating contracts, and other assets of every kind, and all other property, real, personal, and mixed, owned, held, or possessed by that company.

It was further provided in the order of the court that the receivers "shall from time [267] to time, out of the funds coming *into their hands from the operation of the property, pay the expense of operating the same and executing their trusts, and all taxes and assessments upon the said property or any part thereof, and also pay and discharge all such traffic and car mileage balances as may be due to connecting and other railways, and all such loss and damage claims arising from the previous operation of said property as, in their judgment, on examination, are proper to be paid as expenses of operation; and shall also, out of the moneys coming into their hands, pay and discharge all the current unpaid pay rolls and vouchers and supply accounts incurred in the operations of said railroad system, at any time within six months prior hereto."

The receivers, who are referred to in the record as the insolvency receivers, entered into full and exclusive possession on the 16th day of June, 1892.

On that and the succeeding day auxiliary suits were instituted by the plaintiffs against the Danville Company in the circuit

courts of the United States for the western district of North Carolina, the district of South Carolina, the northern district of Georgia, the northern district of Alabama and the northern district of Mississippi, and orders were duly entered of record by each of those courts confirming the original appointment of receivers and recognizing the circuit court of the eastern district of Virginia as having primary jurisdiction over all the railroad system and property of the Danville Company wherever situated.

On the 28th day of June, 1892, the plaintiffs filed a petition in the cause, stating that the Central Trust Company of New York was trustee in five mortgages executed by the Danville Company, resting upon its property, and of the following dates and amounts: October 5, 1874, \$5,997,000; February 1, 1882, \$3,368,000; October 22, 1886, \$4,498,000; September 3, 1889, \$1,390,000; May 1, 1891, \$883,000. The petitioners prayed that the receivers be authorized to execute and sell receivers' certificates to an amount not exceeding \$1,000,000, which should be a first lien on the Richmond & Danville Railroad, its property, leasehold interests, contracts, and income, "and out of the proceeds, as a special fund, to pay and *discharge all outstanding indebtedness of [268] the Danville Company incurred for material and supplies in the operation of the roads in the receivers' hands, which were purchased within six months prior to June 15, 1892, as the said indebtedness shall be ascertained and reported on by special masters to be appointed for such purpose; and also, that out of the funds coming into their hands from the operation of the roads which could be safely used without prejudice to their own current liabilities for operating expenses, the receivers be authorized to pay the instalments of rent and coupons of mortgage bonds resting "upon the several parts of the system, so as to protect and preserve the present unity of the system of roads in their charge." The petition concluded: "The Central Trust Company is the trustee in each and all of the trust deeds and mortgages, and it is made a party hereto, so that it can appear to the application and be heard upon the question of using receivers' certificates and authorizing the payment of mortgage, interest, and rental obligations out of the current net income of the receivership."

Of the application for an order in accordance with the petition, the defendants and the Central Trust Company had notice. The court by order authorized the borrowing of \$1,000,000 receivers' certificates to be used for the purposes indicated in the petition. The Trust Company was represented at the hearing of the application; and, so far as the record discloses, made no objection to the order.

On the 13th day of July, 1892, the Central Trust Company presented its petition and prayed that it be allowed to intervene in the suit brought by Clyde and others for the protection of the holders of the 6 per cent bonds of the Danville Company and of the sub-

scribers to the emergency loan made prior to April 1, 1892, and in respect of which that company was the trust depository of the income of the Danville system pledged to secure such loan; and by order entered August 16, 1892, leave was given for that company to intervene in the cause, "on the condition that it hereby submits to the several orders heretofore entered herein." On the latter day that company presented its petition, asking [269] that Huidekoper *and Foster be appointed as permanent receivers of the Danville Company, if the court should determine to continue its judicial possession of the system. An order to that effect was accordingly made. In presenting the above petition the Central Trust Company appeared not only as trustee of the Richmond & Danville Railroad Company and the consolidated gold mortgage, to be presently referred to, but as trustee representing other mortgages and railroads, including the Virginia Midland Railroad, the Georgia Pacific Railway, and the North Eastern Railroad of Georgia.

On the 19th day of December, 1892, an intervening petition was presented by parties representing the underlying bondholders interested in any litigation or proceedings for the foreclosure of any of the mortgage or trust deeds of the Danville Company or any of the companies forming a part of the Danville system, and they were permitted to become parties complainant in the Clyde suit, and to file such petitions and take such proceedings as they deemed necessary or requisite for the protection of the interests they represented.

In the suit instituted by Clyde and others, the Carnegie Steel Company, Limited, filed with the Master Commissioner, October 14, 1892, its claims arising out of certain contracts made between that company and the Danville Railroad Company in 1891 for steel rails delivered to the latter between July 25, 1891, and October 10, 1891. The facts relating to those contracts will be hereafter stated.

On the 13th day of April, 1894, the Central Trust Company of New York instituted a separate suit against the Richmond & Danville Railroad Company for the foreclosure of what is known as the consolidated gold mortgage. Upon the filing of that petition, and on the motion of the Trust Company, an order was entered appointing Huidekoper, Foster, and Spencer receivers of the court of all and singular the railroads, property, assets, credits, and effects of the Richmond & Danville Railroad Company, "the same being the system of railways owned, operated, or controlled by the said corporation, situate in the District of Columbia and in the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Mississippi, *together with all the equipment, shops," etc., "and other assets of every kind, and all other property, real, personal, and mixed, held or possessed by the said railroad company, the above-mentioned property being now in the possession of said Frederic W. Huidekoper and Reuben Foster, receivers duly appointed by this court in a certain [270] 176 U. S.

suit brought in this court and now pending therein, wherein William P. Clyde and others are plaintiffs and the Richmond & Danville Railroad Company and others are defendants." These receivers are described in the record as the foreclosure receivers.

The order last named contained this clause:

"Nothing in this order contained shall be construed to vacate any of the orders heretofore entered in the case of William P. Clyde and others; but the court reserves full power to act upon the masters' reports filed in the said cause, and in said cause to adjudge and decree upon the rights of creditors ascertaining [asserting] a claim against the property of the said railroad company or income thereof, in preference to the mortgage debt thereof, by orders to be entered in the said suit of William P. Clyde and others, upon notice to parties, with like effect upon the mortgaged property and income as if such orders were entered in this cause."

The Carnegie Company was permitted to intervene in the suit brought by the Central Trust Company, alleging in its petition that the rails sold and delivered by it to the Danville Company were used upon its road-bed for the purpose of maintaining the same in condition to conduct its traffic thereon, and were necessary for that purpose. The claimants referred to the fact that they had previously filed their claim in the Clyde suit, "which claim is now pending in said cause before the masters, the demand of your petitioner that the same shall be allowed as a claim entitled to equitable priority of payment over the mortgage debt of the said defendant not having been heard or considered by said masters."

On the 17th day of February, 1894, the suit instituted by the Central Trust Company of New York and the one brought by Clyde and others were consolidated under the name of "*The Central Trust Company of New York and others v. *The Richmond & Danville Railroad Company and others, Consolidated Cause.*" Upon application of the Carnegie Company it was made a party defendant in the consolidated cause. [271]

A decree of foreclosure and sale in the consolidated cause was entered April 13, 1894, and a sale took place June 15, 1894, the property embraced by the decree being sold as a unit. Charles H. Coster and Anthony J. Thomas, a purchasing committee, as joint tenants purchased the property for the use, benefit, and behoof of a corporation to be organized pursuant to the terms of an act of the general assembly of Virginia, approved February 20, 1894, entitled "An Act Authorizing the Purchasers of the Richmond & Danville Railroad, Their Assigns and Successors, to Become and Be a Corporation." The sale was approved by formal order of court and confirmed to the purchasing committee, composed of Coster and Thomas, for the sole use, benefit, and behoof of the Southern Railway Company created under the laws of Virginia.

The decree of confirmation contained the

following clauses: "And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad, property, and franchises sold under this decree, and holds it as such purchaser obligated to complete and fully to pay the said bid and comply with all the orders of the court already entered, and hereafter, from time to time, to be entered by it obligatory on such purchaser. And the court further reserves full power from time to time to enter orders binding upon the said Southern Railway Company as such purchaser, requiring it to pay into the registry of the court all such sums as have been or may be ordered by the court for the payment of any and all receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage herein foreclosed, or entitled to preference in payment out of the proceeds of sale." That order also contained this clause: "The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed to such purchaser if it fails or neglects fully to complete such

[272]*purchase and comply with the orders of court in respect to full compliance therewith, or to pay into court, in accordance with such decree of sale and orders of court, all sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens, or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage herein foreclosed."

Subsequently, upon a hearing of the exceptions to the masters' report on the claim of the Carnegie Steel Company, Limited, the circuit court found that that company furnished to the railroad company, at the dates and in the quantities named in their petition for claim, steel rails to the aggregate value of \$125,067.39, which the company used and agreed to pay for, and that the interest on that amount was \$29,828.58; in all, \$154,895.97. It further found that that sum had never been paid by the railroad company; that "the earnings of said defendant railroad company, which should have been used for the payment of current expenses, including therein this claim, have been used for the benefit of mortgage creditors, in a sum more than sufficient to pay said claim in full;" and that "prior to May 1, 1888, bonds of the Richmond & Danville Railroad Company known as consolidated bonds were issued to the amount of \$1,621,000, and that since that date such bonds have been issued to the amount of \$2,906,000." And it was adjudged that the claim, with interest thereon from the time when the respective items thereof became due and payable by the Danville Company, was entitled to priority of payment out of the funds resulting from the sale of the mortgaged property, over the bonds secured by the mortgage foreclosed by the decree heretofore passed in this cause, and was also entitled by reason also of the statutes of Virginia "to priority of payment out of the fund resulting from the sale of the mortgaged property, over such of the

bonds secured by the mortgage foreclosed by the decree heretofore passed in this cause as were issued after May 1, 1888, being \$2,906,000 in amount." It was further ordered that "the purchaser at the sale heretofore made, or his assigns, do forthwith pay to the Carnegie Steel Company, Limited, said sum of \$145,895.97, in *compliance with the terms of the decree of sale heretofore passed, whereby the purchaser at such sale, or his assigns, was required to pay off and satisfy all claims filed in this cause, which this court should adjudge prior to the mortgage by said decree foreclosed."

The Southern Railway Company prosecuted an appeal from that order to the circuit court of appeals and the action of the circuit court was approved. 42 U. S. App. 145, 76 Fed. Rep. 492, 22 C. C. A. 289. The case is in this court upon certiorari, sued out by the railway company.

Messrs. Henry Crawford and Edward J. Phelps argued the cause and, with **Mr. Willis B. Smith**, filed a brief for appellant:

The appellee's claim was excluded by the six months' limitation in the original order of June 16, 1892, from asserting any equity whatever to be paid by the receivers.

If the order establishing a general time limit was inequitable, or if special circumstances existed which might give the appellee's claim an exceptional recognition, it was the duty of the claimant to cancel or modify the order which was conceived to be injurious.

Miltenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 304, 37 L. ed. 1090, 14 Sup. Ct. Rep. 86.

The provision in the appointment of receivers in the foreclosure suit that "nothing in this order contained shall be construed to vacate any of the orders heretofore entered" reaffirmed the original and then unchallenged limitation of six months.

Belknap v. Central Trust Co. 47 U. S. App. 663, 80 Fed. Rep. 624, 26 C. C. A. 30.

Claims, to be preferential, must not only be those of the restrictive and favored class, but be contracted "a brief period" before the judicial intervention.

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 197, 34 L. ed. 634, 11 Sup. Ct. Rep. 61.

Ninety days is a reasonable limit within which operating claims must have been incurred to be allowed as preferential.

Miltenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140.

This limit has been adopted in railroad foreclosure cases in the fourth circuit.

Finance Co. v. Charleston, C. & C. R. Co. 52 Fed. Rep. 526; *Boston Safe Deposit & T. Co. v. Richmond & D. R. Co.* 8 U. S. App. 547, 62 Fed. Rep. 205, 10 C. C. A. 323.

In *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741, a four months' limit was fixed.

An extreme limit of six months has been adopted in many cases.

Blair v. St. Louis, H. & K. R. Co. 22 Fed. Rep. 471; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808; *Union Trust Co. v. Souther*, 107 U. S. 592, 27 L. ed. 488, 2 Sup. Ct. Rep. 295; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 463, 29 L. ed. 973, 6 Sup. Ct. Rep. 809; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315, Fed. Cas. No. 14,258; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 38; *Putnam v. Jacksonville, L. & St. L. R. Co.* 61 Fed. Rep. 440; *Belknap v. Central Trust Co.* 47 U. S. App. 663, 80 Fed. Rep. 624, 26 C. C. A. 30.

The consolidated bondholders did not apply for judicial aid or assert any demand for possession, and received no interest from such first receivers, and should not be charged with the responsibility of their operation.

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61.

The distinction in the equitable obligations of the mortgage security, where receiverships have been obtained at the instance of the mortgagee, and those granted to stockholders or general creditors, is well settled.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 46 Fed. Rep. 38; *Street v. Maryland C. R. Co.* 59 Fed. Rep. 25.

Until the mortgagees come into equity with their own application for entry they stand on their vested liens, and are in no way responsible, out of their contract security, for the court's administration of the property.

Bound v. South Carolina R. Co. 47 Fed. Rep. 30.

No possible equitable accountability to restore income used by a general creditor's receivership can be charged against a non-applying mortgagee.

Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Bound v. South Carolina R. Co.* 47 Fed. Rep. 33.

Foreclosing bondholders are not chargeable with the interest paid during the receivership to mortgage bondholders senior to their own; and a sale fund in court need not make good such payments.

St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & St. L. R. Co. 125 U. S. 668, 31 L. ed. 835, 8 Sup. Ct. Rep. 1011; *Belknap v. Central Trust Co.* 47 U. S. App. 663, 80 Fed. Rep. 624, 26 C. C. A. 30.

Appellee made no attempt to modify or intercept the expenditures or interest, rentals, and dividends, and must therefore be conclusively presumed to have accepted and approved them as being for the best interests of the whole trust estate, including its own.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. Rep. 259; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 30 Fed. Rep. 332; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Calhoun v. St. Louis & S. E. R. Co.* 9 Biss. 330, 14 Fed. Rep. 9.

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The beneficiaries of the allowance or preference over recorded mortgages are a favored class, such as "materialmen and laborers and some few others of similar nature."

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Barstom v. Pine Bluff, M. & N. O. R. Co.* 57 Ark. 334, 21 S. W. 652.

Claims fairly within the scope of such protection are restricted to "the current debts, the daily and monthly expenses" which rely for payment on the daily and monthly earnings.

Thomas v. Peoria & R. I. R. Co. 36 Fed. Rep. 808.

The test applied in *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950, to a claim of car rental for preference as a current operating expense, is conclusive here.

The vendor of a locomotive occupies the position of a general creditor with no special equities in its favor.

Huidekoper v. Hinkley Locomotive Works, 99 U. S. 258, 25 L. ed. 344.

The case of a corporation for the manufacture and sale of cars, dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employees, or of those who furnish from day to day supplies necessary for the maintenance of the railroad.

Thomas v. Western Car Co. 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824.

Enforcing the doctrine ruled in *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824, the circuit court of appeals in the 7th and 8th circuits have excluded car rentals from preference as debts of the current income.

Mather Humane Stock Transp. Co. v. Anderson, 46 U. S. App. 138, 76 Fed. Rep. 164 22 C. C. A. 109; *Pullman's Palace Car Co. v. American Loan & T. Co.* 55 U. S. App. 170, 84 Fed. Rep. 18, 28 C. C. A. 263.

A large claim for steel rails sold on several months' credit is not an operating supply claim entitled to preferential payment out of the receiver's income or the sale proceeds under a foreclosing mortgage.

Lackawanna Iron & Coal Co. v. Farmers' Loan & T. Co. 52 U. S. App. 91, 79 Fed. Rep. 202, 24 C. C. A. 487.

The claims allowed preference in *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; and *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 359, 42 L. ed. 1069, 18 Sup. Ct. Rep. 657, were for coal, which was an undoubted and necessary operating supply.

To award a preference it is indispensable that the supplies should not be purchased simply on the personal credit of the railroad company, but upon the tacit or express understanding that the current earnings will be appropriated for the payment of the debt.

Virginia & A. Coal Co. v. Central R. & Bkg. Co. 170 U. S. 359, 42 L. ed. 1069, 18 Sup. Ct. Rep. 657.

Messrs. Nicholas P. Bond and David Willcox argued the cause and, with **Mr. P. C. Knox**, filed a brief for appellee:

If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus misapplied.

Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & St. L. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657; *Atkins v. Petersburg R. Co.* 3 Hughes, 307, Fed. Cas. No. 604; *United States Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 800; *Farmers' Loan & T. Co. v. Vicksburg & M. R. Co.* 33 Fed. Rep. 778; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808; *Farmers' Loan & T. Co. v. Green Bay, W. & St. P. R. Co.* 45 Fed. Rep. 664; *Bound v. South Carolina R. Co.* 8 U. S. App. 461, 58 Fed. Rep. 473, 7 C. C. A. 322; *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741; *Belknap v. Central Trust Co.* 47 U. S. App. 663, 80 Fed. Rep. 624, 26 C. C. A. 30; *New York Guaranty & Indemnity Co. v. Broderick & B. Rope Co.* 48 U. S. App. 668, 83 Fed. Rep. 365, 27 C. C. A. 550; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 895; *Easton v. Houston & T. C. Co.* 38 Fed. Rep. 12; *Finance Co. v. Charleston, C. & C. R. Co.* 48 Fed. Rep. 188; *Northern P. R. Co. v. Lamont*, 32 U. S. App. 480, 69 Fed. Rep. 23, 16 C. C. A. 364; *St. Louis Trust Co. v. Riley*, 36 U. S. App. 100, 70 Fed. Rep. 32, 16 C. C. A. 610, 30 L. R. A. 456; *Veatch v. American Loan & T. Co.* 55 U. S. App. 191, 84 Fed. Rep. 274, 28 C. C. A. 384; *Grand Trunk R. Co. v. Central Vermont R. Co.* 88 Fed. Rep. 620; *Boston Safe Deposit & T. Co. v. Richmond & D. R. Co.* 8 U. S. App. 547, 62 Fed. Rep. 205, 10 C. C. A. 323.

The rule has been frequently applied to material similar to that now involved.

Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; *Farmers' Loan & T. Co. v. Vicksburg & M. R. Co.* 33 Fed. Rep. 778; *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741; *New England R. Co. v. Carnegie Steel Co.* 33 U. S. App. 491, 75 Fed. Rep. 54, 21 C. C. A. 219; *New York Guaranty & Indemnity Co. v. Broderick & B. Rope Co.* 48 U. S. App. 668, 83 Fed. Rep. 365, 27 C. C. A. 550.

Giving a term of credit represented by obligations of the company does not waive the right to priority, even though such obligations be renewed after the appointment of the receiver.

Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Bound v. South Carolina R. Co.* 8 U. S. App. 461, 58 Fed. Rep. 473, 7 C. C. A. 322.

There is no special limitation regarding the time when the supplies have been furnished.

Hale v. Frost, 99 U. S. 389, 25 L. ed. 419;

Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004; *Atkins v. Petersburg R. Co.* 3 Hughes, 307, Fed. Cas. No. 604; *Northern P. R. Co. v. Lamont*, 32 U. S. App. 480, 69 Fed. Rep. 23, 16 C. C. A. 364; *New York Guaranty & Indemnity Co. v. Broderick & B. Rope Co.* 48 U. S. App. 668, 83 Fed. Rep. 365, 27 C. C. A. 550.

The appointment of receivers for the purpose of preventing the enforcement of their claims by the creditors gave the security holders no prior right to the application of the income for their benefit, but it was subject, in the hands of receivers, to the same rights regarding its use as if it were in the hands of the corporation.

Sage v. Memphis & L. R. R. Co. 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. Rep. 887; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657; *New England R. Co. v. Carnegie Steel Co.* 33 U. S. App. 491, 75 Fed. Rep. 54, 21 C. C. A. 219; *Veatch v. American Loan & T. Co.* 55 U. S. App. 191, 84 Fed. Rep. 274, 28 C. C. A. 384.

*Mr. Justice **Harlan**, after stating the facts as above, delivered the opinion of the court: [273]

It appears from the above statement that the property in the hands of the receivers in the Clyde or insolvency suit was surrendered to the receivers in the foreclosure suit under an order that expressly reserved power in the court to adjudge and decree in the Clyde suit upon the rights of creditors asserting claims against the property of the railroad company or its income in preference to mortgage debts. Besides, the decree of sale provided that the purchaser or purchasers, or his or their assigns, under any decretal sale should, as a part of the consideration, in addition to any sum bid, take the property upon the express condition that he or they would pay and satisfy (among other specified claims) all claims theretofore "filed in this case or in either of the causes, consolidated herein, but only when said court shall allow such claims and adjudge the same to be prior in lien or superior in equity to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto." And the right was distinctly *reserved to retake and resell the property in case the purchaser or purchasers, or his or their assigns, failed or neglected to comply with the order of court in respect of the payment of such prior liens. These conditions were repeated in the order confirming the sale. So that the right of the Carnegie Company to have its claims determined upon their merits is not at all affected by the sale of the property held by the receivers in the consolidated cause, or by the fact of its transfer to the Southern Railway Company. And we add that the above reservation in the orders and decree of the circuit court left it open for the Southern Railway Company to contest, upon their [274]

merits, any claims allowed after its purchase under the decree of sale.

The respective rights of the mortgagees of a railroad company and of parties having claims against it at the time its property passed into the hands of receivers have been frequently the subject of consideration by this court. But as counsel differ as to the scope and effect of former decisions, it is necessary to examine them and ascertain whether those decisions embrace the case now before the court.

The leading case is *Fosdick v. Schall*, 99 U. S. 235, 252, 253, 25 L. ed. 339, 342, which related to a claim against a railroad company for rent of cars. In that case Chief Justice Waite delivered the unanimous judgment of the court. After observing that the business of all railroad companies was done to a greater or less extent on credit, and that this credit was longer or shorter as the necessities of the case required, he said:

"The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by

[275]* mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For, even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control." The court further said: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied. We think also that if no such order is made

when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income from the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the *court [276] may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. . . . No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

In *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419, it appeared that a receiver was appointed in a suit brought by trustees to foreclose mortgages executed by a railroad company. He was appointed May 19, 1875, at which time the company owed employees for back wages and was indebted for current supplies. To the Union Car Spring Manufacturing Company it was indebted for springs and spirals furnished in March and April before the appointment of the receiver, and which he continued to use. It was also indebted to Hale, Ayer, & Co. for supplies to the machinery department and for materials for construction purposes; and on the 13th day of February, 1873, a given amount was due

them, as evidenced by the notes of the railroad company falling due on that day. The [277] judges *who heard the case in the court of original jurisdiction were divided in opinion on the following points made by intervening creditors: 1. That the railway mortgage was a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road was in the possession of the company. 2. That after the default in the payment of the interest November 1, 1873, the fact that the mortgagees funded their coupons and left the company in possession of the road constituted the company their agent and trustee in equity, and they were estopped from objecting to the payment from the earnings of the road of all legitimate debts contracted by the company for operating expenses. 3. That the net earnings of the road, while in the possession of the court and operated by its receiver, were not necessarily and exclusively the property of the mortgagees, but were subject to the disposal of the chancellor in the payment of claims which had superior equities, if such should be found to exist, and that the intervening petitioners' claims had superior equities to those of the mortgagees. The petitions were dismissed and the interveners appealed. This court, speaking by Chief Justice Waite, said: "The first question certified in this case is answered in the affirmative, upon the authority of *Fosdick v. Schall*. The third question is answered in the same way upon the same authority. The Union Car-Spring Manufacturing Company is entitled to payment in full, and Hale, Ayer, & Co. to payment of so much of their claim only as is for supplies to the machinery department. There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes. An answer to the second question is unnecessary."

In *Burnham v. Bowen*, 111 U. S. 776, 780-783, 28 L. ed. 596, 598, 4 Sup. Ct. Rep. 675, 677-679, it appeared that the trustees of a mortgage covering all the property of a railroad company and all the revenues and income thereof, brought suit to foreclose the mortgage, and had a receiver appointed. In the order appointing the receiver no special provision was made for the payment of debts owing for current expenses. When the receiver [278] took possession the railroad *company was indebted for coal used on locomotives—a debt contracted by the company in the ordinary course of a continuing business, and which would have been paid out of current earnings at the time agreed on if the company had remained in possession. The debt due the coal company was evidenced by the acceptances of the railroad company, which were for different amounts, maturing a month apart, thus implying, as this court said, monthly settlements of monthly accounts, with a somewhat extended credit to meet the business requirements of the railroad company. A decree was entered finding the amount due to Bowen, the holder of the acceptances, and declaring that the mort-

gaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof.

Chief Justice Waite, delivering the unanimous judgment of this court, said: "In our opinion the view which the circuit court took of this case was the correct one. The company had never paid its bonded interest. From the very beginning it was in default in this particular, yet the mortgage trustees suffered it to keep possession and manage the property. The maintenance of the road and the prosecution of its business were essential to the preservation of the security of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is encumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived. As was said in *Fosdick v. Schall*, 99 U. S. 235, 252, 25 L. ed. 339, 342, 'the income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' Such being the case, when a court of chancery, in *enforcing the [279] rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it. In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors."

It was contended in that case that no part of the income, prior to the receiver's appointment, was used to pay mortgage inter-

est or to put permanent improvements on the property, or to increase the equipment, and therefore there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. Touching that contention, this court said: "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, [280] *from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall* 'the current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular."

The opinion in that case thus concluded: "We do not now hold, any more than we did in *Fosdick v. Schall* or *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, 260, 25 L. ed. 345, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity 176 U. S.

with the restoration of the fund which has been thus improperly applied to their use."

*In *Union Trust Co. v. Morrison*, 125 U. S. 591, 609, 612, 31 L. ed. 825, 830, 831, 8 Sup. Ct. Rep. 1004, 1009, 1010, the contest was between the mortgagees and Morrison, who had become surety in a bond given by an insolvent railroad company which was harassed by suits in order to prevent a levy by a sheriff upon its rolling stock. Subsequently a suit was brought to foreclose a mortgage upon the railroad. The giving of the bond undoubtedly protected the company's property from seizure and enabled it to remain a going concern, and saved it to the mortgagees. This court, speaking by Mr. Justice Bradley, said: "Even if it [the rolling stock] would have been subject to the mortgage, when taken on execution, nevertheless it could have been taken,† and this would necessarily have disturbed, and perhaps interrupted, the operations of the railroad, by separating the property seized from the *corpus* of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards; on the contrary, they allowed the railroad company to continue to use the property, and to take care of it for them, and stood by and saw Morrison (who had no interest in the matter) put his hands into the fire and rescue the rolling stock of which they were to receive the benefit,—both directly, by receiving the property itself without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders, whom they represented, the nominal purchasers, Horsey and Canda, or the present company. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company." Referring to prior cases, and disclaiming *any purposes to modify the rule charging operating expenses upon current earnings, the court said: "The present claim is of a different character, based upon a bona fide effort made by the intervener to preserve the fund itself from waste and spoliation after the mortgage was in arrears and the right to reduce it to possession had accrued. But even here, as we have seen, if the claimant could pursue only the earnings, it is shown that they have been appropriated to the purchase of property which has been added to the fund."

In *St Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 673, 31 L. ed.

†The Constitution of Illinois of 1870, in which state the case arose, declared (article 11, § 10,) that "the rolling stock and other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals."

832, 837, 8 Sup. Ct. Rep. 1011, 1017, the court, speaking by Mr. Justice Matthews, after stating that ordinarily the unsecured debts of an insolvent railroad company cannot take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens, said: "There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens." "The rule," the court said, "governing in all these cases, was stated by Chief Justice Waite in *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 598, 4 Sup. Ct. Rep. 675, 679, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 97, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950, 953, this court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any

[283] general and *unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness, in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens." Again: "It is the excep-

tion, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." These principles were reaffirmed in *Thomas v. Western Car Co.* 149 U. S. 95, 110, 37 L. ed. 663, 668, 13 Sup. Ct. Rep. 824, in which it was held that the car company there seeking a preference over mortgage creditors had contracted upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity; consequently its claim to a preference was denied.

In *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 365, 368, 42 L. ed. 1068, 1072, 18 Sup. Ct. Rep. 657, 661, 662, the court, referring to the decision in *Burnham v. Bowen*, said: "It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in *order that [284] they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected by the fact that, while the company is operating its road, its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders, and are foreign to the beneficial maintenance, preservation, and improvement of the property."

In the opinion in that case the court observed that it did not intend to detract from the force of the intimations contained in *Kneeland v. American Loan & T. Co.* and *Thomas v. Western Car Co.*, above cited, "as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership." And it was further said: "In neither the *Kneeland* nor the *Thomas Case* was there any intention to question the prior decisions of the court, which allowed

priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity."

It is apparent from an examination of the [285] above cases that *the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. The doctrine announced in *Burnham v. Bowen*—in which case the decisions in prior cases were affirmed—is thus expressed in the recent case of *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* above cited: "The dominant feature of the doctrine as applied in *Burnham v. Bowen* is that, where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the *property. The equity thus held [286] to arise when a purchase of necessary current supplies is made by the owning company is not in any wise influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and purchased for use, and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the cur-

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rent earnings would be appropriated for the payment of the debt."

Can the decree below be sustained consistently with these principles? Are the debts due the Carnegie Company of the class designated in the adjudged cases as current debts contracted, not on the personal credit of the railroad company, but in the ordinary course of its business, and to be met out of current receipts? As already said, whether the parties, seller and buyer, had in view only the personal credit of the latter, is to be determined in each case by its special facts, including the amount of the debt and the terms of payment.

All the rails furnished by the Carnegie Company were not supplied under one contract—a circumstance not to be ignored when determining whether the debts were of the kind that would ordinarily be met out of current receipts. The first contract between the Carnegie Company and the Danville Company was made June 10, 1891—within less than twelve months before the appointment of receivers in the Clyde suit. It called for the delivery by the Carnegie Company, during the month of July, 1891, of only 2,500 gross tons of rails for which the railroad company was to pay \$30 per gross ton, in its notes at four months from date of shipment *without interest*, with privilege of one renewal for three months with interest at the rate of 5 per cent per annum, and a second renewal for three months with interest at the rate of 6 per cent per annum. The railroad company reserved the option to increase by 200 or 300 the number of tons to be delivered, making the total delivery 2,700 or 2,800 tons. That option was exercised. By another arrangement between *the parties entered into [287] July 21, 1891, the contract was further extended to cover 1,656 tons of rails at the same price, terms, and delivery. Subsequently, by agreement of October 2, 1891, a provision was made for the delivery of 200 additional tons at the price of \$26 per ton. The delivery of the rails was in varying amounts and at different times between July 25, 1891, and October 10, 1891. The whole quantity delivered was 4,203²⁵⁰/_{2,240} tons, worth \$125,067.39. Notes were given by the railroad company, and they were renewed at their respective maturities. Those last given, and which were unpaid at the time of the institution of the Clyde or insolvency suit, were each payable at three months, except the last one, which was at four months. They were of the following dates and amounts: March 21, 1892, \$38,251.77; March 24, 1892, \$35,499.38; April 4, 1892, \$12,786.16; May 16, 1892, \$5,355.09; June 7, 1892, \$33,174.99. The first note was due June 21-24, 1892 (six days only after the appointment of receivers in the Clyde suit), and the last October 7-10, 1892.

The rails so received from the Carnegie Company were used by the Danville Company on the following roads in its possession and under its control: 1108.5 tons 56lb, \$33,174.99, on the Northeastern Railway of Georgia; 1270 tons 70lb, \$37,713.75,

on the Virginia Midland Railroad; 1793.5 tons 70lb, \$53,258.69, on the Richmond and Danville Railroad; 31.2 tons 70lb, \$920.56, on the Georgia Pacific Railroad. This use of the rails is shown by the report of special masters, and to that report on this point no exceptions were filed by either party.

What was the condition of the roads owned and controlled by the Danville Company at the time the rails were purchased and used? It was in the power of the railroad company and its receivers, who had possession of the books of the company, to have furnished evidence on this point that would have removed all possible doubt. But there is enough in the record to show that the rails purchased from the Carnegie Company were needed in order that the roads in question might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. In August, 1892, immediately after the receivers took possession [288] *of the railroads constituting the Danville system, they reported to the court that the financial difficulties of the Danville Company during the previous two years had "prevented the operating officers from being able to expend the proper amount for new rails and upon the roadbed and structures to keep the railroad in the condition in which it should be maintained, and it will be necessary for the receivers, during the summer and autumn, to make a much larger expenditure than they would for ordinary maintenance." Here is a direct admission by the receivers that during the two years immediately preceding their appointment the railroad company had not expended for new rails and upon the roadbed and structures the amount necessary to keep its road in proper condition. There is no evidence in the record which even tends to show that the statements of the receivers on this point were not strictly accurate. But this purchase of new rails proved to be inadequate; for on the 27th of January, 1894, the foreclosure receivers represented to the court, by petition, that "for the proper and economical operation of the lines of railroad of which they are receivers, and for the safety of passengers and property transported over such roads, as required by the order of this court appointing such receivers, 2,000 tons of new steel rails are an absolute necessity;" and that they "had negotiated with and purchased from the Carnegie Steel Company, Limited, subject to the approval of the court, that quantity of rails at a cost of \$24 per ton." The court made an order in accordance with that petition. Again, on the 13th day of April, 1894, the court—all parties to the foreclosure suit consenting thereto, including the bondholders' committee—made an order authorizing the receivers to purchase 2,500 tons of new steel rails in order "to properly operate the railroads" in their charge "and for the safety of persons and property transported."

It is apparent that the purchases of new steel rails while the railroads were in possession of receivers were made in the ordi-

nary course of business and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the *expenses thus incurred were operating [289] expenses. They were incurred in the interest of mortgage creditors, the value of whose securities depended upon the unity of the Danville system being preserved and the interests of all concerned not allowed to go to ruin. Why should a different rule be applied to the contracts made with the Carnegie Company shortly before the appointment of receivers in the Clyde suit, the original contract being for only 2,500 tons, and the last one for only 1,656 tons? Is it to be said that the contract for 2,000 tons of steel rails and the contract for 2,500 tons, made by the receivers in the foreclosure suit, created debts of a preferential character, while contracts made by the railroad company of exactly the same kind shortly before the appointment of receivers for 2,500 and 1,656 tons of steel rails could not under any circumstances become a preferential debt chargeable upon current receipts? Surely the quantity of rails purchased from the Carnegie Company and delivered in 1891 was insignificant in view of the interests involved and the extensive mileage of the Danville system, and was by no means so large as to suggest that they were to be used in constructing new and additional road, and not to keep existing roads in proper condition for use. Every railroad company must have on hand a limited quantity of rails in order to keep every part of its line in proper and safe condition. It is evident that the Carnegie rails purchased shortly before the receivers in the Clyde suit were appointed—the rails here in question—were obtained for the same reason that induced the subsequent purchases by the receivers. No one will say that the use of these rails did not add directly to the value of the securities of mortgage creditors. Within the reason of the rule adverted to, the debts contracted with the Carnegie Company were as much current debts in the ordinary course of the business of the railroad company as were the debts contracted by the receivers under the orders of court, when they purchased new rails to put the road in safe condition, or when they purchased at one time four passenger locomotives, and at another time eight passenger and freight locomotives, the cost of which was charged upon the income in their hands. Is it to be said *that such expenses [290] incurred by the receivers were preferential debts, but that debts incurred by the railroad company shortly prior to the receivership for rails needed to keep its road in safe condition for use are not of that class?

We next inquire whether it was not at the time the expectation of both parties, vendor and vendee, that the rails delivered by the Carnegie Company between July 25, 1891, and October 10, 1891, should be paid for out of the current earnings of the railroad company? The attendant circumstances require an affirmative answer to this question, al-

though the parties did not in express words declare that the debts due contracted with the Carnegie Company were to be charged upon the current earnings of the railroad company. The quantity of rails was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad company. As already said, it was a very small quantity for purposes of ordinary or necessary repairs, and there is nothing in the record to show that the Carnegie Company relied merely or exclusively on the personal credit of the railroad company. The renewal notes executed by the railroad company were all within the three months, *immediately preceding the appointment of the receivers*. The short credit given strongly indicates, and the fair inference from the record is, that the parties contemplated that the rails were to be paid for out of the current earnings of the railroad. The taking of notes does not indicate the contrary, but only shows that the vendor company preferred to have its debt evidenced by commercial paper which it could use, rather than to stand upon open account. In *Burnham v. Bowen* it was said: "When the receiver was appointed the debt was evidenced by business paper maturing at a future date. It was no waiver of any claim on the fund which might come into the hands of the receiver to renew the paper at maturity for the convenience of the holder. It was undoubtedly given originally to enable the coal company to use it as commercial paper if occasion required, and the renewal may have become desirable on account of the use which had been made of it." The equities of the creditor furnishing that which

[291] protected and preserved *the mortgage security and materially increased its value are none the less because the original debt was evidenced by the notes of the company, taken for its convenience and renewed for its accommodation.

It may be said that a part of the rails furnished by the Carnegie Company were not used on the Danville railroad, although used on roads belonging to the Danville system. But that is not a controlling circumstance. The contracts were made with the Danville Company, and, as between the contracting parties, the debts so incurred were, under the circumstances stated, current debts chargeable upon the current receipts of the railroad company that purchased the rails. The rights of the Carnegie Company are none the less because the Danville Company chose, after obtaining the rails, to use a part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to its successful operation. The scheme of reorganization was in the interest of the stockholders and mortgage creditors of the roads constituting the Danville system, and chiefly of the bondholders represented by the Central Trust Company, the trustee in the consolidated gold mortgage. That company, as we shall presently show, stood by and assented to, indeed approved, the application, for the ben-

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efit of the bondholders represented by it, of funds which should have been applied in payment of current debts contracted in the interest of mortgage creditors before the appointment of receivers in the Clyde suit. Suppose the court had directed the receivers in the Clyde suit, before turning over the property to the receivers in the foreclosure suit, to pay the claims of the Carnegie Company, is it possible that the mortgage creditors would have been heard to object to such an order? Certainly not, if it appeared, as it does satisfactorily appear in the present case, that the Carnegie debts were incurred in the ordinary course of business for the purpose of keeping the railroad in safe condition for use by the public. If the Carnegie claims were preferential debts when the control of the property passed from the railroad company to the receivers in the insolvency or Clyde suit, the latter were bound in equity to *do what the railroad company [292] would have been required to do if it had retained control of the property.

If the parties to the contract contemplated that the notes given for the rails should be paid for out of the current earnings of the railroad, and if the Carnegie Company lost no equity merely by renewing the notes, it follows, under the settled doctrine of this court, that the mortgagees could not have objected to the payment of the renewal notes out of any net earnings in the hands of receivers, although the contract for the rails was a few months back of the six months immediately preceding their appointment. Each case, as already observed, must depend largely upon its special facts. In some cases the courts, in their administration of railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. Touching this question of time and the principles upon which the equitable rights of creditors in such cases as this rest, Mr. Justice Brewer said, in *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 471, 474: "The idea which underlies them I take to be this: that the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employees cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as as-

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[293] sented to by the mortgagees. . . . In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees *and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

What was done with the earnings of the property that originally came to the hands of the receivers, as well as with the earnings during the receivership under the Clyde bill and also during the receivership in the foreclosure suit instituted by the Central Trust Company? As to these matters there is no room for dispute. Assuming, in view of what has been said, that the claims of the Carnegie Company were current debts chargeable upon current earnings of the railroad property, even while in the hands of the receivers, and therefore to be preferred to claims of mortgage creditors, the next inquiry is whether the current receipts were applied during the receiverships for the benefit of the bondholders, or otherwise, when they should have been applied to the payment of current or preferential debts, including the debts due to the Carnegie Company.

During the insolvency or Clyde receivership, from June 17, 1892, to July 31, 1893, the net earnings were \$3,297,792.31. Among the items of expenditure during the same period were the following: Construction, \$232,134.34, of which \$19,717.05 was for *construction on the Danville road*; Equipment, \$81,390.32, of which \$74,733.28 was for *equipment on the Danville road*; Interest, Rentals, and Dividends, \$3,249,481.89, of which \$396,522.14 was for *the Danville road*, \$709,324 for the Virginia Midland, \$20,265 for the North Eastern, and \$232,127 for the Georgia Pacific road, the last four roads being those on which, according to the special master's report, the Carnegie rails were used; Sinking Fund, Richmond & Danville road, 5 per cent equipment mortgage, \$67,205; and Car Trust payments, \$209,500.

[294] *Between August 1, 1893, and December 31, 1893, out of the net earnings of the Danville system, excluding certain lines, the receivers paid among other sums the following: Construction on *Danville road*, \$9,232.61; Equipment on same road, \$6,791.35; Interest, Rentals, and Dividends, \$626,735.85, which included \$48,082.90 for the Danville road, Virginia Midland, \$199,664.50, and \$87.50 for the North Eastern Railroad; Sinking Fund, Danville Company, equipment mortgage, \$37,790; Car Trust payments, \$51,160.

The above figures are found in the statement of the result of the operations of the Danville system for the periods named.

Looking at the cash statement of the receipts and disbursements of the Richmond & Danville Railroad alone, we find that from June 16, 1892, to July 31, 1893, the receipts were \$15,432,055.46. In this sum were included \$480,427.91 cash received from the Danville Company when the Clyde or insolvency receivers were appointed, and \$671,363.40 collected on accounts turned over to those receivers by the railroad company. The disbursements during the above period were \$15,290,730.27, leaving in the hands of the receivers on July 31, 1893, \$141,325.19 in cash, which was turned over to the foreclosure receivers. The disbursements included among other items the following: Interest and Rentals, \$3,249,481.89; Car Trust payments and Sinking Funds, \$486,368.16.

The account of disbursements for the Danville road from August 1, 1893, to November 30, 1893, shows, among other things, the payment of Interest and Rentals, \$591,457.42; Car Trust payments and Sinking Fund, \$88,950.

The total floating debt of the Richmond & Danville Railroad remaining unpaid was \$318,324.71, of which \$22,186.53 represented a claim of the Western Union Telegraph Company in part for labor and supplies and in part for construction of telegraph line, and \$90,000 represented a claim of the Pullman Palace Car for mileage of cars. Of the balance, \$125,067.39 represented the claims of the Carnegie Company, and \$80,317.98 represented all other claims.

These figures show that both during the receivership in the *Clyde suit and the receivership in the foreclosure suit immense sums were expended in paying interest, sinking fund, and car trust debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company. It is a clear case of a diversion of income from the payment of current debts in the interest of mortgage creditors. Judge Simon-ton well said: "There can be no question that the steel rails furnished by the Carnegie Steel Company come within the class of supplies necessary to keep the railroad company a going concern. And the evidence establishes the fact that after incurring the debt the railroad company was in the receipt of large earnings, which were applied to permanent improvements, rentals, and interest on the mortgage debt; that the receivers who, under the Clyde bill, took possession of the property, earned large income which was applied in the same way, leaving this debt unpaid; and that when these receivers were discharged they showed in their accounts a cash surplus, which was duly paid over to their successors under the Central Trust Company bill." Looking at the case in the light of the principle that a mortgagee cannot require from the mortgagor an account of the earnings, tolls, and income until he has made demand therefor or for a surrender of possession under the provisions of the mortgage (*Sage v. Memphis & L. R. R.* [295])

[296] Co. 125 *Jl. S.* 361, 378, 31 *L. ed.* 694, 698, 8 *Sup. Ct. Rep.* 887; *Fosdick v. Schall*, 99 *U. S.* 235, 253, 25 *L. ed.* 335, 342), the circuit court of appeals also said: "When, therefore, the receivers appointed at the instance of stockholders and creditors took possession, they enjoyed the same right to the earnings and income which the railroad company enjoyed, and rightfully received them. As the railroad company would have been bound to use this income in the payment of the current expenses for labor and supplies, the receivers should have done so also. But, instead of this, the receivers diverted the earnings, income, and funds in their hands toward the betterment of the property, permanent improvements and additions to it, and payment of interest. And this was natural. They were appointed to *take possession of the property and to conserve it until a plan of reorganization could be adopted and perfected. To facilitate this plan, the property must be kept up. To this end the funds coming from earnings were used. When the purpose of the first receivership was accomplished, the mortgage creditors came in and reaped the benefit. Surely those creditors whose claims were neglected, and from whom the earnings were diverted, have the right to ask and receive at the hands of the court the recognition and preservation of their claims." 42 *U. S. App.* 156, 76 *Fed. Rep.* 498, 22 *C. C. A.* 294. Judge Morris filed a concurring opinion, and took the same general view of the case as that expressed by Judge Simonton for the court. He said that the case was that of "a supply creditor seeking to be paid out of the earnings which came to the receivers after his debt matured and which were diverted by them, without opposition from the mortgagee, to expenditures which directly resulted in preserving the mortgaged property, which earnings, if the receivers had not been appointed, there is no ground for supposing would not have been applied by the company to the payment of the supply creditor's debt." 42 *U. S. App.* 160, 161, 76 *Fed. Rep.* 501, 22 *C. C. A.* 298.

We must not be understood as saying that a general, unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.

Passing by as unnecessary to be determined

some of the questions discussed by counsel, our conclusion is that as current earnings which should have been applied in meeting current *expenses or liabilities, including the debt due the Carnegie Company, were diverted for the benefit of mortgage creditors, it was the duty of the court to see that that company was reinstated in its claim of priority over the mortgage creditors in the distribution or application of the net earnings of the property. That duty was properly performed by the Circuit Court, and the decree of the Circuit Court of Appeals affirming the judgment of the Circuit Court is affirmed.

Mr. Justice **Brewer**, not having heard the argument in this case, did not participate in the decision.

Mr. Justice **White** dissenting:

As I comprehend the record, the rails for which preferential payment is now allowed did not serve the purpose of ordinary repair and maintenance of the tracks in which they were laid. Moreover, my understanding of the proof is that it obviously shows there was no surplus revenue at any time legally applicable to the claim now allowed, and hence that no such revenue was diverted to the benefit of the foreclosing mortgage creditors during either of the receiverships by way of betterments or otherwise. Moreover, I think the proof is clear that, conceding every possible expense which can be claimed to have been a betterment or in any wise to have inured to the benefit of the foreclosing mortgage creditors, nevertheless as such mortgage creditors have contributed to the payment of the general creditors, by the assumption of receivers' certificates and cash contributions, a sum largely in excess of the amount of such payments for assumed betterments, etc., the mortgage creditors are entitled to credit for their advances, and therefore there would be a large balance in their favor. In effect, to state the presumed betterments and charge them against the foreclosing mortgage creditors, without referring to or taking into account their contributions, is to charge them for betterments for which they have already paid. *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 *U. S.* 658, 31 *L. ed.* 832, 8 *Sup. Ct. Rep.* 1011.

I therefore dissent.

*LACKAWANNA IRON & COAL COMPANY *et al.*, Petitioners,
v.
FARMERS' LOAN & TRUST COMPANY
et al.

(See *S. C. Reporter's ed.* 298-317.)

Receivers—claim of priority for purchase price of steel rails used for reconstruction—collateral security for debt.

1. A claim for the purchase price of rails imperatively required to make a railroad safe

for the transportation of persons and property will not be deemed a current debt which may be paid out of the current receipts of a railroad company in preference to a mortgage debt, if the repairs to the road needed to put it in proper condition are so extensive as to amount to a reconstruction or the construction of new road.

2. Demanding and receiving collateral security to a large amount from a railroad company for a debt on account of rails to be used in repairing the road is a circumstance tending to show that the seller did not regard itself as entitled to an equitable claim upon net earnings in preference to mortgage creditors who relied on the general credit of the railroad company.

[No. 22.]

Argued March 10, 1899. Decided January 29, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming an order of the Circuit Court dismissing the claim of an intervener for priority in the assets of a railroad receivership. *Affirmed.*

See same case below, 52 U. S. App. 91, 79 Fed. Rep. 202, 24 C. C. A. 487.

Statement by Mr. Justice **Harlan**:

The Houston & Texas Central Railway Company, a corporation of Texas, formerly owned and operated in that state several lines of railroad, as follows: From Houston to Denison, a distance of 345 miles, known as the main line; from Hempstead, on the main line, to Austin, a distance of 118¾ miles, known as the Western Division; and from Bremond, on the main line, to Ross, a distance of 58 miles, known as the Waco & Northwestern Division. It also owned lands donated by the state in aid of the construction of its roads.

Prior to April 1, 1881, the company had executed various mortgages or deeds of trust, namely: 1. A mortgage dated July 1, 1866, covering the main line and 10 sections of land for each mile, known as the main-line first mortgage, in which Easton and Rintoul were substituted trustees. 2. A mortgage dated December 21, 1870, covering the Western Division and 10 sections of land for each mile thereof, commonly known as the Western Division first mortgage, in which the same persons were substituted trustees. 3. A mortgage dated June 16, 1873, covering the Waco & Northwestern Division (to be hereafter referred to as the Waco Division) and also 6,000 acres of land for each mile thereof, commonly known as the Waco & Northwestern Division first mortgage, in which the Farmers' Loan & Trust Company, a New York corporation, was trustee. 4. A

[299] mortgage dated October 1, 1872, *covering the main line and Western Division as a second mortgage and 3,840 acres of land per mile of completed road, commonly known as the main line and Western Division consolidated mortgage. 5. A mortgage dated May 1, 1875, commonly known as the Waco & Northwestern Division consolidated mortgage,

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and covering the Waco Division and 6,000 acres of land per mile of completed road. 6. A mortgage dated May 7, 1877, commonly known as the income and indemnity mortgage, and covering all the property of the railway company. 7. A mortgage dated April 1, 1881, commonly known as the general mortgage, and covering all the property of the company.

The present suit, designated in the circuit court by the number 227, was brought April 6, 1889, by the Farmers' Loan & Trust Company to obtain a decree of sale of the property covered by the mortgage of June 16, 1873, on the Waco Division. On the same day Charles Dillingham, who was already receiver and in possession of the railway property of the Houston & Texas Central Company, was appointed receiver of all the railway property and property covered by the first mortgage of the Waco Division with power to operate the same, and was directed to keep separate accounts of the expenditures and earnings of that division.

During the progress of the cause the Lackawanna Iron & Coal Company, a Pennsylvania corporation, intervened by petition, asserting an equitable lien, prior to the claims of bondholders, on the mortgaged property for the value of steel rails alleged to have been furnished by it and laid on the Waco Division. Subsequently the Pacific Improvement Company, a California corporation, became the assignee of the claim of the Lackawanna company, and was made a coplaintiff with the latter company.

From a report made January 13, 1896, by a special master appointed to find and report upon the subject-matter of the intervening petition, the following facts appear:

Pursuant to a written contract with the Houston & Texas Central Railway Company, dated December 28, 1882, the Lackawanna company in the year 1883 delivered to the *former 5,020 tons of steel rails at the price [300] of \$40.40 per ton, in payment for which the Lackawanna company received ten promissory notes of the railway company, payable at six months from their respective dates, amounting with interest to \$206,932.16. These notes were all paid either at their maturity or at the maturity of other notes given in renewal thereof.

Pursuant to another contract dated April 26, 1883, between the Lackawanna company and the railway company, the former delivered to the latter in the year 1883, 5,009 tons of steel rails at \$39.50 per ton, and received in payment therefor the railway company's ten promissory notes dated respectively June 21, 22, and 23, 1883, August 10, 14, and 15, 1883, and September 6, 11, 15, and 20, 1883, each payable six months after date, and aggregating, with interest, \$201,346.64—the railway company being entitled, under the contract, to renew the notes at maturity for a further term of six months by paying the interest at 6 per cent or adding the interest to the new notes. As these notes matured, the payment of so much of the debt as was not satisfied at maturity was extended until,

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in process of settlements and extensions, the railway company, in the satisfaction of the balance due the Lackawanna company under the contract, executed its eight promissory notes payable four months from their respective dates, with 6 per cent interest from maturity. These notes aggregated \$118,000. In the negotiations resulting in this settlement the Lackawanna company demanded that the railway company should secure the renewal notes by the hypothecation of collaterals. In compliance with that demand the railway company deposited with the Lackawanna company, when the renewal notes were delivered, 170 first-mortgage bonds of the Galveston, Harrisburg, & San Antonio Railway Company, of the face value of \$170,000. At the date of the master's report, January 13, 1896, the value of those bonds was \$157,250, or 92½ per cent of their face value. They were in the possession of the Pacific Improvement Company, as assignee of the iron company. No interest on the bonds had been collected by the iron company or by the railway company, but the

[301]*interest had been collected by the Southern Development Company. It was agreed before the special master by the parties in interest that the court should consider the 170 bonds as sold for \$157,250 on December 23, 1895, and should credit that sum, as of that date, upon the claim of the Iron Company or of the Southern Development Company.

On the 30th day of October, 1883,—nearly *six years before the present foreclosure suit was brought*,—the Lackawanna company and the railway company made another contract in addition to those above mentioned, under which the former delivered to the latter, during the months of February, March, April, and May, 1884, 8,552 tons of steel rails. That contract was similar in its general terms to those of December, 1882, and April, 1883. It provided for the delivery by the Lackawanna company of 10,000 tons of Bessemer steel rails at \$36.60 per ton, as nearly as practicable between February 1, and August 1, 1884, at the rate of 1,500 to 2,000 tons per month. It also provided that upon the delivery of each 500 tons of rails payment should be made therefor either in cash or in the notes of the railway company payable at six months from the average date of delivery, with 6 per cent interest from such date, the purchaser to have the privilege of renewing the notes before their maturity for a further term of six months by paying the interest or adding the same to the renewal notes. In March and April, 1884, the auditor of the railway company made a statement or voucher of rails then delivered under the contract. That statement passed into the hands of the treasurer of the railway company with a memorandum that notes were to be issued therefor payable at twelve months from their respective dates. In conformity with that memorandum the railway company executed and sent to the Lackawanna company eight notes, payable twelve (instead of six) months from their respective dates. The latter company there-

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upon notified the railway company of the error, but the notes as executed were received as a matter of accommodation to the railway company.

Afterwards, in April and May, 1884, the railway company, in settlement of the balance due for the 8,552 tons of rails, *executed [302] and delivered to the Lackawanna company nine promissory notes payable at six months from their respective dates, with the option in the maker of renewal for a like term. Each of those notes was renewed for six months for like amount as the originals, and their aggregate amount was \$327,175.50. This sum, added to the \$118,000 above referred to, made \$445,175.50, the aggregate principal amount due to the Lackawanna company, not including the \$157,250, the amount at which the 170 bonds delivered as collaterals were valued.

All the rails delivered under the first contract, and about one half of those delivered under the second contract, were paid for by the railway company prior to the appointment of any receiver of the property; but the remaining half under the second contract, and the rails furnished under the third contract, had not been paid for when the master's report was filed.

The second contract for rails was made one year and ten months prior to the appointment of the receiver in cause numbered 185 (to be hereafter referred to), about three years and three months prior to the appointment of the receiver in consolidated cause numbered 198 (to be presently referred to), and about six years prior to the appointment of the receiver in this cause. The third contract was made about sixteen months prior to the receivership in cause 185, about two years and nine months prior to the receivership in consolidated cause 198, and about five years and six months prior to the appointment of the receiver in this cause.

About 6.2 miles of the railway of the Waco Division (the part of the railway covered by the mortgage to the Farmers' Loan & Trust Company) was laid with the rails furnished under the first two of the above contracts, but it was not shown what proportion of those rails was furnished under each of the contracts; 30.8 miles of the railway were laid with rails furnished under the third contract. The old iron rails removed from the 37 miles of the Waco Division, upon which the above rails were laid—2,960 tons—were received by the receivers in cause No. 185, and were sold by them in 1885 at the price of \$13 net.

*The master's report contained the follow- [303] ing:

"I find that the debt for which the Lackawanna company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business, as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna company and the defendant railway company that the condition of the track of the defend-

ant railway company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5,000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857-1861, and thence northward to Denison, 1867-1872. The Western Division leading to Austin was constructed in part prior to 1861, and completed in 1873, and the Waco Division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5,000 tons of rails purchased prior to December 28, 1882. There was continual breakage of rails and wrecking of trains, the track was unsafe, and was generally so regarded, not only by 'railroad men,' but by the traveling public; the damage to merchandise, rolling stock, etc., was continuous, and the need for new rails appears to have been 'absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment.'

"I find that when the aforesaid contracts were made with the said Lackawanna company both seller and buyer expected the debts to be paid from the net income of the railway; that the credit extended under said contracts was at the request of and for the accommodation of the defendant railway company and upon its general credit. That said sales were made without any stipulation that security should be given by the defendant company for said rails, or that payment therefor should be made out of any particular fund or in any particular way; that said sales were for an unusually large amount of rails, and the defendant was unable to pay cash therefor, and there was no other way of obtaining said rails except [304] upon *credit; and petitioner herein at the time of said contracts and sales had knowledge of the mortgage of June 16, 1873, given by the defendant railway company upon the properties of its Waco & Northwestern Division to secure the first-mortgage bonds, which said mortgage has been herein foreclosed. I find that the steel rails supplied by said Lackawanna company under the aforementioned contracts, 18,581 tons, were placed in the track of the defendant railway company as soon as received."

The bonded debt of the railway company on January 1, 1885, was \$16,874,500. The interest on all classes of its bonds payable in 1894, amounting to \$1,194,200, was paid as it matured. The railway company first made default in the payment of interest on its bonds January 1, 1895, on which day the interest on first-mortgage bonds became payable.

The Southern Development Company, a California corporation, on the 16th day of February, 1885, instituted suit against the Houston & Texas Central Railway Company, asserting a claim against it for about \$600,000 for money loaned at various times. This was cause No. 185. It set forth in its bill the embarrassed condition of the railway

company, the danger of its property being scattered, wasted, and lost, and asked that the company's property be put in the hands of receivers, and a decree passed directing that out of the rents, revenues, issues, and profits coming into the hands of the receivers, after payment of costs of administration, operating and other necessary expenses, the claims of the plaintiff, the Southern Development Company, with interest and costs, be paid. On the motion of that company, Clarke and Dillingham were appointed receivers of the property. They immediately qualified as receivers and took possession of the property. An amended and supplemental bill was filed making Easton, Rintoul, and the Farmers' Loan & Trust Company defendants as trustees of the various mortgages upon the railway company's property. Clarke and Dillingham continued to act as receivers until about July 10, 1886, when they delivered possession of the property and the revenues in their hands to Easton, Rintoul, and Dillingham, who had previously *been appointed joint receivers of the railway [305] company under bills filed by the trustees of certain mortgages on the main line and Western Division, and also by the Farmers' Loan & Trust Company as trustee in the general mortgage of the Houston & Texas Central Railway Company. The last-named litigation was known as cause No. 198.

In cause No. 185 the Lackawanna company intervened by petition, and asked to be made a coplaintiff. It prayed that an account be taken of its several demands, that the amount thereof with interest be paid out of the net revenues of the railway company, and be declared a lien thereon and upon all the property of the company superior in rank to the claims of the trustees and to the mortgage bonds and coupons issued under their various deeds of trust.

To the bill of the Southern Development Company, Easton and Rintoul trustees, demurred generally and specially. The demurrer was sustained, and the bill and supplemental bill were dismissed with costs on the 27th day of May, 1886, but without prejudice to the rights of the complainants to assert their claims, if any they had, in such manner as they were advised. By the same decree Clarke and Dillingham were discharged and ordered to turn over all the property and effects of the railway company together with its accrued revenues in their possession to Easton, Rintoul, and Dillingham, who had then been appointed joint receivers of the railway company under an order made in the "Consolidated Cause No. 198," *Easton and Rintoul, Trustees, and the Farmers' Loan & Trust Co. v. Houston and Texas Central Co. et al.*—the constituent suits of such consolidated cause being causes Nos. 198, 199, and 201, which were bills of foreclosure against various parts of the railway.

The three mortgages declared on in causes 198, 199, and 201 were duly foreclosed by final decree entered in the consolidated cause on the 4th day of May, 1888, and on September 8, 1888, all the property of the rail-

way company was sold under that decree, George E. Downs becoming the purchaser of the Waco & Northwestern Division, subject, however, to the particular mortgage sought [306] in this suit to be foreclosed, *namely, the mortgage of June 16, 1873, known as the Waco Division first mortgage, the Farmers' Loan & Trust Company being the trustee therein. The sale was also made subject to the right which the court reserved by the decree (to use the words of the master in his report) to charge upon the property or any part thereof the payment of any amount that might be found to be due and payable by reason of intervening petitions theretofore filed in that cause and be entitled to priority over the mortgage debts referred to in the decree.

From February 20, 1885, to the date of the report, the property of the railway company, forming the subject-matter of the receivership in this cause, was continuously in the possession of the court under proceedings in suit No. 185, and thereafter in suits Nos. 198 and 227.

The master found and reported that no interest had been paid on the bonded indebtedness by either of the receivers in this cause; that Alfred Abeel, receiver in this cause, had expended under the orders of the court \$46,505.40 for betterments and permanent improvements from December 10, 1892, to September 3, 1895, consisting of bridges, shops, roundhouse, car shed, water stations, locomotives, chair car, and fencing; that no part of the income arising from the operation of the road and no part of the proceeds of sales of old rails, old iron, old cars, and engines, coming into the possession of the receivers in causes 185 and 198, ever came into the possession of the receivers in this cause, and it did not appear that any part of the equipments purchased by the receivers in causes 185 and 198 ever came into the possession of the receivers in this cause; that the evidence failed to show that any improvements and betterments of the property, added to the property of the Houston & Texas Central Railway Company by the receivers in causes 185 and 198, were made *on the Waco Division*; that prior to April 6, 1889, no separate accounts were kept of the receipts and disbursements of the Waco Division, but the same was operated as a branch of the general system of the Houston & Texas Central Railway Company, and the evidence failed to show what, if any, of the expenditures made by the receivers in causes 185 and 198 for extraordinary [307] *repairs, betterments, and improvements, and for operating and running expenses, were made for the Waco Division, and what portions for other divisions of the Houston & Texas Central Railway Company, and this was true also as to receipts and income; that the receivers in cause 185 had on hand in cash at the opening of business on January 21, 1886, \$175,393.65, but it did not appear that any part of that fund came to the hands of the receivers in this cause; and that the receiver in cause 198 had on hand at the beginning of business on April 6, 1889, cash amounting to \$215,842.45, but it

did not appear that any part of that sum came to the hands of the receivers in this cause.

The mortgage given by the railway company to the Farmers' Loan & Trust Company, dated June 16, 1873, and herein declared on, contained the following provisions:

"And in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any instalment of the interest, or any part thereof, on any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses, and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured hereby *pro rata*, and thereafter, to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry *or foreclosure of [308] said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein prescribed, receiving the rents, revenues, and income thereof, and applying them in the same manner as above stated. It is, however, expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or other property as it may own or acquire, which may not be needed or required for the purposes and business of the said Waco & Northwestern Division, except in the case of the 6,000 acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from encumbrance of this mortgage or deed of trust, and to change its tracks and make any and all alterations necessary for the benefit of the same."

That mortgage contained no provision authorizing the trustee, if it acquired possession of the railway under that instrument, to

pay any floating debt or debts of the mortgagor company out of the gross earnings of the railway.

During the receivership of Clarke and Dillingham, in cause 185, they received revenues from the operation of the railway, from February 23, 1885, to January 21, 1886, \$2,758,487.40, and paid out for operating expenses, taxes, etc., for the same period, \$2,137,322.44, leaving a surplus of \$621,164.96. From January 21, to July 10, 1886, they received \$1,143,731.05, and paid out for operating expenses during the same period \$1,341,753.85, leaving a deficit for that period of \$198,022.80, but leaving a net balance from the operation of the railway from February 23, 1885, to July 10, 1886, of \$423,142.16. When Clarke and Dillingham took possession of the property of the railway company on February 23, 1885, they received in cash \$30,416.34, while they collected for traffic balances *and other claims \$118,730.08, from sales of old rails on hand February 23, 1885, \$110,275, and from sales of old cars \$6,500, making a total of \$265,921.42.

Clarke and Dillingham during the time they were in possession of the property as receivers, and Easton, Rintoul, and Dillingham, while they were in possession as receivers, expended under the orders of court the following sums outside of operating expenses: \$23,274.20 for liabilities of the railway company; \$751,438.15, interest on first-mortgage bonds of the company, due January 1 to July 1, 1885; \$245,792.64 for new steel rails; \$125,695.44 for car trust notes; \$265,696.33 for new passenger coaches, baggage, mail, and express cars, locomotives, etc.; and \$126,218.62 for right of way, fencing track, real estate, depot, roundhouse, foundry, and patternhouse; in all, \$1,536,116.38, of which \$384,026.20 was expended under the receivership of Clarke and Dillingham. These were the receipts and expenditures up to January 9, 1888, and there was no evidence as to receipts and expenditures after that date.

Easton, Rintoul, and Dillingham during their receivership realized out of proceeds of sale or collection of old assets of the defendant company the sum of \$135,889.70.

The receivers in cause 198 received from the receivers in cause 185 the sum of \$138,751.37 in cash.

The receivers in the consolidated cause 198, after taking possession on July 10, 1886, paid liabilities of the receivers, Clarke and Dillingham, taxes, outstanding vouchers, pay rolls, traffic balances, \$221,421.32, and collected from the amount due Clarke and Dillingham as receivers in cause 185 the sum of \$39,016.69.

On the 26th day of November, 1886, the Lackawanna company filed its petition of intervention in cause 198, praying substantially for the same relief against all the railways, revenues, earnings, moneys, and other properties and assets of the defendant company, including those forming the subject-matter of the receivership herein, as was prayed for by its petition of intervention in this cause. Upon that petition the master reported in that cause that under the facts

the *debt for which the company filed its petition was of a character equitably entitling it to be discharged in preference to the mortgage represented in that suit, but which preference should be applicable to so much only of the company's debt as should remain unsatisfied after exhausting the 170 first-mortgage 5 per cent bonds of the Galveston, Harrisburg, & San Antonio Railway (Mexican & Pacific extension) of the face value of \$170,000, and which, as heretofore stated, were pledged as security. The Farmers' Loan & Trust Company filed exceptions in that cause to the master's report, but at the date of the master's report in this cause the exceptions had not been brought to a hearing.

The Lackawanna company on the 30th day of April, 1889, filed suit upon its claims against the Houston & Texas Central Railway Company in the district court of Dallas county, Texas, a court of competent jurisdiction, and in that suit, after due citation, judgment was rendered against the railway company May 19, 1899, for \$555,914.25 with interest. Upon that judgment execution was issued and was returned August 20, 1899, no property found subject to execution.

Of the interest paid by the receivers on the first-mortgage bonds of the defendant railway company, \$79,800 consisted of coupons upon the first-mortgage bonds of the company secured by mortgage upon the Waco Division, being the property forming the subject-matter of the litigation herein. Interest was paid upon the coupons representing the same, maturing January 1 and July 1, 1885, to the amount of \$11,571, making a total amount of interest paid to holders of bonds secured by mortgage on the Waco Division of \$91,371, paid May 1, 1887.

During the years 1883 and 1884 the defendant company paid \$2,386,400 interest upon its bonds, which amount, less \$1,043,198.27, borrowed for interest purposes in those years, was presumably (the contrary not appearing) paid from its income or current earnings, and out of said total the sum of \$159,600 was paid as interest upon the first-mortgage bonds of the Waco Division, the bonds which are the subject-matter of the bill of complaint in this cause. During 1883 and 1884 \$2,225,000 *approximately [311] were expended from the earnings and general income of the defendant company's property in the payment of interest on bonds and in additional equipments, permanent improvements, etc.

The accounts of the railway company were not kept in such manner as to indicate the exact fund out of which the interest on the first-mortgage bonds of the Waco Division was paid, or the exact fund out of which the interest upon the bonds of the other divisions was paid; and no separate account was kept of the earnings of that division as distinguished from the net earnings of the other divisions of the railway company, either prior to or during the receivership thereof, until about April 20, 1889. During the receivership in cause 198, the receivers ex-

pended in the payment of interest upon the bonds forming the subject-matter of the bill of foreclosure herein the sum of \$91,371.

By a final decree rendered March 16, 1892, the circuit court made in this cause a decree of foreclosure and sale in behalf of the Farmers' Loan & Trust Company. The decree contained these among other provisions:

"And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims and interventions now pending and undetermined in this court, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and also upon the further express conditions that he or they will pay off, satisfy, and discharge all debts, claims, and demands of whatsoever nature incurred or which may hereafter be incurred by said receiver Charles Dillingham, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defense to any claim, debt, or demand sought to be enforced against said property, and said purchaser or purchasers, their successor or successors or assigns, shall also have the right to appear and make defense to any claim, debt, or demand pending and undetermined at the date of the confirmation of such sale. . . .

"And it is further ordered, adjudged, and decreed that it be recited in the deed to be executed and delivered to said purchaser or purchasers, that he or they do take said property, subject to, and that said purchaser or purchasers do assume and agree to pay off, any and all debts, claims, and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court as prior to any right secured under complainant's mortgage, and subject likewise to all debts, claims, and demands of whatsoever nature incurred by Charles Dillingham as receiver in this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented, as hereinbefore provided, within six months after the confirmation of said sale. It is further ordered, adjudged, and decreed that the rights of the Lackawanna Coal & Iron Company, the Southern Development Company, the Pacific Improvement Company and the Morgan's Louisiana & Texas Railroad & Steamship Company, interveners herein, and the rights of all other interveners herein, be and they are hereby reserved to be hereinafter adjudicated, and are in no manner affected or prejudiced by this decree. It is further ordered that the disposition of any surplus funds arising from the earnings of the road, or otherwise, that may be in the hands of

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the receiver, is reserved for future determination."

Subsequently, February 26, 1896, a decree was passed in this cause dismissing the intervention herein by the Lackawanna Iron & Coal Company and the Pacific Improvement Company, but without prejudice to the rights of those companies under or by virtue of the intervention in equity cause 198.

This order was affirmed in the circuit court of appeals. 52 U. S. App. 91, 79 Fed. Rep. 202, 24 C. C. A. 487. The case is now here on certiorari for re-examination.

Messrs. Maxwell Evarts and E. B. Kruttschnitt argued the cause and filed a brief for petitioners:

Property saved and preserved by materials and supplies furnished at the request of the owner is subjected to, and charged with, a lien as against the owner for the value thereof.

Shearman v. British Empire Mut. Life Assur. Co. L. R. 14 Eq. 4; *Re Tharp*, 2 Smale & G. 578; *Minnitt v. Talbot*, Ir. L. R. 1 Eq. 143; *Mannix v. Purcell*, 46 Ohio St. 102, 2 L. R. A. 753, 19 N. E. 572; 2 Story, Eq. Jur. 13th ed. p. 582, § 1237; *Perry v. Protestant Episcopal Church Bd. of Missions*, 102 N. Y. 99, 6 N. E. 116; *Smith v. Smith*, 51 Hun, 164, 4 N. Y. Supp. 669, Affirmed in 125 N. Y. 224, 26 N. E. 259; *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875; *Poland v. The Spartan*, 1 Ware, 134, Fed. Cas. No. 11,246; *Stevens v. The Sandwich*, 1 Pet. Adm. 233, Fed. Cas. No. 13,409; *The Felice B.* 40 Fed. Rep. 653; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612; *Williams v. Gibbs*, 20 How. 535, 15 L. ed. 1013.

The cases of *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 482, 20 L. ed. 199, 206; and *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546, in which the claims were for materials used in the original construction of a railroad and not in its repair, are distinguishable from this case in which an equitable lien is claimed for material and work which saves and preserves a railroad as a going concern.

The mortgage creditors, by leaving the railway company in possession of the property, impliedly authorized it to create any liens therein which might be necessary to keep up the property and enable it to continue to earn the interest upon the mortgaged debt.

Hammond v. Danielson, 126 Mass. 294; *Tucker v. Werner*, 2 Misc. 193, 21 N. Y. Supp. 264; *Scott v. Delahunt*, 65 N. Y. 128; *Williams v. Allsup*, 10 C. B. N. S. 416; *The Canada*, 7 Sawy. 173, 7 Fed. Rep. 119; *White v. Smith*, 44 N. J. L. 105.

An equitable lien superior to the mortgage arises whenever services are rendered which result in the saving and preserving the mortgaged property and keeping it a going concern.

Union Trust Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed.

596, 4 Sup. Ct. Rep. 675; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295; *Milttenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657.

The decisions in the *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; and *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824, were not intended by this court to limit the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657.

The public have an interest in the railroad, and any repair thereof which tends to preserve such public interest is entitled, because of its public benefit, to a preference over a prior mortgage right.

Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243.

Receiver's certificates issued for supplies furnished to a railroad to keep it a going concern, after his appointment, are given preference over the prior mortgage in a suit to foreclose which the receiver was appointed.

Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; *Kneeland v. Luec*, 141 U. S. 491, 35 L. ed. 830, 12 Sup. Ct. Rep. 32; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809.

The right of a materialman to be paid for supplies furnished by him to keep a railroad a going concern is not determined by the time when the supplies were furnished prior to the appointment of the receiver in foreclosure proceedings.

Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657.

Mr. Herbert B. Turner argued the cause and, with **Mr. M. F. Mott**, filed a brief for respondents:

A creditor who permits his rails to go into and become part of the road, consents to their being covered by the existing mortgages, and acquires no lien which could displace such mortgages.

Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; *United States v. New Orleans & O. R. Co.* 12 Wall. 362, *sub nom. New Orleans & O. R. Co. v. Mellen*, 20 L. ed. 434; *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; *Skiddy v. Atlantic, M. & O. R. Co.* 3 Hughes, 320, Fed. Cas. No. 12,922; *Olyphant v. St. Louis Ore & Steel Co.* 28 Fed. Rep. 729; *Bound v. South Carolina R. Co.* 8

U. S. App. 461, 58 Fed. Rep. 473, 7 C. C. A. 322.

No doctrine was laid down in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, from which it could be justly argued that the current-fund creditor has any lien upon the earnings or the corpus of the property.

Southern Exp. Co. v. Western N. C. R. Co. 99 U. S. 191, 25 L. ed. 319; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315, Fed. Cas. No. 14,258; *Milttenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140.

The effort to bring within the scope of the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, all matter of general debts of railroad companies has been severely discountenanced by this court.

Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

The petitioners' claim is clearly not entitled to priority over the bondholders.

Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; *Huidekoper v. Hineckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 344; *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. ed. 490, 2 Sup. Ct. Rep. 299; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; *Penn v. Calhoun*, 121 U. S. 251, 30 L. ed. 915, 7 Sup. Ct. Rep. 906; *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825, 8 Sup. Ct. Rep. 1004; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. Rep. 29; *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338; *Toldeo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824.

Mr. L. W. Campbell argued the cause and filed a brief for respondents *Moran Bros.* and *Henry K. McHarg*:

Before a debt contracted by a railroad company prior to the appointment of a receiver will be given priority over the debt of the bondholders secured by a prior mortgage on the road, it must appear in cases where the debt is for supplies or materials, that it is the purchase price of current supplies needed from time to time to keep the road in repair.

Huidekoper v. Hineckley Locomotive Works, 99 U. S. 258, 25 L. ed. 344; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup.

Ct. Rep. 675; *Hale v. Frost*, 99 U. S. 391, 25 L. ed. 419; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657.

The credit must be temporary and result from the necessities of the business.

Blair v. St. Louis, H. & K. R. Co. 22 Fed. Rep. 471.

The debt must have been contracted within a reasonable time prior to the appointment of a receiver.

Thomas v. Peoria & R. I. R. Co. 36 Fed. Rep. 808; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315, Fed. Cas. No. 14,258; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Taylor v. Philadelphia & R. R. Co.* 7 Fed. Rep. 377; *Miltnerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140.

There is no such encumbrance known as a common-law materialman or mechanic's lien on real estate, nor is there such an encumbrance known to or recognized by courts of equity.

Phillips, *Mechanics' Liens*, 3d ed. § 1; 2 Jones, *Liens*, 2d ed. § 1184; *South Fork Canal Co. v. Gordon*, 6 Wall. 571, 18 L. ed. 896; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 136, 35 L. ed. 964, 12 Sup. Ct. Rep. 181.

No equitable lien exists on railroads for necessary improvements.

St. Louis, A. & T. R. Co. v. Mathews, 75 Tex. 92, 12 S. W. 976; Jones, *Railroad Securities*, § 573; Jones, *Corporate Bonds & Mortgages* (2d ed. of *Railroad Securities*), §§ 584, 587; *Bound v. South Carolina R. Co.* 58 Fed. Rep. 473.

Railroad companies in possession of railway property which is encumbered with a mortgage have no implied authority from mortgage creditors to displace their contract priority with the purchase price of rails used for retracking the entire system.

2 Jones, *Liens*, 2d ed. §§ 1457, 1477; *Chaloner v. Bouck*, 56 Wis. 652, 14 N. W. 810; Phillips, *Mechanics' Liens*, 3d ed. § 225; *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571; *Jones v. Walker*, 63 N. Y. 612; *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 40 N. W. 513; *Giles v. Stanton*, 86 Tex. 620, 26 S. W. 615; *Holmes v. Morse*, 50 Me. 102.

[313] *Mr. Justice Harlan, after stating the above facts, delivered the opinion of the court:

In *Southern R. Co. v. Carnegie Steel Co.* (176 U. S. 257, ante, 458, 20 Sup. Ct. Rep. 347), just decided, we had occasion to consider in the light of our previous decisions the principal questions arising in the present case. We need not repeat here what was said in the opinion in that case as to the general principles applicable in cases involving the respective rights of mortgage creditors and of unsecured creditors in the earnings of an insolvent railroad corporation in the hands of a receiver.

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The above statement of the history of this litigation shows that the Houston & Texas Central Railway Company had three contracts with the Lackawanna company for steel rails; that those contracts were made, respectively, on December 28, 1882, April 26, 1883, and October 30, 1883; and that all the rails delivered under the first contract, and about one half of those delivered under the second contract, were paid for, leaving unpaid for one half of the rails delivered under the second contract and all delivered under the third contract. But the claim for the balance due for rails covered by the contract of April 26, 1883, is abandoned because, as stated by counsel for the Lackawanna company, it is impossible to state with certainty how many of the rails delivered under that contract were actually used on the Waco Division. We are therefore only concerned in this case with the contract of October 30, 1883, under which rails were delivered.

It also appears that in suit No. 185, brought by the Southern Development Company in February, 1885, receivers were appointed of the entire property of the Houston & Texas Central Railway Company, including the Waco Division; that that suit was dismissed in May, 1886, and shortly before that time suits were brought by the trustees of the mortgages on the main line and on the Western Division of that company for the foreclosure of those mortgages, receivers were appointed, and the suits were consolidated as "Consolidated Cause 198;" that in the latter cause the entire property was sold September 8, 1888, subject, however, to the first mortgage on the Waco Division; and that the Waco Division was separately sold subject to the first mortgage thereon.

Subsequently, September 6, 1889, the present suit was brought to foreclose the first mortgage on the Waco Division. The Lackawanna company intervened herein by petition, asking that an account be taken of the amounts due to it, and for a decree "declaring that the sums so due are liens upon the net earnings of said railway company, and especially upon those portions of said net earnings which have accrued or may accrue from the railways described in the bill of complaint in this cause, both those accrued prior to said receivership in said cause No. 185, and those accrued and to accrue during the receivership in said cause No. 198, extended to this cause, and upon all of the property of said railway company, superior in rank to the claims of said trustee and of the mortgage bonds and coupons issued under the deed of trust sought to be foreclosed in this cause;" and "that the net earnings of the railway described in the bill of complaint in this cause in the hands of said receiver, accrued or to accrue, be first devoted to the payment of the accounts so decreed, and if they be not sufficient prior to the final decree in this cause to pay said amounts, then that your honors do decree the payment of said amounts out of any proceeds of sale of the property of said railway

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company to be made under said final decree, the amounts so decreed to your petitioner to be paid in preference to any amount due under the mortgage bonds and coupons issued under the deed of trust annexed to the bill of complaint in this cause."

[315] The principal ground upon which the Lackawanna company *bases its claim for the relief asked is that when each of the above contracts was made the Waco Division was in such condition that new rails were imperatively required in order that the road might be safely used for the transportation of persons and property. Such, it may be assumed, was the condition of the road when the rails were contracted for and delivered, for it was so found by the master to whom the intervening petition of the Lackawanna company was referred with direction to take the account prayed for and to report the facts, and to that report no exceptions were filed. But the necessary inference from the report in connection with the averments of the intervening petition is, that the work required to be done in order to put the main road of the Houston & Texas Central Railway Company and its divisions in proper condition was not such as would be done in the ordinary course of the business and operations of a railroad, but was so extensive as to amount to reconstruction, or the construction of new road. That was the view expressed by the circuit court of appeals, and it explains what the master meant by the finding that the debt for which the Lackawanna company claimed payment could not be classed as a "current debt made in the ordinary course of business." This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the making of the contracts with the Lackawanna company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon [316] *such income. *Southern R. Co. v. Carnegie Steel Co.* and authorities there cited, 176 U. S. 257, ante, 458, 20 Sup. Ct. Rep. 347. They are rather to be regarded as extraordinary expenditures, outside of the ordinary course of business and incurred for purposes, not of repair, but of construction. This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 98, 34 L. ed. 484

379, 383, 10 Sup. Ct. Rep. 950; *Thomas v. Western Car Co.* 149 U. S. 95, 111, 37 L. ed. 663, 13 Sup. Ct. Rep. 824. We have said that priority of unsecured claims is recognized only in a few specified cases in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna company. To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest. Besides, the rails in question were delivered long before the railroad company had made any default in the payment of interest; about sixteen months before the company's property was put into the hands of a receiver, and about five and a half years before the appointment of a receiver in this cause. Then there is the circumstance that the Lackawanna company, during the negotiations resulting in the execution of renewal notes under the second contract for rails, demanded and received collateral security to a large amount from the railroad company—a circumstance tending to show that it did not regard itself as entitled to an equitable claim upon net earnings in preference to mortgage creditors, but relied upon the general credit of the railroad company. However meritorious the claim of the Lackawanna company may be as between it and the railroad company, we cannot, by reason of anything appearing in the record, impair or displace the liens of mortgage creditors for its benefit. Under all the circumstances, including the amount of the debt and the long period of credit, the claims in question must be regarded as general, unsecured debts not contracted in the ordinary course of business and *with the ex-[317] pectation of the parties that they were to be met out of current receipts in preference to claims of mortgage creditors. It is not therefore entitled to the priority claimed. The view taken of the case by the circuit court of appeals is indicated by Judge Parlange, whose opinion, on behalf of that court, thus concludes: "The unusually large purchase of rails, the time within which they were to be delivered, the condition of the road, the contracts providing for notes at six months renewable for a like term at the maker's option, the hypothecation of securities for the payment of the claim, the knowledge which the intervener had of the mortgage, the fact that the contracts contained no promise to pay out of any particular fund, the time which elapsed between the date of the contracts and the appointment of a receiver in cause No. 185—are circumstances which, taken together, cannot fail to convince us that the intervener relied upon the general credit of the railway company."

The decree of the Circuit Court of Appeals is therefore affirmed.

UNITED STATES, *Appt.*,
v.

PARKHURST-DAVIS MERCANTILE
COMPANY, National Bank of St. Marys,
Kansas, *et al.*

(See S. C. Reporter's ed. 317-320.)

Injunction from Federal court against proceedings in state court.

An injunction against enforcing claims against Indians in a state court cannot be granted by a Federal court under U. S. Rev. Stat. § 720, which prohibits an injunction from a Federal court to stay proceedings in any court of a state except in matters of bankruptcy.

[No. 130.]

Submitted January 31, 1900. Decided February 26, 1900.

APPEAL from decision of the Circuit Court of the United States for the District of Kansas sustaining a demurrer and dismissing a bill for an injunction against proceedings in a state court. *Affirmed.*

Statement by Mr. Justice **Brewer**:

[317] *On August 21, 1897, the United States filed their bill in the circuit court of the United States for the district of Kansas seeking an injunction restraining defendants from enforcing in the courts of the state of Kansas certain claims against Eli G. Nadeau and John Nadeau, members of the *Prairie band of Pottawatomie Indians, and residing on a reserve within the limits of that state. On November 22, 1897, an amended bill was filed, to which bill the defendants demurred, and on March 4, 1898, the demurrer was sustained and the bill dismissed. From such order of dismissal the government took its appeal directly to this court.

[318] The amended bill alleged in substance that the two Indians were members of the Prairie band of Pottawatomie Indians; that such band had a reservation in the county of Jackson, within the limits of that state; that by the act of Congress admitting Kansas into the Union it was expressly provided, among other things, as follows, to wit: "That nothing contained in the said Constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas,

NOTE.—As to injunction restraining proceedings in state courts,—see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90, and *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

As to injunction against suit in foreign jurisdiction,—see note to *Thorndike v. Thorndike* (Ill.) 21 L. R. A. 71.

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until said tribe shall signify their assent to the President of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to make if this act had never passed" (12 Stat. at L. 127, chap. 20); and that the Prairie band had never in any manner consented or signified to the President of the United States that any rights of person or property formerly appertaining to these members should be extinguished, nor have they ever consented that they or their reservation should be governed or controlled by the laws of the state of Kansas. The bill then proceeds to state a series of facts tending to show that this reserve had been exempted from the laws of the state of Kansas; that the tribal relation had been preserved and the government superintendency and *control over the Indians maintained. It further disclosed that the two Indians had received patents for their respective portions of the reservation, as provided in § 5 of the act of Congress of February 8, 1887 (24 Stat. at L. 389, chap. 119), that they resided each on the separate tract or parcel allotted and patented to him; but, as averred, they had never been naturalized as citizens of the United States, and had maintained in all respects their peculiar life as members of the Indian tribe. The bill also disclosed that the Bureau of Indian Affairs, prior to the commencement of the actions referred to, had lawfully authorized the two Nadeaus and one Henry B. Ekeam, a white man, to trade and do business as licensed traders of the United States, with said Prairie band of Pottawatomie Indians upon said reservation, under the firm name and style of Eli G. Nadeau, Son, & Company; and averred that the said Ekeam, in May, 1897, became an embezzler, and fled the country with practically all the available means and assets of the firm except a stock of merchandise located in the storehouse on the reservation. It alleged that the various defendants, including among them the sheriff of Jackson county, were, by several writs already issued out of the state courts, attempting to enforce claims of the defendants, other than the sheriff, against the property of said Nadeau and his son. The prayer of the bill was for an injunction restraining all the parties from further prosecuting those actions or in any manner proceeding in the state courts to enforce those claims.

Solicitor General John K. Richards and Mr. F. E. Hutchins submitted the cause for appellant.

No brief filed for appellees.

*Mr. Justice **Brewer** delivered the opinion of the court: [319]

It is conceded by counsel for the government that so much of the bill as alleges that by treaties with the Pottawatomie *Indians [320] and the act admitting Kansas into the Union, the reservation was excluded from

the state and from the jurisdiction of Kansas, is erroneous, and may be ignored.

Section 6 of the act of February 8, 1887 (24 Stat. at L. 390, chap. 119), contains this provision:

"Each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

Upon these admissions and facts the case comes clearly within the provision of § 720 of the Revised Statutes, to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings in any court of a state except in matters of bankruptcy. *Peck v. Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846; *Watson v. Jones*, 13 Wall. 679, 719, 20 L. ed. 666, 672; *Haines v. Carpenter*, 91 U. S. 254, 257, 23 L. ed. 345, 346. In this latter case, Mr. Justice Bradley, delivering the opinion of the court, said:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the Federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in § 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law."

Without stopping to consider any other questions presented by counsel, this is sufficient to sustain the ruling of the Circuit Court, and the decree is affirmed.

cannot be held final on the ground that the jurisdiction of the circuit court was dependent entirely upon diverse citizenship, where the plaintiff's declaration claimed that the controversy turned on a construction of the laws of the United States, and both courts below dealt with the case on that assumption.

2. A plaintiff whose statement of his own claim does not disclose a Federal question cannot create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States.
3. Jurisdiction of a claim to recover mesne profits accruing between a pre-emption entry and the issuance of a patent cannot be taken by a circuit court of the United States which does not have jurisdiction to determine the question of title to the land in dispute, or of the right of possession thereof.
4. Plaintiffs who elect to assert a joint claim and title with other persons, and recover a joint judgment for their undivided interests, cannot, when there is no Federal question involved, support jurisdiction of a circuit court of the United States on the ground that they are not citizens of the same state as the defendant, when such jurisdiction cannot be sustained on that ground with respect to their coplaintiffs.

[No. 95.]

*Argued and Submitted December 22, 1899.
Decided February 26, 1900.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming a decision of the Circuit Court in favor of the plaintiff in an action of ejectment. *Reversed*, with directions to dismiss the action for want of jurisdiction.

See same case below, 59 U. S. App. 189, 87 Fed. Rep. 369, 31 C. C. A. 9.

Statement by Mr. Justice Shiras:

In the circuit court of the United States for the southern district of Florida, William J. Bell, John W. Bell, Frank A. Bell, citizens of the state of Texas; E. A. Bell, Matilda P. Feihe, all heirs of and children of Louis Bell, deceased, late of Hillsborough county, state of Florida; and George A. Bell and Simon Bell, heirs of and grandchildren of said Louis Bell; and Anton Feihe, husband of said Matilda P. Feihe, brought an action of ejectment against the Florida Central & Peninsular Railroad Company, a corporation of the state of Florida, seeking to recover possession of about 7 acres of land in Hillsborough county, Florida, alleged to be of the value of \$30,000, and damages in the sum or \$10,000. The declaration alleged that the land in controversy was occupied by defendant as its roadbed and right of way, and that the plaintiffs claimed title to said land under and by virtue of a patent granted by the United States *to said Louis Bell and his heirs upon [322] a pre-emption claim filed in the local land office of the United States in 1883, and upon appeal to the General Land Office, and upon and from an appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior of the said United States, when by the order of the said

[321]*FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, Plff. in Err.,
v.

WILLIAM J. BELL, John W. Bell, *et al.*

(See S. C. Reporter's ed. 321-335.)

Appeal—Federal question—conflict between patent for lands and claim under act of Congress—jurisdiction of circuit court—on question of mesne profits—jurisdiction on ground of citizenship—joinder of plaintiffs from different states.

1. Judgment of the circuit court of appeals

NOTE.—As to diverse citizenship as ground of Federal jurisdiction.—see notes to *Seddon v. Virginia, T. & C. Steel & Iron Co.* (C. C. W. D. Va.) 1 L. R. A. 108; *Myers v. Murray* (C. C. S. D. Iowa) 11 L. R. A. 216; *Roberts v. Lewis*, 36 L. ed. U. S. 579; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298, and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 479.

As to what is a final decree or judgment from which appeal lies.—see note to *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

As to Federal questions as conferring jurisdiction on United States courts.—see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 7.

Secretary the said patent was granted. The declaration further alleged that, in the proceedings in the Land Department, the defendant claimed and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to said Louis Bell and his heirs, and that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to said land under and by virtue of the said patent, and at the same time claimed that under the laws of the United States, and especially under and by virtue of the 1st section of an act of Congress entitled "An Act Granting Public Lands in Alternate Sections to the States of Florida and Alabama to Aid in the Construction of Certain Railroads in Said States," approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said land was a part of that tract of land which constituted at one time a military reservation, known as the Fort Brook Military Reservation at Tampa, state of Florida. And the plaintiffs further alleged in their declaration that after the passage of an act of Congress entitled "An Act to Provide for the Disposal of Abandoned and Useless Military Reservations," approved July 5, 1885, they contended for and claimed title and a patent to said parcel of land, under and by virtue of the 1st proviso of the 2d section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior; and that the defendant appeared in both of the said offices, by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to a patent or title to said

[323] parcel of land under the *said proviso of said act of Congress, and, at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in possession thereof, under and by virtue of the 3d proviso of the aforesaid act of Congress approved May 17, 1856.

This declaration was filed on December 29, 1896, and on January 4, 1897, the defendant appeared and filed a plea of not guilty.

On February 4, 1897, the defendant, after notice to the plaintiffs, asked leave to file further and special pleas denying that the court had jurisdiction of the action, denying that the defendant claimed title under the act of May 17, 1856, or under any other act of Congress or law of the United States, and alleging the pendency of a prior suit in equity between the same parties in the circuit court of the United States, and also the pendency in the circuit court of the sixth judicial circuit of the state of Florida, of a petition and proceeding by the defendant to condemn the land in dispute under its right of eminent domain under the laws of the state of Florida.

Thereafter, on February 18, 1897, the court made the following order:

"This cause coming on to be heard upon
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the motion of the defendant for leave to file additional pleas, and upon the motion of the plaintiffs to transfer the cause to Tampa for trial, and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied, and that the order to transfer the cause for trial be granted, and that this order be without prejudice to any motion for a stay of an enforcement possession under any judgment which may be recovered on account of condemnation proceedings."

On February 10, 1897, the defendant moved for a continuance, which motion was on February 18 denied.

On March 5, 1897, the defendant moved the court to "dismiss the cause, for the reason that there is nothing on the face *of the[324] declaration to show that this court has jurisdiction to hear and determine the said cause."

On March 11, 1897, after a consideration of this motion to dismiss, it was ordered in open court that said motion be dismissed. On the same day an agreement, signed by the attorneys of the respective parties, to waive a jury and that the cause might be tried by the court, was filed.

The cause was so proceeded in that on March 23, 1897, the court found that the plaintiffs were entitled to possession and have a fee-simple title in and to the land in dispute, and assessed their damages in loss of rent and profit in the sum of \$1,955, and entered a judgment as follows:

"It is considered by the court that the plaintiffs herein, William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe, and George A. Bell, and Simon Bell, do receive and recover from the defendant, the Florida Central & Peninsular Railroad Company, the sum of \$1,955, as well as for costs in this behalf; and it is further considered that said plaintiffs have a fee-simple title in and to the lands and premises described as follows, to wit," etc.

On April 10, 1897, the defendant moved the court for a writ of error and a citation to review the judgment in said cause, returnable to the United States circuit court of appeals, and for a supersedeas of the said judgment upon filing a bond. On the same day the writ of error was allowed, and it was ordered that, on the defendant filing a bond with sufficient sureties in the sum of \$3,500, to be approved by the court or by the clerk thereof, the said writ should operate as a supersedeas of the judgment in said cause. A bond was approved and filed accordingly.

On May 24, 1898, the circuit court of appeals affirmed the judgment of the circuit court. 59 U. S. App. 189, 87 Fed. Rep. 369, 31 C. C. A. 9.

And thereupon, on June 2, 1898, a writ of error from this court was allowed.

Mr. J. C. Cooper argued the cause and, with Mr. J. A. Henderson, filed a brief for plaintiff in error:

Where a case arises under the laws of the
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United States, and on that ground jurisdiction is assumed by the court below, a writ of error will lie from the United States Supreme Court to the United States circuit court of appeals to review a judgment of the latter court.

Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 57, 18 Sup. Ct. Rep. 794.

In a case involving the question of jurisdiction with other questions, the defeated party may prosecute a writ of error to the United States circuit court of appeals, and there contest all the questions in the case, or such party may prosecute a writ of error directly to the United States Supreme Court to review the question of jurisdiction alone; and on such writ of error the United States Supreme Court will review all questions involved.

Scott v. Donald, 165 U. S. 73, 41 L. ed. 633, 17 Sup. Ct. Rep. 265; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Carey v. Houston & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

The fact that plaintiffs claim title by virtue of a patent from the United States does not raise a Federal question, and does not confer jurisdiction.

Romic v. Casanova, 91 U. S. 379, 23 L. ed. 374; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Trafton v. Nougues*, 4 Sawy. 178, Fed. Cas. No. 14,134; *Theurkauf v. Ireland*, 27 Fed. Rep. 769; *Murray v. Bluebird Min. Co.* 45 Fed. Rep. 386; *Blue Bird Min. Co. v. Largey*, 49 Fed. Rep. 289; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

A statement by plaintiffs of defendant's claim of title does not make a case of Federal jurisdiction.

Tennessee v. Union & P. Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Florida v. Charlotte Harbor Phosphate Co.* 41 U. S. App. 405, 74 Fed. Rep. 578, 20 C. C. A. 538; *Wabash R. Co. v. Barbour*, 43 U. S. App. 102, 73 Fed. Rep. 513, 19 C. C. A. 546.

Unless a question of jurisdiction is made on the face of the declaration it shall be dismissed on motion.

Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Central R. Co. v. Mills*, 113 U. S. 249, 29 L. ed. 949, 5 Sup. Ct. Rep. 456; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 93 Fed. Rep. 274, 35 C. C. A. 1.

Where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that the jurisdiction may be inferred argumentatively under

averments on the pleadings, but the averments should be positive. The exact question of construction must be stated.

Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Iowa v. Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 391, 4 Inters. Com. Rep. 425; *Manhattan R. Co. v. New York*, 18 Fed. Rep. 195.

Even if the complaint, standing by itself, made out a case of jurisdiction by reason of the averments as to what the defenses would be, these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied upon.

Robinson v. Anderson, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011; *Southern P. R. Co. v. Whittaker*, 47 Fed. Rep. 529; *Stayton Min. Co. v. Woody*, 50 Fed. Rep. 633.

Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or be liable to be sued in the courts of the United States.

Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. ed. 435; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Case of Sewing Mach. Cos.* 18 Wall. 553, *sub nom. Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.* 21 L. ed. 914; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010.

If there are several coplaintiffs, each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained.

Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. ed. 179; *Korns v. Atlantic & O. R. Co.* 10 Fed. Rep. 309.

Mr. William Wirt Howe filed a supplemental brief for plaintiff in error.

Mr. H. Bisbee submitted the cause for defendant in error:

Where plaintiff claims title directly under a patent from the United States, and defendant denies such title, the case is within the jurisdiction of the court.

Pierce v. Molliken, 78 Fed. Rep. 196; *Evans v. Durango Land & Coal Co.* 49 U. S. App. 320, 80 Fed. Rep. 433, 25 C. C. A. 531; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728.

The precise question that there was jurisdiction, both on the ground that plaintiffs claimed directly under a patent against defendant, denying their title upon a plea of not guilty, and on the ground of claiming mesne profits under the laws of the United States prior to the issue of the patent, has been settled by this court.

Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728.

*Mr. Justice Shiras delivered the opinion of the court:

Our first inquiry is whether this court has

jurisdiction to review the judgment of the circuit court of appeals. The writ of error in this case was brought under § 6 of the judiciary act of March 3, 1891. If the judgment of the circuit court of appeals was final, under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the circuit court was not dependent solely upon the opposite parties being citizens of different states. *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

This question must be answered upon an inspection of the declaration of the plaintiffs in the circuit court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different states, or because the case was alleged to be one arising under the Constitution, laws, or treaties of the United States?

The action was in ejectment to recover possession of a tract of land in Hillsborough county, state of Florida. The plaintiffs were eight in number, three of whom were alleged to be citizens of the state of Texas, and there was no allegation as to the citizenship of the other five. The defendant, the Florida Central & Peninsular Railroad Company, was alleged to be a corporation organized and existing under the laws of Florida. Hence, upon the face of the declaration, the jurisdiction of the circuit court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. The declaration, however, alleges that the plaintiffs claim title to the land in dispute by virtue of a patent granted to their ancestor by the government of the United States; that the defendant claimed title under the 1st section of an act of Congress entitled "An Act Granting Public Lands in Alternate Sections to the States of Florida and Alabama, to Aid in the Construction of Certain Railroads in said States," approved May 17, 1856; and, further, that the defendant railroad company claimed and insisted that it was entitled to locate and maintain the route of its road through the land in question under said act of Congress.

Accordingly, it appears that the theory of the plaintiffs in bringing their suit in the circuit court of the United States was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States. This was the view of the judge who tried the case in the circuit court, as he refused to grant the defendant's motion to dismiss for want of jurisdiction, and this view was also taken by the circuit court of appeals, as appears in the following passage of its opinion:

"There is no effort in this case to found the jurisdiction of the court on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of

the circuit court entertained jurisdiction of the case on that ground. The declaration shows that in the pre-emption claim by the ancestor of the defendants in error to the land involved the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before the different officers of the Land Department. It shows that under a named act of Congress (act of May 17, 1856, 11 Stat. at L. 15, chap. 31) the defendant claimed the right to occupy the land in question in the manner in which it was occupying it, without accountability to the defendants in error. . . . So that, independently of the claim for mesne profits for the time transpiring between the pre-emption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the circuit court."

As, then, the plaintiffs in the circuit court claimed in their declaration that the controversy was one that turned on a construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the circuit court of appeals was final because the jurisdiction of the circuit court was dependent entirely upon the opposite parties being citizens of different states. [327]

Nor do we find merit in a second ground urged to maintain the motion to dismiss; namely, that the action was in ejectment; that the defendant admitted of record that it had no title; and that therefore the only question it could raise was one of jurisdiction. An inspection of the defendant's answer shows that, while it did disclaim title under the act of Congress, it claimed a right of possession on other grounds, with respect to which it had a right to be heard, if indeed the circuit court had jurisdiction.

We come to the case, then, as one in which we have a right to supervise the judgment of the circuit court of appeals. And the first question, and indeed, as we read the record, the only one we have to meet, is whether the circuit court had jurisdiction of the case. Not having, as we have seen, jurisdiction because of a controversy between citizens of different states, did it have jurisdiction because the case was one arising under the Constitution or laws of the United States? This question was answered affirmatively in both courts below, and this because, as it seemed to them, the plaintiff's declaration disclosed such a case.

It must be regarded as conclusively established by our decisions that the jurisdiction of the circuit court must appear in the plaintiff's statement of their case.

"Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit was one of

which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon [328]*its own inspection of the pleading, must dismiss the suit, just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and, if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind." *Metcalf v. Watertown*, 128 U. S. 588, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

We do not, however, understand that these cases are questioned by the defendants in error, but their contention is that in the plaintiff's declaration it did sufficiently appear that a Federal question was necessarily involved, upon the solution of which the determination of the case depended.

The paragraph of the declaration which sets forth the plaintiffs' claim is as follows:

"The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and prosecuted by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the General Land Office of the government, and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the Secretary of the Interior of the United States, the said heirs prosecuted the pre-emption claim, until by the order and decision of the said Secretary the said patent was granted."

In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs under and by virtue of a patent [329]granted by the United States, presents *no question which, of itself, confers jurisdiction on a circuit court of the United States. *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, ante, 276, 20 Sup. Ct. Rep. 222.

But it seems to be thought that, by alleging that the defendant claimed and contended in the Land Department that the plaintiffs were not entitled under any of the laws of the United States to have a patent granted to them, and that the defendant at the time of the commencement of this suit claimed and insisted that the plaintiffs derived no title

to the said land under and by virtue of the said patent, and at said time claimed that under the laws of the United States, and especially under and by virtue of the 1st section of an act of Congress entitled "An Act Granting Public Lands in Alternate Sections to the States of Florida and Alabama, to Aid in the Construction of Railroads in said States," approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said § 8 was a part of that tract of land which constituted at one time a military reservation known as the Fort Brooke Military Reservation, at Tampa, state of Florida,—there was presented a question needing for its solution a construction of laws of the United States.

It is obvious that all that is added by these allegations to the plaintiffs' statement of their own claim is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of the declaration, the source of the defendant's title, but it could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a Federal question, cannot create jurisdiction in a circuit court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States.

*Thus, in *Tennessee v. Union & P. Bank*, [330] 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654, Mr. Justice Gray, after citing *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173, and other cases, said:

"In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. In the first and second bills the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws." *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869.

And even if it could be held that, by anticipating a supposed defense, a Federal question might be made to appear to be involved in the controversy, jurisdiction in the cir-

cuit court would fail if, on the coming in of the plea or answer, the defense would turn out to be based on matter wholly independent of the Constitution or any law of the United States, and it would be the clear duty of the court to dismiss the suit for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction of that court."

So it was held in *Robinson v. Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011, where an order of the circuit court dismissing the case was affirmed, this court saying, through Mr. Chief Justice Waite:

[331] "Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there were jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiff would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were *relied on. The circuit court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made 'for the purpose of creating a case,' cognizable by the circuit court, when none in fact existed."

Such observations are directly applicable to the present case, for the defendant, in its plea to the jurisdiction of the court, explicitly admitted the plaintiffs' title to the land under the patent, and denied that the defendant claimed title to the land in dispute under the act of May 17, 1856, or under any other act of Congress, but placed its defense, by way of confession and avoidance, on totally different grounds than those mentioned in the declaration, and which involved no construction or application of the Constitution or laws of the United States.

It is contended, however, that, whether or not the circuit court had jurisdiction to determine the question of title to the land in dispute, or of the right of possession thereof, the plaintiffs' demand to recover mesne profits accruing between the pre-emption entry and the issuance of the patent presented a question within the jurisdiction of that court. It is not easy to perceive why, if the circuit court did not possess jurisdiction to decide the right of possession, it could have jurisdiction to pass upon the question of mesne profits, the right to recover which would depend on the right of possession.

In affirming this view of the case the circuit court of appeals cites *Evans v. Durango Land & Coal Co.* 49 U. S. App. 320, 80 Fed. Rep. 433, 25 C. C. A. 531. That was a case where the circuit court of appeals of the eighth circuit held that the inquiry as to the right of the plaintiff to recover mesne profits accruing while the alleged contest was depending and undetermined in the General

Land Office involved an examination and construction of the laws of the United States. The case was brought to this court, but was dismissed on stipulation of the *parties. The report of the case does not disclose whether there was really a controversy between the parties respecting the construction of the land laws of the United States. What really seems to have been involved, in respect to mesne profits, was whether the doctrine of relation, which is a common-law doctrine, would enable the plaintiff, after having established his title, to recover the mesne profits which accrued while the plaintiff was wrongfully excluded from possession. Such a question would not seem to be a Federal one, but one incidental to the determination of the principal controversy concerning the right of possession.

At all events, there is nothing disclosed in the declaration in the present case showing that, so far as the damages and mesne profits are concerned, any Federal question was presented. If the circuit court had jurisdiction to determine the right of possession, and, in the exercise of that jurisdiction, decided in the plaintiffs' favor, the incidental question of the time when damages and profits would accrue to the plaintiffs would legitimately arise. But if that court had not jurisdiction to determine the controversy as to the right of possession, it could not draw to itself the jurisdiction of the case by considering what the consequences would be if the plaintiffs were permitted to recover possession.

Apart from the question of jurisdiction arising from the presence of any Federal question, can it be said that jurisdiction did attach in respect to those plaintiffs who were alleged to be citizens of Texas?

As we have seen, neither of the courts below were of that opinion. The judgment of the circuit court was in favor of all the plaintiffs jointly for the entire tract in dispute, and, in so doing, followed the plaintiffs' claim in their declaration, wherein they claimed title to the whole tract as belonging to them jointly. They did not allege that they were tenants in common, although in the findings the court found that the respective plaintiffs held undivided interests in the land.

In *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435, it was said:

"Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, *in the circuit courts. But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue or liable to be sued, in the courts of the United States."

New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44, was the case of a possessory action brought by the heirs of Elisha Winter, deceased, to recover the possession and property of certain lands in the city of New Orleans. One of the petitioners was described in the record as a citizen of the state of Kentucky, and the other as a citizen of the territory of Mississippi. The plaintiffs recovered a judgment in the circuit court, but this

judgment was reversed by this court, Chief Justice Marshall saying:

"Gabriel Winter, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his ease mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge v. Curtiss* it was decided that where a joint interest is prosecuted the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The circuit court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must on that account be reversed, and the petition dismissed."

In *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825, it was held that part owners or tenants in common in real estate of which partition is asked in equity have an interest in the subject-matter of the suit and in the relief sought, so intimately connected with that of their cotenants that if these cannot be subjected to the jurisdiction of the court the bill will be dismissed.

Hooc v. Jamieson, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596, was an action of ejectment brought in the circuit court of the United States for the western district of Wisconsin, by a complaint in which the plaintiffs alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the state of Wisconsin. Defendants moved to dismiss the action on the ground that the circuit court had no jurisdiction, as the controversy was not between citizens of different states. The circuit court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the state of Minnesota, and that each was the owner of an undivided one fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied, and the action dismissed. Plaintiff sued out a writ of error, and the circuit court certified to this court these questions of jurisdiction: First. Whether or not said complaint set forth any cause of action in which there is a controversy between citizens of different states, so as to give said circuit court jurisdiction thereof. Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different states, so as to give said circuit court jurisdiction thereof. This court held, through Mr. Chief Justice Fuller, after

reviewing the cases, that the voluntary joinder of the parties had the same effect for purposes of jurisdiction as if they had been compelled to unite; that as no application was made to discontinue as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota, jurisdiction as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. Accordingly the judgment of the circuit court was reversed.

As, then, in the present case the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a *joint judgment for their undivided interests therein, and as the plaintiffs' declaration discloses no Federal question, the principles of the cited cases apply, and compel a dismissal of the suit for want of jurisdiction in the circuit court. [335]

This conclusion withdraws from our consideration the errors assigned to the action of the courts below in respect to the defendant's several pleas of *lis pendens*.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to dismiss the action for want of jurisdiction.

ADIRONDACK RAILWAY COMPANY,
Plff. in Err.,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 335-350.)

Vested right of railway company to condemn lands—effect of filing map—impairment of obligation of contract.

A railroad company's right to take lands by eminent domain, so long as it is unexecuted except by merely filing a map of a proposed route, is not vested so as to make the condemnation of the land by the state for other purposes operate as an impairment of the obligation of the contract with the railroad company, when the company was organized under general statutes which provided for the alteration, amendment, or repeal of corporate charters.

[No. 439.]

Argued January 15, 16, 1900. Decided February 26, 1900.

IN ERROR to the Court of Appeals of the State of New York to review a decision affirming a judgment which reversed that of the Appellate Division and affirmed the original judgment in favor of the People of the State enjoining condemnation proceedings by a railroad company. *Affirmed*. See same case below, 160 N. Y. 225, 54 N. E. 689.

Statement by Mr. Chief Justice Fuller:
*This is a writ of error to a judgment of [336]
176 U. S.

the court of appeals of the state of New York affirming a final judgment of the supreme court of New York perpetually enjoining the Adirondack Railway Company from taking certain lands by condemnation proceedings. The People of the State of New York brought the action, and obtained judgment at a special term of the supreme court, which was reversed by the appellate division, 39 App. Div. 34, 56 N. Y. Supp. 869, whose order was in turn reversed by the court of appeals, and the original judgment affirmed. 160 N. Y. 225, 54 N. E. 689.

The case is thus stated in the opinion of the court of appeals by Vann, J.:

"In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the river St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the Laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the Laws of 1890, to relieve it from the statutory obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North creek through the counties of Warren, Hamilton, and Essex, to the outlet of Long lake in Hamilton county, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence river. Before anything further was done to extend the road, certain action, taken by the state, should be briefly alluded to.

[337] "In 1885 the forest preserve was created by statute, embracing "all the lands now owned, or which may be hereafter acquired, by the state of New York within' certain counties, and the area was extended by subsequent legislation. Laws 1885, chap. 283; Laws 1887, chap. 639; Laws 1893, chap. 332. These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased, or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

"In 1890 the forest commission was authorized to 'purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park,' and in 1892 the Adirondack park was established and placed under the control

of said commission. Laws 1890, chap. 37; Laws 1892, chap. 707.

"The revised Constitution, which went into effect on the 1st of January, 1895, provides that 'the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed.' Const. art. 7, § 7.

"In 1895 the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game, and forest law, and it was declared by § 290 that 'such park shall be forever reserved, maintained, and cared for as ground open for the free use of all the people for their health and pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply; and shall remain part of the forest preserve.' Laws 1895, chap. 395, §§ 270, 295. During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. Laws 1895, chap. 561. In 1897 an act was passed, the object of which, according to its title, was 'to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor.' Laws 1897, chap. 220. By this act the appointment 'of a forest preserve [338] board was authorized, and it was made its duty 'to acquire for the state, by purchase or otherwise, land, structures, or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game, and forest law, as it may deem advisable for the interests of the state.' Section 3 of said act provides that 'the forest preserve board may enter on and take possession of any land, structures, and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in § 290 of the fisheries, game, and forest law, and in § 7 of article 7 of the Constitution.' It is provided by the next section that 'upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board, or a majority thereof, shall indorse on such description a certificate stating that the lands described therein have been appropriated by the state for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry

upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state. § 4. Provision is made by the next section for the payment for lands so taken, and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the state treasurer upon the warrant of the comptroller. § 5. If the forest preserve board is unable to agree with the owner upon

[339] *the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the court of claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable by the treasurer upon the warrant of the comptroller. § 6. No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered, and it appears that there is a lien or encumbrance upon the property appropriated, the amount thereof shall be stated in the judgment, and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the person entitled to the same as directed by the judgment. § 19. The sum of \$600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow \$400,000 more upon the request of the forest preserve board to be expended under its direction.

"On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of \$149,000, of which \$99,000 was for the land and \$50,000 was for certain improvements at Indian lake for the use of the state, to be made in accordance with the plans and specifications to be furnished by the state engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, 'wholly within the bounds of the forest preserve and also of the Adirondack park.' Upon the 15th of August, 1897, a representative of the state engineer with a surveying party began surveying at Indian lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain canal and for water power on the Hudson river. Upon the completion of the survey plans and specifications were prepared and the construction of the dam was commenced.

[340] "September 18, 1897, the defendant caused a map and profile *to be filed in the counties of Hamilton, Warren, and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in

each of said three counties. It also gave notice of such filing to the occupants as required by statute, but did nothing else. About the 1st of October following, as the owners were about to convey to the state the lands covered by the resolution of August 6, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed in escrow to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the \$99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and, learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The state engineer having furnished a description in writing of the 6-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: 'State of New York, county of Albany, city of Albany, ss. We, Timothy L. Woodruff, Charles H. Babcock, and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the state of New York, being chapter 220 of the Laws of 1897, entitled "An Act to Provide for the Acquisition of Land in the Territory Embraced in the Adirondack Park and Making an Appropriation Therefor," do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex, and Warren, of the state of New York, described in the foregoing certificate of the state engineer, have been and hereby are *duly appro-[341] priated by the state of New York for the purpose of making them a part of the Adirondack park.' These papers, indorsed 'State engineer's certificate and description and forest preserve board's certificate of condemnation,' were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchelon, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but, as the special term is also presumed to have found, they did not file the *lis pendens* until afternoon, and hence not until after the aforesaid proceeding in behalf of the state had been completed. No notice of condemnation was served on the defendant.

"On the 2d of March, 1898, the injunction restraining the conveyance of said lands to the state was reversed on appeal by the appellate division, and thereupon the original deed in escrow was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

"The defendant alone answered, and after a trial the special term rendered judgment for the people, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the company, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the state of New York. The people have appealed to this court, giving the usual stipulation for judgment absolute."

Mr. R. Burnham Moffat argued the cause and filed a brief for plaintiff in error:

The authority and right granted the old Adirondack Company to construct its road to a point on the St. Lawrence river upon complying with the provisions of the railroad law was a valid franchise or grant by the state, having all the obligatory force of a contract, and is a property right of value.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 365, 25 L. ed. 187; *Pierce v. Emery*, 32 N. H. 484; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Hall v. Sullivan R. Co.* Brunner, Coll. Cas. 613, Fed. Cas. No. 5,948; *New Orleans, S. Fort & Lake R. Co. v. Delamore*, 114 U. S. 508, 29 L. ed. 247, 5 Sup. Ct. Rep. 1009; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 378, 20 L. ed. 611; *Farrington v. Tennessee*, 95 U. S. 683, 24 L. ed. 559; *Georgia P. R. Co. v. Wilks*, 86 Ala. 482, 6 So. 34; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *State ex rel. Prosecuting Atty. v. Commercial Bank*, 10 Ohio, 535.

The decision in *Re Washington Park Comrs.* 56 N. Y. 144, 147, relied on by adverse counsel, that until final confirmation of the report of commissioners of appraisal the owners of land taken for a public use have no vested interest in the damages assessed, or to be assessed, is a very different proposition from saying that the right of a corporation under legislative grant to acquire by exercise of the right of eminent domain a right of way over lands between specified termini is in no sense a property right, and can be cut off by the legislature at will and without compensation.

On the expiration of fifteen days after the plaintiff in error had filed its maps and profiles and served notice of such filing upon the occupants of the land over which it had located its route, no application having been made by any party to change such location, it was vested with a completed right of action to condemn that land for the purposes of its right of way, and no transfer of

such land to any person or to the state could free it from a liability to be so condemned.

Rochester H. & L. R. Co. v. New York, L. E. & W. R. Co. 110 N. Y. 128, 17 N. E. 680; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525; *Poconico Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246.

Assuming that the right acquired is a lien, the case of *Watson v. New York C. R. Co.* 47 N. Y. 157, is not in point. It is an authority simply for the proposition that the legislature has the power to change a given remedy, so long as it does not take away all remedy or impair or destroy the right. It is distinguishable at once from the case at bar, where taking away the statutory lien upon the 6-foot strip deprives the plaintiff in error for all time of its vested right to continue the construction of its line of railroad.

The distinction between an act which affects merely a remedy, and one which destroys the very right itself, has been carefully preserved in a long line of decisions in this court.

Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; *Edwards v. Kearney*, 96 U. S. 604, 24 L. ed. 797; *Planters' Bank v. Sharp*, 8 How. 301, 12 L. ed. 447; *Green v. Biddle*, 6 Wheat. 1, 5 L. ed. 547; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Antoni v. Greenhow*, 107 U. S. 775, 27 L. ed. 471, 2 Sup. Ct. Rep. 91; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 170, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Brine v. Hartford F. Ins. Co.* 96 U. S. 637, 24 L. ed. 862.

From the side of the railroad it is apparent that the statute gave and was intended to give an exclusive vested right to construct, maintain, and operate its railroad over the land so designated.

Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. 27 Fed. Rep. 770; *Davis v. Titusville & O. C. R. Co.* 114 Pa. 308, 6 Atl. 736; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 468, 25 L. ed. 438; *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 635.

No question is here involved of the binding effect upon this court of the decisions of the state courts of New York.

Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Norton v. Shelby County*, 118 U. S. 440, 30 L. ed. 185, 6 Sup. Ct. Rep. 1121; *Butz v. Muscatine*, 8 Wall. 582, sub nom. *United States ex rel. Butz v. Muscatine*, 19 L. ed. 493; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Pease v. Peck*, 18 How. 599, 15 L. ed. 520; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 257, 27 L. ed. 926, 3 Sup. Ct. Rep. 193.

Nor will this court accept as conclusive a decision of the state court after the rights of the parties have become fixed.

East Alabama R. Co. v. Doe ex dem. Visscher, 114 U. S. 353, 29 L. ed. 141, 5 Sup. Ct.

Rep. 869; *Buncombe County Comrs. v. Tommey*, 115 U. S. 127, 29 L. ed. 306, 5 Sup. Ct. Rep. 626, 1186; *Anderson v. Santa Anna*, 116 U. S. 362, 29 L. ed. 635, 6 Sup. Ct. Rep. 413; *Bolles v. Brimfield*, 120 U. S. 763, 30 L. ed. 788, 7 Sup. Ct. Rep. 736; *German Sav. Bank v. Franklin County*, 128 U. S. 538, 32 L. ed. 524, 9 Sup. Ct. Rep. 159; *Folsom v. Ninety Six Twp.* 159 U. S. 626, 40 L. ed. 283, 16 Sup. Ct. Rep. 174.

A single decision of the highest court of a state, even when construing the words in a deed or will, and so affecting title to real estate, is not conclusive upon this court, but only when these words have by a series of decisions become a settled rule of property.

Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 100, 41 L. ed. 933, 17 Sup. Ct. Rep. 488.

The state cannot deprive the plaintiff in error of its vested property rights under any pretended exercise of the reserved power; nor in any other way except by a direct taking upon a lawful exercise of one of its sovereign powers.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Morawetz, Corp.* § 1096; *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Shields v. Ohio*, 95 U. S. 324, 24 L. ed. 359; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 451, 6 Am. Rep. 247; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Com. v. Essex Co.* 13 Gray. 239; *St. Louis, I. M. & St. P. R. Co. v. Paul*, 173 U. S. 408, 43 L. ed. 748, 19 Sup. Ct. Rep. 419; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610.

The constitutional provision that alllands within the limits of the forest preserve, then owned or thereafter acquired by the state, should be forever kept as wild forest lands, and should not be leased, sold, or exchanged, or be taken by any corporation, public or private, and that the timber thereon should not be removed or destroyed,—cannot defeat or impair the obligation of the state to this plaintiff in error.

Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610; *Edwards v. Kearzey*, 96 U. S. 604, 24 L. ed. 797; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212.

The legislature may prescribe the kind of notice and the mode in which it shall be made, but cannot dispense with all notice.

Scott v. Toledo, 36 Fed. Rep. 397, 1 L. R. A. 688.

This court has invariably held that due process of law requires a hearing before it shall finally condemn.

McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Huling v. Kaw Valley L.*

& Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 406, 25 L. ed. 207; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Kentucky Railroad Tax Cases*, 115 U. S. 332, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 417, 6 Sup. Ct. Rep. 57; *State Railroad Tax Cases*, 92 U. S. 575, sub nom. *Taylor v. Secor*, 23 L. ed. 663; *Spencer v. Merchant*, 125 U. S. 356, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Williams v. Albany Supers.* 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; *Pittsburgh, C. C. & St. L. R. Co. v. Baekus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Holden v. Hardy*, 169 U. S. 389, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Bellingham Bay & B. C. R. Co. v. New Whatecom*, 172 U. S. 318, 43 L. ed. 461, 19 Sup. Ct. Rep. 205; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

And the law is really the same in New York.

Rensselaer & S. R. Co. v. Davis, 43 N. Y. 146; *People ex rel. Witherbee v. Essex County Supers.* 70 N. Y. 234; *People v. Turner*, 117 N. Y. 236, 22 N. E. 1022.

Mr. Edward Winslow Paige argued the cause and filed a brief for defendant in error:

The license to exercise the right of eminent domain will not be given except by plain, unambiguous words.

Re Poughkeepsie Bridge Co. 108 N. Y. 483, 15 N. E. 601; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Re Boston & A. R. Co.* 53 N. Y. 574.

If § 6 of the railroad law by the filing of the map and the expiration of fifteen days makes a lien upon the land, then it is unconstitutional and void because it takes private property without notice; *i. e.*, without due process of law.

Kentucky Railroad Tax Cases, 115 U. S. 331, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 416, 6 Sup. Ct. Rep. 57.

The filing of the map only proposed the location, and the location was made only by the expiration of the fifteen days or the final determination of the commissioners or the court, and until then the railroad company could not begin proceedings to take land by the right of eminent domain.

Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 110 N. Y. 128, 17 N. E. 680; *Re Long Island R. Co.* 45 N. Y. 364; *People ex rel. Erie & G. Valley R. Co. v. Tubbs*, 49 N. Y. 356; *Re Washington Park Comrs.* 56 N. Y. 144; *Wallkill Valley R. Co. v. Norton*, 12 Abb. Pr. N. S. 317; *New York & B. R. Co. v. Godwin*, 12 Abb. Pr. N. S. 21, 62 Barb. 85; *Re Niagara Falls & W. R. Co.* 46 Hun, 94; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; *New York C. & H. R.*

R. Co. v. Aldridge, 133 N. Y. 83, 17 L. R. A. 516, 32 N. E. 50; *Archibald v. New York C. & H. R. Co.* 157 N. Y. 574, 52 N. E. 567.

The forest preserve has been made by the state with the deliberate intention of excluding corporations, and particularly railroad corporations, from it.

Re Boston & A. R. Co. 53 N. Y. 574; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525.

The act under which the appropriation was made provides for service upon and compensation to the owner only, and vests the whole title in the state free of all liens, and is, notwithstanding, constitutional.

Watson v. New York C. R. Co. 47 N. Y. 157.

Chapter 220 of the New York Laws of 1897 is constitutional and valid.

Beekman v. Saratoga & S. R. Co. 3 Paige, 45, 22 Am. Dec. 679; *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Bloodgood v. Mohawk & H. Rivers R. Co.* 14 Wend. 51, 18 Wend. 9, 31 Am. Dec. 313; *Sweet v. Rachel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

That the act does not give to the landowner the right to be heard as to whether his land should be taken is a legislative, not a judicial, question.

Re Poughkeepsie Bridge Co. 108 N. Y. 483, 15 N. E. 601; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Bauman v. Ross*, 167 U. S. 574, 42 L. ed. 283, 17 Sup. Ct. Rep. 966; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

[342] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The court of appeals ruled that on the record it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the courts below; that it was to be assumed that the condemnation proceedings instituted by the forest preserve board were fully completed as required by the statute of 1897 before proceedings to condemn on its part were commenced by the railroad company; and that, thereby, if the condemnation act under which the board proceeded was valid, title to the strip of land in question passed to the state, became a part of the forest preserve, and the railroad company was forbidden by the Constitution to take it. The court sustained the validity of the law, and, without discussing "whether the state became the equitable owner through contract, possession, and performance," held that "it became the legal owner through the power of eminent domain."

Plaintiff in error contends, in substance: that it possessed by contract a vested right

to construct its road over the 6-rod strip in question, and to take that strip by the exercise of the power of eminent domain, and that the condemnation features of the act of 1897, as construed by the court of appeals, are void because impairing the obligation of the contract; that the condemnation features of the act as construed to confer authority on the state to acquire, by the proceedings in question, title to the 6-rod strip are unconstitutional and void in that they authorize the taking from plaintiff in error its vested property right to construct, maintain, and operate its railroad over said strip, "without any notice whatsoever or opportunity to be heard, and without the making of any compensation therefor;" that the proceedings authorized by the act of 1897 do not constitute due process of law.

Section 1 of article VIII. of the Constitution of New York authorized the formation of corporations under general laws, and by special act (for municipal purposes and) in cases where in the judgment of the legislature the objects of the corporation *could not[343] be attained under general laws, but provided that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The Adirondack Company was organized in 1863 under the general railroad law of New York of April 2, 1850, which reserved the right of the legislature to "at any time annul or dissolve any incorporation formed under this act."

The Revised Statutes, in force from 1829 to 1882, provided: "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature."

By an act of March 31, 1865, the Adirondack Company was authorized to "amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or river St. Lawrence."

April 25, 1867, the railroad law of April 2, 1850, was amended so as to provide that if corporations formed under the act should not within five years after the filing and recording of its articles of association commence construction or finish its road and put it in operation within ten years, its corporate existence and powers should cease.

In 1882 the railroad of the Adirondack Company extended from Saratoga Springs to North creek, and in that year the Adirondack Railway Company acquired all the rights of the Adirondack Company, and, under the reorganization laws of New York, organized itself with a life of a thousand years.

The 83d section of the railroad law of June 7, 1890, provided as follows [chap. 565]: "A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorgan-

[344] ized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the state shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify, and shall file in their office such certificate, which certificate *shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed or operated or apply to Kings county."

On the 9th of May, 1892, on the application of the Adirondack Railway Company, the board of railroad commissioners issued its certificate, certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North creek, in the county of Warren.

Counsel argue that the contract with the state was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association, or forfeit its existence and powers; that this was one of the conditions of the contract; that it was perfectly competent for the state to release the other party from the fulfilment of such condition without in any way withdrawing its own grant if it chose to do so; and that this was the sole effect of the application for and the obtaining of the certificate. In other words, that the Adirondack Railway Company was released from the obligation to extend its road, but retained the right to do so at any time within nine hundred and ninety years, and that although the company still possessed and operated the road so far as constructed, and had asked and received a dispensation from carrying its enterprise further except as it might choose during the passage of centuries, the state was bound by contract not to withdraw the bare right, notwithstanding the contract, according to its express terms, might be changed or abrogated.

[345] Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation *of the fruits already reduced to possession of contracts lawfully made. But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope. *People ex rel. Schurz v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 498

Rep. 705; *Bank of Commerce v. Tennessee for use of Memphis*, 163 U. S. 424, 41 L. ed. 214, 16 Sup. Ct. Rep. 1113.

But it is said that by the filing of the map across township 15 and the service of its notices, the railroad company so far exerted its capacity to extend and construct as to secure rights in the strip of land which could not be taken at all, or, if so, not without compensation.

The railroad law provided that companies formed under it before constructing any part of their road into or through any county named in their articles of association should make a map and profile of the route intended to be adopted, file the same in the office of the clerk of the county in which the road was to be made, and give written notices to all actual occupants of the route so designated, and that any party feeling aggrieved by the location might within fifteen days after receiving notice apply to a justice of the supreme court, by petition, who could affirm or alter the proposed route in such manner as might be consistent with the just rights of all parties and the public. The Code of Civil Procedure provided for proceedings to be taken to acquire title to real property for a public use by condemnation.

In this case the railroad company filed its map on September 18 and served its notices September 23, 1897. The Forest Preserve Board on August 6, 1897, had accepted an offer by the owners of lands, over which the route was projected, and conveyance thereof was about to be delivered, when on September 30, 1897, an injunction was granted at the suit of the railway company restraining the owners from conveying. The fifteen days for objections to the proposed route prescribed by the railroad law had not then expired. The state condemned October 7, and on the same day, but subsequently, *the [346] company commenced proceedings to condemn under the Code.

The court of appeals held that assuming that the filing of the map created a lien, or something in the nature of a lien, as this was by statute and not by contract, it could be done away with by statute without liability to make compensation, unless some vested right had accrued under it. The court further held that no lien nor any right in the nature of a lien could be created as against the state by the mere filing of a route map under the railroad law; that the filing established no right against the owners, because that would be in violation of the Constitution; and that it established none against the state because the power of the state was paramount. But the court was of opinion that, as against all other railroad companies, and as against all other creatures of the state empowered to use the right of eminent domain, "it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use." And the court said: "The claim that a lien, good as against the creator of the corporation, was placed upon the land

simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no property in a naked railroad route existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

In arriving at these conclusions the court of appeals was construing and applying the laws of the state of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the state impaired the obligation of no contract between it and the railway company.

Counsel concedes that the sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition, and is as indestructible as the state itself; *and "that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power, even that which may already be devoted to a public use."

It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured.

And the constitutionality of the act of 1897 is attacked as authorizing the deprivation of property without due process of law, and the taking thereof without provision for compensation.

The forest preserve was created by an act of May 15, 1885 [chap. 285], and consisted of "all the lands now owned or which may hereafter be acquired by the state of New York" within the counties of Essex, Warren, Hamilton, and other counties.

Section 8 read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." The forest commission was created by the act, and in 1890 was authorized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park," and an appropriation was made for that purpose. By an act of May 20, 1892 [chap. 707], the Adirondack park was established in the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex, and Warren, was made part of the forest preserve, and declared to be "forever reserved, maintained, and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply," and the forest commission was given power to contract for the pur-

chase of land subject to restrictions therein mentioned. Laws on the subject of this park were passed in 1893, 1894, and 1895, and in the latter year a new state Constitution came into effect, of which section 7 of article VII. was as follows: "The lands of the state now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. *They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed."

Then came the act of 1897 [chap. 220] creating the forest preserve board, which was empowered to acquire for the state by purchase or otherwise such "lands, structures, or waters" within the limits of Adirondack park as might be deemed advisable for the interests of the state, and to enter thereon and take possession thereof.

By section 4 it was provided that when the board should have determined to appropriate certain lands, the state engineer should furnish it with an accurate description thereof certified by him to be correct; that a majority of the board should indorse on such description a certificate setting forth that the lands specified had been appropriated by the state for the purpose of making them a part of Adirondack park, which description and certificate should thereupon be filed in the office of the secretary of state; that the board should then serve on the owner of the property so appropriated a notice setting forth the fact of such filing, the date of filing, and a general description thereof; and that "from the time of such service the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state."

Under the 6th section the owner, if unable to agree with the board on the value of the property appropriated or the amount of damages resulting from such appropriation, might within two years after the service upon him of the notice of appropriation, present to the court of claims a claim for the value of the land and for damages, and the court of claims shall have jurisdiction to hear and determine such claims and render judgment thereon, provision being made for the payment of such judgment.

By the 19th section it was provided that when a judgment for damages was rendered, "and it appears that there is *any lien or encumbrance on the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the state may be deposited, to the account of such judgment to be paid and distributed to the persons entitled to the same as directed by the judgment."

The lands taken for the park were thereby dedicated to a public use regarded by the

state as of such vital importance to the people that they were expressly put by the Constitution beyond the reach of any other destination. The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. The state possesses the power as a sovereign, and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the state has acted in the absence of legislation permitting that to be done?

It is true that the state may delegate the power, and where it has done so to a railroad corporation, and by its exercise lands have been subjected to a public use, they cannot be applied to another public use without specific authority, expressed or imperatively implied, to that effect. But the sovereign power of the state cannot be alienated, and where exercised is exclusive.

In this case the use for the park was in itself inconsistent with the use for railroad purposes, and the legislation and the Constitution alike forbade this company to acquire for its use any portion of that which the state had taken for its own exclusive and designated purposes.

Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for (*Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445); and it is the rule in New York that where this is done, and a certain, definite, and adequate source of payment is provided, compensation need not actually be made in advance of a taking [350] by the state or one of its municipal subdivisions. *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Sweet v. Rechel*, 159 U. S. 400, 40 L. ed. 196, 16 Sup. Ct. Rep. 43.

This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and encumbrances. In providing for notice to owners only, the act seems to contemplate that it will appear in the progress of the proceedings to ascertain compensation whether there are outstanding claims, and that such claimants may thereupon come forward and be heard.

We need not discuss the sufficiency of the provision in this respect, since we agree with the court of appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right; and no contract between it and the state was impaired, nor was due process of law denied to it within the meaning of the Constitution of the United States under the circumstances disclosed on this record.

Judgment affirmed.

ANTOINETTE THORMANN, *Plff. in Err.*,
v.

ANDREW J. FRAME and Magdalena Fabacher and Jacob Fabacher, Minors, by D. S. Tullar, Their Guardian *ad litem*.

(See S. C. Reporter's ed. 350-356.)

Judgment of other state—appointing administrator as adjudication of domicile.

The appointment of an administrator in a state where the decedent died and where there are immovable property and effects of the estate does not constitute an adjudication that the decedent was domiciled there at the time of his death, where the court did not make and the letters did not recite any finding as to his domicile.

[No. 341.]

Submitted January 22, 1900. Decided February 26, 1900.

IN ERROR to the Circuit Court of the County of Waukesha, State of Wisconsin, to review a judgment probating a will. On motion to dismiss or affirm. *Affirmed.*

See same case in supreme court of Wisconsin, *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39.

Statement by Mr. Chief Justice Fuller:

*Joseph Fabacher died March 3, 1897, in the [351] city of New Orleans, leaving a last will and testament dated October 29, 1896, in which he described himself as of Waukesha, Wisconsin, where the will was executed, and where he had a residence and a considerable amount of personal property. His widow and ten of his children were named as legatees and devisees. On March 27, 1897, A. J. Frame, appointed executor, presented the will for probate in the county court of Waukesha county, Wisconsin, alleging that it had been duly executed under the laws of Wisconsin, and that Joseph Fabacher was at the time of his decease "an inhabitant of the said county of Waukesha." Publication of the application was made according to law and the matter set for hearing May 4, 1897. On that day Antoinette Thormann, daughter of Fabacher by a prior marriage, appeared and objected to the admission of the instrument to probate, alleging herself to be, under the law of Louisiana, the sole heir of the deceased, and also setting forth matters which, it was contended, would by the law of that state disqualify the beneficiaries named in the will from taking under it, and averring, as to Joseph Fabacher, that "continuously ever since 1843 up to and at the time of his death he, the said deceased, was domiciliated in the city of New Orleans, in the state of Louisiana, and an inhabitant and resident thereof, and that this court has no jurisdiction in the probate of said alleged last will and testament and in the settlement and distribution of said estate of said deceased." She further charged that any attempt on the part of Fabacher to acquire or create a domicile at Waukesha was in fraud of her rights; that the will was procured by undue in-

fluence; and that it was not duly executed in the manner and form required by law. It was conceded that Fabacher's adult children resided in New Orleans, but insisted that the domicil of the minor children was in Wisconsin, and a guardian *ad litem* was appointed as to them. Trial was had in the county court, which held the will in all respects valid; that at the time of his death and some time prior thereto, Joseph Fabacher was domiciled in the county of Waukesha, state of Wisconsin; and that the will was entitled to probate.

[352] The case was then carried to the circuit court of Waukesha *county, and there tried before a jury, who returned a verdict sustaining the will and finding the domicil of Joseph Fabacher at the time of his death, March 3, 1897, to have been at the city of Waukesha, whereupon the circuit court made findings of fact and conclusions of law, and entered judgment admitting the will to probate and affirming the judgment to that effect of the county court. A large amount of testimony was introduced on these trials, and, among other things, it appeared that on March 29, 1897, Antoinette Thormann petitioned the civil district court for the parish of Orleans, Louisiana, to be appointed administratrix of the succession of Joseph Fabacher, her father, asserting that he "was at the time of his death and many years before a citizen of Louisiana, domiciled and residing in the city of New Orleans; that said deceased left property in this city, and within the jurisdiction of this honorable court," and "that your petitioner is the sole surviving heir and legitimate child of said deceased, issue of his marriage with petitioner's mother. . . ." Letters of administration were granted by the court April 30, 1897.

The inventory stated the property of deceased as "one marble tomb in lot situated in St. Joseph cemetery, No. 2, bearing the inscription, 'Family of Joseph Fabacher;' also two (2) galvanized iron sofas and five (5) vases, valued by said appraisers at the sum of thirty-five hundred dollars (\$3,500)." An attempt was made to inventory some household effects, which, however, were claimed as the property of one of the sons.

From the judgment of the circuit court of Waukesha county an appeal was taken to the supreme court of Wisconsin, the judgment affirmed, and the record remanded to the circuit court. 102 Wis. 653, 79 N. W. 39. A writ of error having been sued out from this court, motions to dismiss or affirm were submitted.

Messrs. **E. Howard McCaleb** and **William A. Maury** submitted the cause for plaintiff in error:

The judgment of the Louisiana court is conclusive as to the domicil of the decedent, the right of the petitioner to have administration of the succession, and the intestacy of the decedent, the determination of these questions being fundamental to it, whether a precise issue was taken on any one of them or not.

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2 Black, Judg. § 614, and cases cited in note 547; *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Garrett v. Boeing*, 37 U. S. App. 42, 68 Fed. Rep. 51, 15 C. C. A. 209; *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 523, 7 Sawy. 380, 9 Fed. Rep. 229; *East Tennessee, V. & G. R. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652; *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650; *Duson v. Dupré*, 32 La. Ann. 896; *Grevenberg v. Bradford*, 44 La. Ann. 418, 10 So. 786; *Vinet v. Bres*, 48 La. Ann. 1254, 20 So. 693; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61.

A grant of probate or of administration is not to be questioned anywhere but in the court that made it.

McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325; *Lawrence v. Englesby*, 24 Vt. 42; *Naylor v. Moffatt*, 29 Mo. 126; *Savage v. Benham*, 17 Ala. 119.

The judgment of the Wisconsin court that Joseph Fabacher was domiciled in Waukesha cannot control, because posterior in date to the Louisiana judgment.

Stout v. Lye, 103 U. S. 66, 26 L. ed. 428; *Rogers v. Odell*, 39 N. H. 417; *Low v. Mussey*, 41 Vt. 393; *Peak v. Ligon*, 10 Yerg. 469.

To say that a judgment does not involve a final determination of every matter *in pais* necessary to give the court jurisdiction seems like a solecism, and is irreconcilable with the solemn determinations of this court.

Grignon v. Astor, 2 How. 338, 11 L. ed. 290; *Florentine v. Barton*, 2 Wall. 212, 17 L. ed. 783; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

The cases of *Beckett v. Selover*, 7 Cal. 233, 68 Am. Dec. 237, and *Williamson's Succession*, 3 La. Ann. 261, cited by opposing counsel, were respectively overruled in *Irwin v. Seriber*, 18 Cal. 499 and *Duson v. Dupré*, 32 La. Ann. 896, 898.

Messrs. **Chas. F. Buck**, **D. S. Tullar**, and **T. E. Ryan** submitted the cause for defendant in error:

The domicil of the deceased is not essentially involved in a judgment appointing an administrator, and, if it were jurisdictional, facts are always open to inquiry.

Bigelow, Estop. 3d ed. 227, 235; *Williamson's Succession*, 3 La. Ann. 261; *Freeman*, Judg. §§ 562, 563; *Rohrer*, Inters. Law, p. 107.

Even a judgment probating a will does not determine the domicil of the deceased.

12 Am. & Eng. Ency. of Law, 149.

An adjudication of a foreign court is conclusive only of matters without which the judgment could not have been pronounced.

Bigelow, Estop. 4th ed. p. 187.

A judgment appointing an administrator is absolutely conclusive of nothing except the fact of an appointment, and the appointment can even be collaterally questioned when the jurisdiction of the court is involved.

Williamson's Succession, 3 La. Ann. 261; *Beckett v. Selover*, 7 Cal. 233, 68 Am. Dec.

237; *Garrett v. Boeing*, 37 U. S. App. 42, 68 Fed. Rep. 51, 15 C. C. A. 209; *Fletcher v. McArthur*, 37 U. S. App. 69, 68 Fed. Rep. 65, 15 C. C. A. 224.

An administration by a court of a state of which the deceased was not a resident is an absolute nullity, unless there was property within the jurisdiction of the court.

Fletcher v. McArthur, 37 U. S. App. 69, 68 Fed. Rep. 65, 15 C. C. A. 224; *Christy v. Vest*, 36 Iowa, 285; *Rohrer*, Inters. Law, pp. 249, 332; *Atkinson v. Rogers*, 14 La. Ann. 643.

Mr. D. S. Tullar also filed a brief for the guardian *ad litem*, in support of the motion to dismiss the writ of error.

[353] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The contention is that the issuing of letters of administration to Mrs. Thormann by the civil district court of the parish of Orleans was an adjudication that Fabacher was domiciled in that parish at the time of his death; that Mrs. Thormann was the sole surviving heir; that he died intestate; that this adjudication was in all these respects conclusive against the world; and that the Wisconsin courts in admitting the will to probate did not give to the Louisiana proceedings that full faith and credit to which they were entitled under the Constitution and laws of the United States, and therefore denied a right secured thereby.

But it is objected that no such right was specially set up or claimed in the county and circuit courts, and this would appear to have been so. The Louisiana record was not pleaded, and seems to have been offered and admitted in evidence as tending to throw light on the question of domicile, and not as concluding it. Mrs. Thormann contested that question on the merits, and also denied the validity of the will in respect of its execution, and because of undue influence. As the supreme court was reviewing the decision below for errors committed there, it would ordinarily follow that error could not be predicated on the deprivation of a right which had not been asserted, and perhaps might properly be held to have been waived.

However, while we think that on this record there was color for the motion to dismiss, we shall decline to sustain that motion inasmuch as the supreme court in its opinion considered the particular question here presented, but will dispose of the case on the motion to affirm, as the ruling of that court, so far as open to our examination, is so obviously correct, under the circumstances, that further argument is unnecessary.

The question before us is whether the supreme court deprived Mrs. Thormann of a right secured to her by the Constitution and laws of the United States in holding that her appointment as administratrix of the succession of Joseph *Fabacher was not a conclusive adjudication that Fabacher's domicile was at the time of his death in the parish of Orleans, Louisiana. The court said: "The record of the Louisiana court in evidence merely shows that the contestant was,

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after appropriate proceedings, appointed administratrix of the succession of the deceased, and that the inventory of the estate there presented consisted of the tomb, etc. There was no attempt in that court to adjudicate as to the property situated in Wisconsin, nor as to the domicile of the deceased. That court, it may be conceded, had jurisdiction as to any tangible property actually located in that state. . . . Certainly there was no adjudication in the Louisiana court which precluded the county court of Waukesha county from taking jurisdiction and admitting the will to probate and administering so much of the estate as was actually located in Wisconsin, and this includes the bonds, mortgages, and evidences of debt deposited in the Waukesha bank with the president thereof, who is executor of the will."

Fabacher's property in Wisconsin consisted of movables and immovables. His will was executed in that state in accordance with its laws, and was open to no objection for want of testamentary capacity. But Mrs. Thormann resisted the probate on the ground that the will was invalid by the law of Louisiana, and that that law must be applied in Wisconsin, because Louisiana was, and Wisconsin was not, the domicile of the deceased. We need not go into the rules and their exceptions governing such cases, for the issue as to Fabacher's domicile, raised by Mrs. Thormann in the Wisconsin proceedings to which she made herself a party, was regularly tried at large and determined against her. Nevertheless she contended in the state supreme court that the judgment below was erroneous as matter of law because the question of domicile had been absolutely concluded by her appointment in Louisiana.

Yet the proceeding in Louisiana, instituted, it may be remarked, after the will was presented for probate in Wisconsin, amounted to no more than an *ex parte* application for letters of administration and a grant thereof. Doubtless the destination *of [355] the tomb and accompanying seats and vases was thereby fixed, but not that of property in Wisconsin; nor can the bare appointment be held, on principle or authority, to foreclose inquiry into the fact of domicile in the courts of another sovereignty.

The technical distinction between an original and an ancillary administration is unimportant here.

Whatever the effect of the appointment, it must be as a judgment and operate by way of estoppel. Now a judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment *in personam*, and as a judgment *in rem* it merely determines the right to administer the property within the jurisdiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated.

In this country the general rule is, "that

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administration may be granted in any state or territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased." 1 Woerner on Administration, 2d ed. § 204.

As to successions, the law of Louisiana provides as follows:

"Art. 935. The place of the opening of successions is fixed as follows:

"In the parish where the deceased resided, if he had a fixed domicile or residence in this state.

"In the parish where the deceased owned immovable property, if he had neither domicile nor residence in this state, or in the parish in which it appears by the inventory his principal effects are, if he have effects in different parishes.

"In the parish in which the deceased has died, if he had no fixed residence, nor any immovable effects within this state, at the time of his death."

The order of appointment by the Louisiana court did not make, nor did the letters themselves recite, any finding as to Fabacher's last domicile, and as he died in the parish of

[356] *Orleans, and owned, as contended, immovable property and effects there, such a finding was wholly unnecessary to jurisdiction, and is not to be presumed.

In *DeMora v. Concha*, L. R. 29 Ch. Div. 268, it was held that the decree of a probate court was not conclusive *in rem* as to domicile, although the fact was found therein, because it did not appear that the decree was necessarily based on that finding; and it was doubted whether the findings on which judgments *in rem* are based are in all cases conclusive against the world. The decision was affirmed in the House of Lords, *Concha v. Concha*, L. R. 11 App. Cas. 541. The case is a leading and instructive one, was ably argued, and has been repeatedly followed since the judgment was pronounced.

In *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265, conclusive effect to judgments in probate proceedings in respect of their grounds was denied altogether.

Again, it is thoroughly settled that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction. *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

The point before us is a narrow one, but in any aspect in which it may be considered we are unable to assent to the view that the supreme court of Wisconsin was bound to

treat the proceeding in Louisiana as conclusively determining the question of domicile; and unless it was so bound its decision deprived plaintiff in error of no right secured to her by the Constitution and laws of the United States.

Judgment affirmed.

*CHARLES L. BENEDIOT, Appt., [357]
v.

UNITED STATES.

(See S. C. Reporter's ed. 357-361.)

Salary of judge after resignation—extra pay for holding terms of court.

The salary payable to a judge of the United States district court after his resignation, under U. S. Rev. Stat. § 714, when he has held his commission at least ten years and has reached the age of seventy years, does not include the allowance of \$300 per term provided by U. S. Rev. Stat. § 613, in case of a judge holding terms of the circuit court for the southern district of New York for criminal business, although the judge may, for many years before his resignation, have held every such term.

[No. 435.]

Argued January 15, 1900. Decided February 26, 1900.

ON APPEAL from a decision of the Court of Claims dismissing a petition for an alleged residue of salary due to a judge of the District Court after his resignation. *Affirmed.*

See same case below, 34 Ct. Cl. 388.

Statement by Mr. Justice Brown:

This was a petition by the late district judge for the eastern district of New York, for his retiring salary, under Rev. Stat. § 714, at the rate of \$6,800 per annum, which the petitioner avers was the salary which was by law payable to him during the year previous to his resignation. The petitioner acknowledges the payment of \$5,000 and claims a residue of \$1,800, to which he avers himself to be justly entitled.

Upon hearing the case and upon the consent of parties, the court of claims found the following facts:

"First. The petitioner, Charles L. Benedict, is a citizen of the United States, of lawful age, and resides at Dongan Hills, Staten Island, in the city of New York, and state of New York.

"Second. In the month of April, 1865, the petitioner was duly appointed by the President of the United States judge of the district court of the United States for the eastern district of New York.

"Third. The petitioner duly entered on the duties of his office, and duly performed the same until the year 1897, during which, and on or about the 20th of July, 1897, he resigned his office, having then held his commission as judge of said court for more

than ten years, and having attained the age of seventy and upward.

[358] "Fourth. Since the passage of the act of February 7, 1873, the petitioner has held, under the provisions of that act and the Revised Statutes, to wit, §§ 613 and 658 of the Revised Statutes, the six terms of the circuit court of the United States for the southern district of New York, referred *to in said statutes, in every year, and has received for holding each of said terms the sum of \$300; the same being paid to him by the United States marshal for the southern district of New York, pursuant to §§ 613 and 597, Revised Statutes.

"Fifth. That the same was paid upon a voucher in substance as follows:
(Omitted.)

"The total amount thus paid annually to the plaintiff was \$1,800.

"Sixth. That such payments to the petitioner by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of the courts of the United States.

"Seventh. During the year previous to the petitioner's resignation he received the said \$1,800 for that year, in accordance with the provisions of §§ 613, 597, and 658, Revised Statutes, as above set forth, and also the salary of \$5,000 payable to him as provided by the act of Congress of February 24, 1891 (26 Stat. at L. 783, chap. 287), out of the appropriation to pay the salaries of district judges of the United States.

"Eighth. During the year since his resignation petitioner has only received as salary the sum of \$5,000, which sum has been received by him without prejudice to the claim which he makes in this proceeding.

"Ninth. The petitioner presented to the auditor of the state and other departments a bill for the amount of his salary claimed by him herein to be remaining due and unpaid, and made claim on the auditor for the payment of said bill, but the auditor refused to audit or approve the said bill, and no part of the said \$1,800 has been paid to him."

The petition was dismissed (34 Ct. Cl. 388), and petitioner appealed to this court.

Mr. Robert D. Benedict argued the cause and filed a brief for appellant.

Assistant Attorney General Pradt argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Brown delivered the opinion of the court:

[359] *By Rev. Stat. § 714, "when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

In April, 1865, petitioner was appointed by the President, judge of the district court of the United States for the eastern district

of New York, and served as such until July 20, 1897, when he resigned his office, having then held his commission for over thirty years, and attained the age of seventy years and upwards. The salary of all district judges was fixed by the act of February 24, 1891 (26 Stat. at L. 783, chap. 287), at the rate of \$5,000 per annum: There is no question made but that petitioner was entitled to this amount, and that it has been paid him.

The controversy arises over the proper construction of the act of February 7, 1873, reproduced in Rev. Stat. §§ 658 and 613. By § 658 it is enacted that "the regular terms of the circuit court shall be held in each year, at the times and places following: . . . in the southern district of New York, at the city of New York, . . . exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court, on the second Wednesday in January, March, and May, on the third Wednesday in June, and on the second Wednesday in October and December;" and by § 613 it is provided that "the terms of the circuit court for the southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial court [circuit] and the district judges for the southern and eastern districts of New York, or any one of said three judges; and at every such term held by said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

The facts are that, after the passage of this act of February 7, 1873, petitioner held each year the six terms of the district *court [360] of the United States for the southern district of New York, referred to in the statute, and received for holding each of said terms the sum of \$300, amounting in all to \$1,800 per annum. Petitioner now insists that this was a part of the salary which was by law payable to him at the time of his resignation, within the meaning of the retiring act, § 714, and should therefore be added to the \$5,000 per annum admitted to be due him.

The case in reality turns upon the meaning of the word "salary," as used in § 714. The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending upon the time, and not upon the amount, of services rendered. *Thompson v. Phillips*, 12 Ohio St. 617; *Landis v. Lincoln County*, 31 Or. 427, 50 Pac. 530; *Dane v. Smith*, 54 Ala. 49; *State ex rel. Murphy v. Barnes*, 24 Fla. 33, 3 So. 433; *Castle v. Lawlor*, 47 Conn. 345; *Com. ex rel. Wolfe v. Butler*, 99 Pa. 542. As applied to district judges in general, and, indeed, to every district judge except the judge of the eastern district of New York, it doubtless refers to the salary of \$5,000 fixed by the act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more

onerous in some districts than in others, and regardless of the fact whether such duties are performed by the judge in person, or by the judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation, or impeachment.

[361] Wholly different considerations apply to the compensation provided for by § 613. To entitle the judge of the eastern district of New York to the \$300 per term, provided for by that section, it is necessary that the term be actually held by him, when he is paid for his services in the manner provided by law for the expenses of a district judge holding court in another district than his own. He may hold but one term a year, for which he would receive \$300. He may hold three terms, for which he may receive \$900, or he may hold the entire six terms and receive \$1,800. Such compensation *is a variable quantity, dependent upon the number of terms held by the judge. Upon the theory of the petitioner, if he had held but one term during the year previous to his resignation, he would be entitled to but \$300 in addition to his regular salary of \$5,000. The fact that he was able to hold the entire number of six terms for the twenty-four years preceding his resignation is a tribute to his industry, faithfulness, and capacity, as well as to his good health, but it does not affect the question in a legal point of view. This compensation was not only for services actually performed, but was subject to be diminished or taken away at the will of Congress. It was something entirely distinct from the salary paid to him as judge of the district court for the eastern district of New York, but was in fact, as was held by the court of claims, extra pay for extra work performed—for particular, as distinguished from continuous, services.

We are all of opinion that the judgment of that court was right, and it is therefore affirmed.

Mr. Justice McKenna did not sit in this case.

THE ADULA.

(See S. C. Reporter's ed. 361-398.)

Lawfulness of blockade—when port blockaded—power to establish blockade—effect of blockade—intent to violate blockade—approaching blockade in fleet—nationality of chartered vessel—notice to charterer of blockade—directing vessel to enter blockaded port—motion for further proofs in prize case.

1. A blockade of an enemy's port may be established without any proclamation by the President, by the commander of the naval

NOTE.—As to what constitutes blockade; right to; violation of; penalty; termination; inquiry at blockaded port; necessity may justify entry of such port,—see note to *Preciat v. United States*, 17 L. ed. U. S. 459.
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forces, as an adjunct to naval operations against other blockaded ports and the enemy's fleet.

2. The blockade of a port is not terminated by the fact that the mouth of the bay is in the complete possession and control of the blockading fleet, when the enemy's port is still in the possession of the enemy's forces, as are several other positions in the neighborhood, and the port is 18 miles from the mouth of the bay, and access to it is obtained either by a small river emptying into the upper bay, or by rail from another town on the bay.
3. The legal effect of a lawful and sufficient blockade is the closing of the port and an interdiction of the entrance of all vessels, of whatever nationality or business.
4. The sailing of a vessel with a premeditated attempt to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure.
5. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty would not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries.
6. The opinion of foreign writers on international law cannot be accepted as overruling. In any particular, prior decisions of the Supreme Court of the United States to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure.
7. A chartered vessel is to a certain extent, *pro hac vice*, a vessel of the nation to which the charterer belongs.
8. A notice of a blockade to the charterer of a vessel, who is on board with power to name the port which she is to visit, but with no right to interfere with the navigation of the ship, is a notice to the vessel.
9. A direction to enter a blockaded harbor, given by the commanding officer of one of the blockading vessels, which has hailed an approaching ship, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority.
10. A motion to take further proofs in a prize case is properly denied where the proof proposed to be brought forward, when compared with that already in the case, leaves the court to the conclusion that the legal effect of the facts before it cannot be varied by the explanation offered.
11. It is only where the testimony in *preparatorio* makes a case of grave doubt that the court orders the taking of further proofs.

[No. 167.]

Argued November 7, 1899. Decided February 26, 1900.

APPEAL from a decree of the District Court of the United States for the Southern District of Georgia condemning a vessel as a prize of war for attempting to run a blockade. *Affirmed*.

See same case below, 89 Fed. Rep. 351.

Statement by Mr. Justice Brown:

*This was a libel in prize against the Brit- [362]
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ish steamship *Adula*, then under charter to a Spanish subject, which was seized June 29, 1898, by the United States cruiser *Marblehead*, for attempting to run the blockade established at Guantanamo bay in the island of Cuba, and was subsequently sent into the port of Savannah for adjudication.

The *Adula*, a vessel of 372 tons, was built at Belfast in 1889, for her owner, the Atlas Steamship Company, Limited, a British corporation, and was registered in the name of its managing director, Sir William Bowers Forwood. Prior to the American-Spanish war she was engaged in general trade between Kingston and other ports on the coast of Jamaica, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons, in the intervals of its regular work, for voyages to Cuba.

[363] *In the meantime, however, under the command of Rear Admiral Sampson, a blockade was established at Santiago, where the Spanish fleet lay under the command of Admiral Cervera. Upon June 8th a blockade of Guantanamo bay was also established by order of Admiral Sampson, the blockading squadron being under the command of Commander McCalla. Both of these blockades were maintained during the war. On April 22d, a blockade of the north coast of Cuba between Cardenas and Bahia Honda and of Cienfuegos on the south coast, was declared by the President. On June 27th the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Frances and Cape Cruz. This included the port of Manzanillo. On the 28th this proclamation was made known to the vessels off Guantanamo.

On June 27th the *Adula*, then at Kingston, was engaged in taking on a cargo for shipment. On the 28th she discharged this cargo, and the agent of the Atlas company entered into a charter party with one Solis, a Spanish subject formerly resident in Manzanillo, of the material parts of which the following is a copy:

The *Adula* was put at the disposal of the charterer "for the conveyance of passengers from Cuban ports hereinafter to be named, to Kingston. The ports that the vessel is to go to are Manzanillo, Santiago, and Guantanamo; but it is distinctly understood and agreed by the parties aforesaid that it shall not be deemed a breach of this agreement should the steamer be prevented from entering any of those ports from causes beyond the control of the company, but that should she be able to enter one or all of them, she shall embark the passengers that the charterer shall engage for her and proceed on her voyage. If she is not permitted to enter either Manzanillo, Santiago, or Guantanamo, the vessel is to return to Kingston, and the voyage shall be considered completed, and the charter money hereinafter referred to earned without any deductions. . . . The charterer is to provide a good and efficient government pilot to conduct the ship safely into the ports which have been named. Should

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she be permitted to *enter them the charterer[364] guarantees that the proper and efficient clearances shall be obtained for each port, so that the ship shall not be subjected to any fines for breach of regulations. . . . The company will give the option to the charterer for another voyage similar to this on similar terms, providing the charterer gives the company twenty-four hours' notice after the arrival of the steamer at Kingston."

Accompanying this charter were certain instructions printed in the margin,† from

†Atlas Steamship Company,

Jamaica Agency, June 28, 1898.

Captain Yeates, S. S. *Adula*.

Dear Sir: I inclose hereln a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I ask you to show him every attention on the voyage.

You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signaled to, stop immediately and communicate to the commanding officer the voyage that you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port.

You must be careful on your arrival there not to interfere or in any way make any observation or sketches or anything that you may see or hear of, but adhere strictly to the duties of your ship.

At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in.

From Guantanamo you will proceed to off Santiago. Here you will meet the other fleet, and carry the same instructions out with them as I have mentioned to you in reference to Guantanamo. The charterer is telegraphing at once to Santiago for a pilot to come off to meet the ship, if permission is granted to pilot your ship into the port.

From Santiago you will proceed to Manzanillo, and from thence back to Kingston. The charterer, Mr. Solis, may order you direct from Guantanamo to Kingston or from Santiago to Kingston, and in such a case you will follow out his orders, which he will give you in writing. He has the option of going to the three ports, but it may be convenient for him to go to only one or even two. The boat's crew that is mentioned in the appendix of this agreement you will provide, but it will be necessary for you to have the ensign in the stern, so as to show your nationality.

You will not allow any provisions of any sort to leave your ship at any of the ports or to do anything that is contrary to the laws of the country or that may be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports, and I must ask you not to permit any of your crew to land at any of the ports, and only yourself, if necessary, to visit the British consul.

Wishing you a pleasant voyage, I am sir,

Yours faithfully,

(S'g'd) W. Leploe Forwood, Gen. Ag't, Jca.

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the agent of the company to Captain Yeates, the commander of the Adula. These were [365] taken from *the ship when she was captured. The Adula left Kingston late in the afternoon of June 28th. Before sailing, Solis asked from the United States consul at Kingston a permit to enter the ports of Guantanamo, Santiago, and Manzanillo. This the consul refused to give without special instructions from Washington. Just before sailing to Santiago, Solis cabled for a licensed pilot to meet the Adula. On leaving Kingston she took her course around Morant point at the easterly end of the island, first toward Santiago, and then to Guantanamo, and about 4 P. M. of the following day was met before reaching the harbor and brought to by the steamship Vixen; was directed to proceed, entered the harbor of Guantanamo, and was seized by the Marblehead, which, with other vessels of the fleet, was lying inside the bay, and was sent to Savannah, where a libel in prize was filed against her on July 21, 1898. The depositions in *preparatorio* were taken July 21st, and her owner, the Atlas Steamship Company, appeared as claimant and filed its answer. The case was heard upon the proofs in *preparatorio*, and a decree of condemnation entered July 28th. 89 Fed. Rep. 351. Before the decree, claimant moved for leave to take further proofs. The court set the motion down for August 9th, giving claimant leave to serve such affidavits and other papers as it might desire to read upon the motion, and directed the entry of the decree to be without prejudice to such motion. The motion was finally denied, and the vessel released upon a stipulation for her value. From the decree of condemnation her owner and claimant appealed to this court.

Mr. Everett P. Wheeler argued the cause and filed a brief for appellant:

Guantanamo bay was not blockaded.

The Abby, 5 C. Rob. 251; *The Trende Sostre*, 6 C. Rob. 390, note.

The Circassian, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796, does not support the converse of this proposition. Moreover, this decision was not followed by the international tribunal created by the treaty of Washington.

Lawrence, ed. Wheaton, p. 30; Lawrence, Belligerent and Sovereign Rights, p. 4.

Even the authorities that are most rigorous in regard to the law of blockade concede that where the sovereign power of one belligerent has declared the limits of a blockade it is not competent for a naval commander to extend those limits.

Thirty Hogsheads of Sugar v. Boyle, 9 Cranch, 191, 3 L. ed. 701; 1 Duer. Ins. 647, § 23; *The Henrick & Maria*, 1 C. Rob. 146.

The authorities on the subject of cartel ships are in strict analogy. These hold that the more humane principles applicable to the treatment of prisoners, which have gradually become part of the laws of war, entitle to immunity from capture cartel ships intended bona fide to carry prisoners for exchange.

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The Daiffie, 3 C. Rob. 140; *The Rose in Bloom*, 1 Dodson, Adm. 57.

Where a blockade has not been enforced rigorously, but some vessels from time to time have been allowed to enter the blockaded port, this amounts to an implied license to others to enter.

1 Duer. Ins. 654, § 30; *The Rolla*, 6 C. Rob. 364; *The Juffrow Maria Schroeder*, 3 C. Rob. 147.

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned.

The Olinde Rodrigues, 174 U. S. 535, 43 L. ed. 1075, 19 Sup. Ct. Rep. 851; *Prize Cases*, 2 Black, 635, *sub nom. Preciat v. United States*, 17 L. ed. 459.

Assistant Attorney General Hoyt argued the cause and filed a brief for appellee:

The Adula on this voyage was in effect a Spanish ship, and at all events is liable to condemnation as such by intendment of the law.

The Bermuda, 3 Wall. 514, *sub nom. Haigh v. United States*, 18 L. ed. 200; *The St. Lawrence*, 1 Gall. 467, Fed. Cas. No. 12,232.

It is a general rule of the prize court that the *onus probandi* that the property is neutral rests upon the claimant, and, if he fails to show it, condemnation ensues.

The Walsingham Packet, 2 C. Rob. 77; *The Rosalie and Betty*, 2 C. Rob. 343; *The Countess of Lauderdale*, 4 C. Rob. 283; *Story Prin. & Prac.* pp. 26, 45, 53.

The vessel was plainly engaged in a violation of the blockade, with knowledge thereof, and must be condemned.

The Circassian, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796; *The Baigorry*, 2 Wall. 474, *sub nom. The Baigorry v. United States*, 17 L. ed. 880; *The Cornelius*, 3 Wall. 214, *sub nom. Corneliu v. United States*, 18 L. ed. 93; *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; *The Bermuda*, 3 Wall. 514, *sub nom. Haigh v. United States*, 18 L. ed. 200; *The Admiral*, 3 Wall. 603, *sub nom. The Admiral v. United States*, 18 L. ed. 58; *The Herald*, 3 Wall. 768, *sub nom. Herald v. United States*, 18 L. ed. 135.

Or, seeking to elude the blockade, rather than openly break it, and professing an innocence which did not exist, she approached a blockaded and invested port for inquiry, which, under the circumstances, was not permissible, and equally subjects her to condemnation.

The Cheshire, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; *The Josephine*, 3 Wall. 83, *sub nom. Queyrrouze v. United States*, 18 L. ed. 65; *The Admiral*, 3 Wall. 603, *sub nom. The Admiral v. United States*, 18 L. ed. 58.

Mr. James H. Hayden argued the cause and, with Mr. Joseph K. McCammon, filed a brief for captors:

The Spanish passport was an enemy's license, and the fact that it was obtained for the use of the Adula in entering enemies' ports rendered her liable to seizure.

The Aurora, 8 Cranch, 203, 3 L. ed. 536; *The Julia*, 8 Cranch, 181, 3 L. ed. 528.

The mere fact of sailing under such a license would have rendered the vessel liable to confiscation, without regard to the object of her voyage or the port of her destination.

The Ariadne, 2 Wheat. 143, 4 L. ed. 205; *The Hiram*, 1 Wheat. 440, 4 L. ed. 131.

The blockades of Guantanamo and Santiago were lawful, actual, and effective.

The Circassian, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796; Duer, Ins. p. 60, § 44.

The universal actual knowledge of the conditions existing dispensed with the necessity of notice, which would have been an empty form.

Hall, *International Law*, pp. 718-724.

The Adula was guilty of a breach of the blockade.

The Circassian, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796; *Yeaton v. Fry*, 5 Cranch, 335, 3 L. ed. 117; *The Frederick Molke*, 1 C. Rob. 86; *The Columbia*, 1 C. Rob. 154; *The Neptunus*, 2 C. Rob. 110; 1 Kent. Com. 150; Duer, Ins. p. 661; *The Admiral*, 3 Wall. 603, *sub nom. The Admiral v. United States*, 18 L. ed. 58; *The Baigorry*, 2 Wall. 474, *sub nom. Baigorry v. United States*, 17 L. ed. 880; *The Herald*, 3 Wall. 768, *sub nom. The Herald v. United States*, 18 L. ed. 135; *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; *The Peterhoff*, 5 Wall. 28, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564.

If such voyages were permitted, the purposes of the blockade would be defeated and it would become no more than a farce.

The Tulip, 3 Wash. C. C. 181, Fed. Cas. No. 14,234.

The prize court would not have been justified in ordering further proofs to be taken.

The Pizarro, 2 Wheat. 227, 4 L. ed. 226; *The Amiable Isabella*, 6 Wheat. 1, 5 L. ed. 191; *The Gray Jacket*, 5 Wall. 342, *sub nom. The Gray Jacket v. United States*, 18 L. ed. 646; Story, *Principles and Practice in Prize Courts*, pp. 9, 18, 24; Benedict, *Admiralty*, § 612.

Mr. George A. King, William B. King, and William E. Harvey filed a brief for certain captors.

[366] *Mr. Justice Brown delivered the opinion of the court:

The rectitude of the decree of the district court condemning the Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27th, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago

and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

The legality of a simple or actual blockade as distinguished from a public or presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must therefore, in all cases, be established by clear and decisive evidence." Halleck. *International Law*, chap. 23, § 10. A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, *sub nom. Hunter v. United States*, 17 L. ed. 796, 799, in which the question arose as to the blockade of New Orleans during the Civil War. In delivering the opinion of the court, the chief justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 146, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But, says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant parts of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the more immediate purpose of reduction." See

also *The Johanna Maria*, Deane on Blockades, 86.

[368] In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo, as an adjunct to such operations. Indeed, it would seem to have been *a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy, as they would be quite sure to do, if their ships were given free ingress and egress from these harbors. While there could be no objection to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is 18 miles from the mouth of Guantanamo bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7th, entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

[369] In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796, is decisive. The *Circassian* was captured May 4, 1862, for an attempted *violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May 1st. It was held that neither the capture of the forts nor the military

occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the chief justice is equally pertinent to this case: "Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the *Circassian*, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment." The occupation of a city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 150, 151, as "a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to *assist the traffic of [370] exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo bona fide purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade." It is also said by Phillimore (3 International Law, 383), that "the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place." The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton v. Fry*, 5 Cranch, 335, 3 L. ed. 117; *The Circassian*, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796; *The Frede-*

rick Molke, 1 C. Rob. 86; *The Columbia*, 1 C. Rob. 154; *The Fortune*, 2 C. Rob. 94; *Wheaton*, Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603, *sub nom. The Admiral v. United States*, 18 L. ed. 58; *Prize Cases*, 2 Black, 635, 677, *sub nom. Preciat v. United States*, 17 L. ed. 459, 479; *Duer*, Marine Ins. 661; *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175; *The James Cook*, Edw. Adm. 261; *The Josephine*, 3 Wall. 83, *sub nom. Queyrouze v. United States*, 18 L. ed. 65; *The Spes*, 5 C. Rob. 76; *The Letsy*, 1 C. Rob. 334; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry v. Delaware Ins. Co.* 2 Wash. C. C. 243, Fed. Cas. No. 13,236. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the *Adula* in view of the admitted fact that she was informed by the *Vixen* that the port was under the control of the United States military forces, and that the war ships were visible before she entered the bay.

[371] In this connection we are cited by counsel for the *Adula* to a change in the law said to have been effected by the adhesion of this government, at the beginning of the war, to the *declaration of Paris abolishing privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, vol. 1, p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that "the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the

opinions of foreign writers as to what they suppose to be the existing law upon the subject.

We have not overlooked in this connection the provision contained in article 18 of Jay's treaty of 1794, to the effect that "whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter." *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185, 2 L. ed. 591. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a correct *exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded, or invested. The whole case against the *Adula* depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 3 L. ed. 143, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British government, and communicated to our government, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

2. The questions concerning the notification of, and the intent to violate, blockade depend largely upon the same testimony, and may be properly disposed of together. There is no doubt that the *Adula* belonged to a British corporation, the Atlas Steamship Company; was registered in the name of the managing director of such corporation; flew the British flag, and prior to the Spanish-American war was engaged in general trade between Kingston and other ports on the coast of Jamaica, in connection with other steamers of the same line from New York, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons, in the intervals of its regular work, for voyages to Cuba. On May 7th, in pursuance of a verbal arrangement between the agent of the steamship company and the American consul, the *Adula* was sent to Cienfuegos in Cuba to bring away refugees. On arrival off Cienfuegos she was boarded by officers of the U. S. S. *Marblehead*, who, upon being shown the permit and the ship's

[373] papers, allowed her to proceed, though the officers served the master with a *printed copy of the President's proclamation blockading Cienfuegos and several ports on the north side of Cuba, and made a memorandum on the ship's log that they had done so. She sailed from Cienfuegos May 10th, with 350 passengers, mostly women and children, was again boarded on leaving the port, but was allowed to proceed.

On May 16th she was chartered by a Cuban refugee to proceed to Santiago, arrived there the following day, and returned with 200 passengers. No war ships were off Santiago at that time. She arrived at Kingston on the 19th, and landed her passengers.

On May 21 she was again chartered to go to Cienfuegos, having a permit from Washington, through the consul, to pass the blockade. She reached the blockading fleet on the 23d, was boarded by a boat from one of the vessels, and was again given permission to proceed; was arrested upon suspicion by the Spanish authorities in the port of Cienfuegos, but after a detention of sixty hours was released. She sailed again on May 26th directly for Kingston, saw no war ships in sight, and arrived at Kingston on May 28th.

After making two of her ordinary coasting voyages around Jamaica, she was offered a further charter for Cienfuegos, but could not obtain the permission of the American consul, who told the master he had no authority to grant it. She left June 15th, with a letter of instructions to the captain to proceed to the fleet off Cienfuegos, then under a public blockade, to ask permission from them to enter the port, and if granted, to go in, and if not granted, to return to Jamaica. She arrived at Cienfuegos June 17th; landed some provisions which had been shipped for her passengers, found no war ships there, and sailed away on the 19th with only ninety-eight passengers. Sixty miles S. S. E. from Cienfuegos she was stopped by the U. S. S. Yankee, and an officer sent on board. The master showed the boarding officer his instructions and the ship's papers, as well as the passenger list; was informed that Cienfuegos was blockaded, and that he must not enter it again. She arrived in Kingston on June 21st, proceeded around the island on her usual coasting trip, and returned to Kingston on the 27th.

[374] She was chartered for her last voyage June 28th by one Solis, *a Spanish subject born near Havana, and living with his family at Manzanillo. He had landed recently from Manzanillo with a cargo of refugees. He had lived in Cuba, and at one time had been the French consul at Manzanillo, though there was no evidence that he had ever co-operated with the Spanish authorities during the war, or rendered aid or comfort to the Spanish forces. He had, however, a passport from the Spanish consul to enter the cities to which he was bound and take passengers away as refugees. He had previously been engaged in shipping supplies to Cuban ports and returning with passengers for Jamaica. He also carried a special

personal Spanish passport granted the year before. Such being his political character, he entered into a charter party with the Atlas Steamship Company, under which he was at liberty to go to Manzanillo, Santiago, and Guantanamo, and, if not permitted to enter these harbors, to return to Kingston. An option was also given to the charterer for another similar voyage upon like terms upon twenty-four hours' notice after arrival at Kingston. The charter was for the conveyance of passengers from Cuban ports to Kingston at 100 pounds per day. Solis was entered upon the ship's articles as supercargo. She was evidently chartered for his personal benefit, with power to name the port which she was to visit, but with no right to interfere with the navigation of the ship. Solis had made the same sort of trip twice before with English schooners, and expected upon this trip to make \$19,000 net profit. He appeared to have known nothing about the previous voyages of the Adula, and had seen her for the first time only about two months before. The vessel bore a passport from the Spanish consul at Kingston; a bill of health *viséd* by the Spanish consul. With regard to his knowledge of the blockade at Guantanamo he testified as follows:

"I knew that there was a condition of war existing between America and Spain on the 21st. They told me on board the Adula that the blockade of Guantanamo was published on the 27th, the day before. I had not heard it before I left Kingston. I did not know officially Guantanamo was blockaded. On board the Adula I heard that on the 27th there was issued *an order from the President of the United States declaring a blockade of the port of Guantanamo, but I did not know it until we arrived at Guantanamo. At Kingston I heard there were some warships at Guantanamo, and I told Captain Forwood that the first thing I would do would be to go to the admiral and tell him my intentions. I did not think the papers in Kingston published the blockade. I did not see it if they did. The people generally did not talk about it. I read something about 'McCalla's camp.' I understood Guantanamo was not blockaded by the United States. I heard that marines had been landed at the entrance to Guantanamo, Caimenera—the bay is called Caimenera—and that the marines had possession of the port, and that the ships were inside. I cannot tell when I received the information that marines had been landed there and taken possession of the point of Guantanamo or Caimenera. Perhaps it was one or two days before. I don't know what the others knew about a state of war existing. I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston, and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side; they call it 'East Point.'"

It further appeared that the American

consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade in the following language, as stated by the agent himself: "Well, Forwood, I would not advise you to let the ship go; they won't let her into Guantanamo, and they will be watching for her." I said to him, 'Oh, Dent, let me show you the captain's instructions. He has got orders to go to the fleet there and ask their permission to take some refugees.' 'Well,' he said, 'I don't know, but they will be watching for her, and I think that Senor Solis is a Spanish agent, carrying \$300,000 in gold to buy over the rebels in the American camp.' I told him that I had inquired about the man, and that it was one of the usual Kingston yarns." It also appears that Mr. Forwood knew that Mr. Solis was a Spaniard, and had been shipping supplies to Cuban ports. After taking [376] on board a large supply *of coal, the Adula left Kingston on June 28th, rounded Morant point on the east end of the island of Jamaica, proceeded at her usual speed toward Santiago, and sighted the blockading fleet off that port about noon of the 29th. The captain gives as his reason for going by the way of Santiago that he was not acquainted with the coast line to the eastward of that port; had no large scale chart, and therefore steered more to the westward than he should have done, because he knew the coast about Santiago, and did not know that about Guantanamo; but it is quite as probable that it was the presence of a number of war vessels off Santiago which sent her to Guantanamo. She was hailed by the Vixen within half a mile of the entrance to the harbor of Guantanamo, brought to, and then directed into the harbor, where several war vessels were lying, and was shortly thereafter seized by order of Commander McCalla of the Marblehead.

In his testimony before the prize commissioners, Captain Yeates, master of the Adula, stated that he was stopped by the Vixen about half a mile from the entrance to the bay and permitted to proceed, and that it was not until after he had anchored that he was acquainted with the blockade of the harbor. One of the crew testified somewhat to the contrary and swore that "about three days before I left Kingston I heard that Guantanamo was blockaded; I heard it from people around the streets; I did not see it; I heard it was in the papers; I never heard any of the officers of the Adula or people on board talking about Guantanamo being blockaded, and I don't know exactly whether the owner or master or officers of the ship Adula knew that Guantanamo was blockaded. I knew about it, but I don't know anything about them. I don't know how I found it out, but I heard it on the streets of Kingston." He also swore "that at that time we went up to the mouth of the harbor, and at that time, when we got to Guantanamo, we found the war ships there blockading the harbor." A small cruiser, the Vixen, "ran up across our bow and the captain of the cruiser asked us: 'Didn't you sight the war ships down at Santiago?' and the captain said, 'Yes.' And the captain stopped, and he said: 'Didn't you hear that Guantanamo was *blockaded?' and our cap-[377] tain said 'Yes.' Then he said, 'You can proceed on.' I heard about the blockade in Kingston, but after leaving Kingston, until we met the cruiser, I never heard anything more about it." Captain Yeates also testified that he expected to be stopped when he approached Santiago. Mr. Solis, who had chartered the Adula for this voyage, testified that he was told, while on board the Adula, that the blockade of Guantanamo was published on the 27th, the day before, but that he had not heard of it before he left Kingston, though he had heard, while in Kingston, that there were some war ships at Guantanamo. At the time the Adula was captured she was searched for her ship's papers and other documents and letters. Several letters were found, as well as copies of a newspaper published at Kingston, which spoke of the American military and naval operations both at Santiago and Guantanamo.

Among these extracts from "The Gleaner" of June 14, 1898, is the following, apparently telegraphed from London: "A despatch boat off Santiago reports that the Americans now hold 35 miles of the coast east of Santiago, including Guantanamo harbor, and that 20,000 Spanish troops at Santiago are preparing to desperately resist the Americans, who have landed 3,000 rifles, 300,000 rounds of ammunition, and large stores of provisions;" and the following from the issue of June 25th: "On board the Adula, which arrived from Cienfuegos this week, there was an individual officially appointed by the Captain General in Cuba to make arrangements in Jamaica for regularly supplying the Spanish troops with provisions; in fact, to make Jamaica a base for Spanish purposes."

In this connection it would seem from the report of the Bureau of Navigation that the consul at Kingston telegraphed to Washington that the under secretary of the Captain General of Cuba and certain Spanish naval officers "came aboard the Adula with, it is supposed, \$250,000 to purchase provisions to be taken to Manzanillo for Cervera. . . . Extensive preparations being made for shipping provisions to Cuba."

In a letter from Captain Yeates to his parents, under date of July 13th, and apparently written while the Adula was at Savannah, he says: "And now to tell you dear ones how it is *or was that we got into [378] this pickle, which has not come as any surprise, as I have anticipated this for some time; it is I did not think I should be in command when it happened, but it was my luck to be, I suppose." Speaking of the capture, he says: "They turned the ship upside down; took my papers; measured the coals, and took stock generally. As far as the ship is concerned she was on perfectly legitimate business, fetching refugees. Whether Mr. Solis chartered the ship for that purpose alone, of course, has to be proved, and we are now on our way to Savan-

nah for that purpose with a prize crew and Lieutenant Anderson in charge." In a postscript dated at Savannah, July 15th, he says: "We have not yet reached the town proper, for we are going through the same performance as we did at Tampa, but I was not caught this time, for I managed to keep my things out of the oven."

As tending to show the good faith of this expedition, and more particularly the owners of the Adula, much reliance is placed upon the letter of Mr. Forwood to Captain Yeates of June 28, the day upon which the Adula left Kingston, in which he instructs him, in case he finds American warships off Guantanamo, to stop immediately upon being signaled, and communicate to the commanding officer the object of the voyage, and to be careful upon his arrival "not to interfere, or in any way make any observations or sketches, or anything you may see or hear of, but adhere strictly to the duties of your ship," and to observe the same precautions off Santiago. In this letter he also instructs him not to allow any provisions to leave the ship, or to do anything which could be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports. While this letter doubtless tends to show good faith on the part of Mr. Forwood, still it was written with full information from Mr. Solis that the consul had refused to give him a passport, without permission from the American authorities in Washington. That Mr. Forwood recognized the necessity of an authority from Washington in order to pass the blockade is shown by his letter to Captain Walker of May 21, 1898, in reference to one of the voyages to Cienfuegos, in which he says: "In giving this letter to the [379] blockade, be sure and ask *the officer if he would allow the ship to pass another voyage without cabling to Washington."

From all the testimony in the case it appears very clear:

That Guantanamo was actually and effectively blockaded by orders of Admiral Sampson from June 7th until after the capture of the Adula;

That the Adula was chartered to a Spanish subject for a voyage to Guantanamo, Santiago, or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent, *pro hac vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126; *The Jonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatchf. Prize Cas. 296, Fed. Cas. No. 10,012. The fact of her sailing under a Spanish passport—in fact, an enemy's license—is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The Julia*, 8 Cranch, 181, 3 L. ed. 528; *The Aurora*, 8 Cranch, 203, 3 L. ed. 536; *The Hiram*, 1 Wheat. 440, 4 L. ed. 131; *The Ariadne*, 2 Wheat. 143, 4 L. ed. 205. This passport gave the Adula authority to enter [380] 176 U. S. U. S. Book 44.

the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss.

Both Solis himself and the Adula had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war;

While the mission of the Adula was not an unfriendly one *to this government, she was [380] not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the Adula were cognizant of this fact. The direction of the commanding officer of the Vixen, which overhauled the Adula off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. *The Hope*, 1 Dod. Adm. 226; *Rogers v. The Amado*, Newberry Adm. 400, Fed. Cas. No. 12,005; *The Joseph*, 8 Cranch, 451, 3 L. ed. 621; *The Benito Estenger*, 176 U. S. 568, *post*, 592, 20 Sup. Ct. Rep. 489.

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7th it is scarcely possible that, in the three weeks that elapsed before the Adula sailed, it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris, that it was matter of common talk in Kingston. The testimony of Solis, that he did not know "officially" that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade.

[381] 3. There was no error in denying the motion of the claimant to take further proofs. It appears from the opinion of the court that "the hearing upon the proceedings for condemnation was upon the evidence afforded by the examination of the *captured crew taken upon standing interrogatories, the ship's papers, and other evidence of a documentary character found upon the ship by the captors. This was done in conformity to the established rule in prize causes."

The motion to take further proof was made upon the affidavit of Robert Gemmell, the New York agent of the company, the statement of W. P. Forwood, the Kingston agent, annexed thereto, as well as his own affidavit and exhibits, and upon the counter testimony of Anderson, Ellenberg, and Gill taken *de bene esse*. Upon the hearing of this motion the court considered the allegations of Forwood, attached to Gemmell's affidavit, as if Forwood had testified upon depositions regularly taken, giving due weight to the same in connection with other evidence in the case; and was of opinion that the evidence as it stood was not susceptible of any satisfactory explanation; and comparing the proof proposed to be brought forward with that already in the case, came to the conclusion that the legal effect of the facts before the court could not be varied by the explanation offered. The motion was denied. In considering this case we have also given effect to these affidavits, and have come to the conclusion that, if they are to be taken as true, and the further proofs, if taken, would support them, they would not change our opinion with respect to the affirmance of the decree.

If an examination of the ship's papers and of the crew, taken in *preparatorio*, upon which the cause is first heard in the district court, make a case for condemnation, the order for further proof is, as stated in *The Grey Jacket*, 5 Wall. 342, 368, *sub nom. The Grey Jacket v. United States*, 18 L. ed. 646, always made with extreme caution, and only where the interests of justice clearly require it. If the ship's papers and the testimony of the crew do not justify an acquittal, it is improbable that a defense would be established by further proof; and as the interest of all parties require that prize causes be quickly disposed of, it is only where the testimony in *preparatorio* makes a case of grave doubt, that the court orders the taking of further proofs. *The Pizarro*, 2 Wheat. 227, 4 L. ed. 226; *The Amiable Isabella*, 6 Wheat. 1, 77, 5 L. ed. 191, 209; Benedict, Adm. § 512a; Story, Prize Courts, 17.

[382] *It was said by Sir William Scott in *The Sarah*, 3 C. Rob. 330, that "it has seldom been done except in cases where there has appeared something in the original evidence which lays a suggestion for prosecuting the inquiry farther. In such cases the court has allowed it; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very

particular circumstances indeed that the court will be induced to accede to such an application; because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions."

These remarks are specially pertinent to the offer of further proof that, while Solis owed allegiance to the Queen of Spain, yet that he left Cuba soon after the war broke out, took no part in the hostilities, but on the contrary had done all in his power while he remained in Cuba to assist citizens of the United States residing there; had sided with the natives of Cuba, and was desirous that a government should be established in the island under the auspices of the United States. As was observed in the very satisfactory opinion of the district judge in this case, this evidence was altogether irrelevant to the case of the *Adula*, and was, to a certain extent, a contradiction of his testimony before the prize commissioners that he was a loyal subject of Spain, bore a Spanish passport, and carried a bill of health *viséd* by the Spanish consul at Kingston. It would throw the whole practice in prize cases into confusion if the testimony, taken in *preparatorio*, when the facts are fresh in the minds of the witnesses, were subject to be contradicted by the same witnesses after its weak points had been developed. It was said by Mr. Justice Story in *The Pizarro*, 2 Wheat. 227, 4 L. ed. 226: "Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon their first examination; and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice *equally point out the necessity of [383] an inflexible adherence to this rule."

Upon the whole, we think *the decree of the District Court was correct, and it is therefore affirmed.*

Mr. Justice Shiras dissenting:

I cannot concur in the judgment of the court in this case, and shall state my views briefly, without entering at length upon a discussion in support of them.

By a joint resolution of the Senate and House of Representatives of the United States, approved April 20, 1898, it was declared: "That the people of the island of Cuba are, and of right ought to be, free and independent." "That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters." "That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval

forces of the United States, and to call into the actual service of the United States the militia of the several states to such extent as may be necessary to carry these resolutions into effect." "That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." 30 Stat. at L., part 2, p. 738.

By an act approved April 25, 1898, Congress declared "That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain." 30 Stat. at L., part 2, chap. 189.

[384] On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda, and of Cienfuegos on the south coast, was declared by the President, and on June 27th the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Frances and Cape Cruz. Neither of these proclamations included the port of Guantanamo, nor was any blockade of that port ever proclaimed by the President.

The Adula was a British vessel, and on June 28th she left the British port of Kingston, in the island of Jamaica, bound, according to the instructions from the agent of the Atlas Steamship Company, the owners, to Captain Yeates, the master of the vessel, directly to the port of Guantanamo. Among the instructions found on the vessel when she was captured were the following:

"I inclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I will ask you to show him every attention on the voyage.

"You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

"On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signaled to, stop immediately and communicate to the commanding officer the voyage that you are on, and in fact you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port. You must be careful on your arrival there not to interfere or in any way make any observations or sketches or anything you may see or hear of, but adhere strictly to the duties of your ship. At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in."

On the afternoon of the 29th June the Adula approached the harbor of Guantana-
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namo, and there met the United States war vessel Vixen. It was testified by Captain Yeates before *the prize commission as follows: "We passed one vessel. I think it was the Vixen. He fired a gun. I stopped immediately, and he told me to proceed. He did not stop his engines at all; just steamed right on by. Captain Forwood told me I should see vessels of war around there. When the Vixen hailed me we were about half a mile from the entrance of the bay, and about 4 miles from where we anchored." This evidence was not contradicted, and, in respect to the permission to proceed, was corroborated by one of the crew of the Adula.

After the vessel had entered and anchored in the bay she was seized by the Marblehead, a warship of the United States, which was lying inside the bay, and was sent to Savannah, where, on July 28th, a decree of condemnation was entered against her. No goods of a contraband character were on the vessel.

Upon these admitted facts, there was no duly constituted blockade of Guantanamo existing when the Adula sailed for and entered that port.

On the contrary, by the successive Presidential proclamations of blockade, that port was left free and open for the entrance of neutral vessels. Indeed, it may be fairly said that, in the special circumstances of our war with Spain, those proclamations were intended to permit, if not to invite, the continuance of commerce in goods, not contraband, in all the Cuban ports not included within the limits defined. The United States were not carrying on warlike operations against the people of Cuba. They were declared, by the joint resolution of the two houses of Congress, to be free and independent, and the government of Spain was called upon to relinquish its government, and to withdraw its land and naval forces from Cuba and Cuban waters. It was notorious that great misery and destitution had been caused among the inhabitants by the military operations of the Spanish army in a long and fruitless effort to subdue the revolutionary movement. Indeed, that condition of the people of Cuba was one of the principal inducements to the United States to intervene on their behalf.

It may be well here to refer to the message of the President *to Congress, of the date of [386] April 11, 1898, wherein will be found the following statements:

"Our people have beheld a once prosperous community reduced to comparative want, its lucrative commerce virtually paralyzed, its fields laid waste, its mills in ruins, and its people perishing by tens of thousands from hunger and destitution. . . . The policy of devastation and concentration, inaugurated by the Captain General's bando of October 21, 1896, in the province of Pinar del Rio, was thence extended to embrace all of the island to which the power of the Spanish arms was able to reach by occupation or by military operations. The peasantry, including all dwelling in the open agricultural interior,

were driven into the garrison towns or isolated places held by the troops."

And, after reciting the fact that he had made an appeal to the American people to furnish succor to the starving sufferers in Cuba, the President concluded:

"In view of these facts and of these considerations I ask the Congress to authorize and empower the President to take measures to secure a full and final termination of hostilities between the government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government, capable of maintaining order and observing its international obligations, insuring peace and tranquillity and the security of its citizens as well as of our own, and to use the military and naval forces of the United States as may be necessary for these purposes. And in the interest of humanity and to aid in preserving the lives of the starving people of the island, I recommend that the distribution of food and supplies be continued, and that an appropriation be made out of the public treasury to supplement the charity of our citizens."

The policy of our government, in respect to the rights of neutrals, was further made to appear in the President's proclamation of April 26, 1898, declaring our adhesion to the rules of the Declaration of Paris, whereby important modifications, in recognition of the rights of neutrals and of principles of humanity, were introduced into international law.

[387] What was more natural, then, than that our government *would approve all efforts to furnish food to those famishing people, and to aid them in escaping from the seat of war? It appears that the *Adula*, after the declaration of war, had made several voyages to Cuban ports, with the express permission of the American consul at Kingston; had brought away several hundred refugees, chiefly women and children, and was engaged in a similar errand when seized.

It is, however, claimed that an actual blockade of Guantanamo had been established by Admiral Sampson early in June, which was in existence at the time the *Adula* entered that port, and that her master had knowledge of such blockade before leaving Kingston.

To declare a blockade effective against neutrals not carrying contraband goods is said by all the authorities to be one of the highest acts of sovereignty, not to be resorted to except for reasons based on well known principles of modern warfare, and to be proclaimed so as to give full notice to friendly and neutral nations.

As was said by this court, through Mr. Justice Grier, in *Prize Cases*, 2 Black, 665, *sub nom. Preciat v. United States*, 17 L. ed. 476: "Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent, engaged in actual war, to use this mode of co-

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ercion, for the purpose of subduing the enemy. . . . That the President, as the executive chief of the government and commander-in-chief of the army and navy, was the *proper* person to make such notification, has not been and cannot be disputed."

So it was held by Sir William Scott, in *The Henrick and Maria*, 1 C. Rob. 146, that "notification of a blockade is an act of high sovereignty, and not to be extended by those employed to carry it into execution. . . . A declaration of blockade is a high act of sovereignty; and a commander of a King's ship is not to extend it."

"Where a blockade has been declared by the government, the commander of the blockading squadron has no discretionary *power[388] to extend its limits. If he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded." 1 Duer, *Marine Ins.* 647, § 23.

"A declaration of blockade is a high act of sovereignty, and it is usually made directly by the government to which the blockading squadron belongs. A blockade is, however, in some cases, declared by an officer of a belligerent power, and when so declared it will affect the subjects of neutral nations as far as it is authorized, or adopted and ratified, by his government. The implied authority in this respect vested in a naval commander is much greater at a distance from his government than when he is near it. To affect neutral nations, it must be laid by competent authority, and they are affected only in the extent to which it is so laid." 1 Phillips, *Ins.* 466.

As it does not appear that the government delegated any authority to Admiral Sampson to declare a blockade of the port of Guantanamo, but declared a limited and specified blockade of portions of the Cuban coast by Presidential proclamation, leaving the port in question free and open to neutral commerce in goods not contraband, it follows that for Admiral Sampson to declare a blockade of such port would have been, on his part, an effort to defeat the policy of his government, which, as we have seen, was shown, by the proclamations and messages of the President, to have intended to leave open a large portion of the Cuban coast, and ports included therein, to neutral and friendly commerce, designed to furnish food to our starving allies, and to enable their women and children to flee from the oppression under which they were suffering.

Moreover, it does not appear that Admiral Sampson claimed or exercised any right to declare a blockade of Guantanamo. Doubtless he occupied that bay and its adjacent waters with his war vessels, and that gave him a right to visit and search even neutral vessels, to discover whether they carried contraband goods. But this did not warrant any vessel of his *squadron to seize a[389] neutral ship, not carrying contraband goods, when entering a port in effect left free by the proclamation of the President.

But even if it were conceded that the American commander could establish, without proclamation, a valid actual blockade of the port in question, it would still be true, in my opinion, that the seizure of the Adula was contrary to well-established principles of international law.

When a blockade of a given coast or port of one belligerent has been declared by the sovereign power of another, all vessels of neutral or friendly nations are thereby supposed to be visited with notice of such blockade, and it has been held that if they sailed for the blockaded port, with the intent to enter it, and approach it for that purpose, they are subject to seizure and condemnation, and that they cannot even approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty might lead to attempts to violate the blockade under pretext of approaching for the purpose of making such inquiries. *The Cheshire*, 3 Wall. 231, *sub nom. The Cheshire v. United States*, 18 L. ed. 175.

But, in the case of a blockade established by a naval officer, acting upon his own discretion, without governmental proclamation, neutrals are not visited with implied notice of the existence of such a blockade, and they may rightfully sail for such a blockaded port, and if, when approaching it, armed vessels are seen to be in its immediate neighborhood, they may apply to such vessels for information and for leave to enter, without subjecting themselves to capture. The duty of the blockading squadron, if objection exists to permitting neutral vessels to enter, is to warn them off. If, after such warning, the neutral vessels, disregarding it, attempt to enter, they are liable to seizure.

As was said in the case of *The Circassian*, 2 Wall. 150, *sub nom. Hunter v. United States*, 17 L. ed. 799, which was a case where the blockade had been proclaimed by the American government: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion, or under direction of superiors, without governmental [390] notification; while a public blockade is *not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade the captors are bound to prove its existence at the time of capture; while, in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter sort. It was legally established and regularly notified by the American government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance."

In *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185, 2 L. ed. 591, it was held that the fact of clearing out for a blockaded port is, 176 U. S.

in itself, innocent, unless accompanied by other incidents; that the offense consists in persisting in attempting to enter the interdicted port after having been warned; and it was said by Chief Justice Marshall:

"The right to treat the vessel as an enemy is declared by Vattel to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact. But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall *again attempt to enter*; but she shall be permitted to go to any other port or place she may think proper."

"*This treaty is conceived to be a correct exposition of the law of nations*; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or *to constitute a rule in the place of it. [391] Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact."

The distinction between a blockade declared by a government and a blockade *de facto* is thus stated by Chancellor Kent [1 Com. p. 147]:

"A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

"In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified and one without such notice: that, in the former case, the act of sailing for the blockaded place with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas, in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination."

It should be noted that the American cases cited, on behalf of the captors, to the effect that sailing from a neutral port to a blockaded port is, in itself, a violation of the blockade, were cases in which there had been a Presidential proclamation, of which neutral vessels were bound to take notice. *The Circassian*, 2 Wall. 135, *sub nom. Hunter v. United States*, 17 L. ed. 796; *The Admiral*, 3 Wall. 603, *sub nom. The Admiral v. United States*, 18 L. ed. 58.

It should further be considered that in the President's proclamation of April 22, 1898, establishing the extent of the blockade, there was contained the following provision:

[392] "Any neutral vessel approaching any of said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the commander of the blockading forces, who will indorse on her register the fact and the date of such warning where such instrument was made; and if the same vessel shall again *attempt to enter any blockaded port she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable." 30 Stat. at L. 1769.

Of course, if the blockade of Guantanamo was illegal, as inconsistent with the terms and intent of the President's proclamations, no consideration of the evidence regarding the movements of the vessel is called for, and it is a clear case for restitution. In such a case, no importance can be ascribed to any supposed notice to the owners of the ship. The admiral's want of power to override the policy and intentions of the government cannot be supplied by imputing to the vessel a knowledge of an actual occupation of the port by armed vessels of the United States. Such occupation would be no reason why neutral ships, not carrying contraband cargo, might not fearlessly approach and enter the harbor.

If, however, the other view be taken, namely, that it was competent for the admiral, of his own motion, to establish a blockade, still as we have seen, neutral vessels were entitled, on principle and authority, to a warning by the blockading squadron, and could only become lawful prize by disregarding the warning, and renewing the attempt to enter. Mere knowledge by the neutral vessel that vessels of war occupied the harbor and adjacent waters would not constitute notice or knowledge of a blockade; she would be entitled to an actual warning. *Maryland Ins. Co. v. Woods*, 6 Cranch, 49, 3 L. ed. 148.

The *Adula* received no such warning. When she approached the harbor she was hailed by a war vessel, the *Vixen*, and was told to proceed. If, by telling the *Adula* to proceed, the commander of the *Vixen* is to be understood as taking charge of the *Adula* as engaged in an attempt to break the blockade, there was, of course, no warning. If, what seems the natural import of the language, the commander of the *Vixen* gave the neutral vessel permission to enter the harbor, not only was there no warning, but such permission protected her from the subsequent seizure after she had entered and anchored in the harbor.

[393] *But it is contended that the *Adula* had actual knowledge of the existence of the blockade when she sailed from Kingston, and that such knowledge deprived her of the right to a warning.

As already said, if the blockade had been regularly proclaimed by the United States government, the *Adula*, as a neutral vessel, if aware of the blockade, could not lawfully

have sailed from Kingston and approached Guantanamo with an intention to enter it unless intercepted. It is well settled that in the case of a proclaimed blockade, the neutral vessel may not, with a knowledge of the proclamation, approach the prohibited port, even for the purpose of inquiring from the vessels in occupation whether the blockade was still in existence. The reason given for such a decision is that it would seriously affect the efficiency of the blockade if ships were permitted to approach the blockaded port on pretext of inquiry, and thus be enabled to slip in if there was a momentary absence of a blockading vessel.

But different principles prevail in the case of a blockade *de facto*. Then, neutral vessels may, even with knowledge that such a blockade had been in existence, sail for such port with a clear right to inquire whether the blockade was still in force, and to enter the port if it is found not to be actually blockaded. The reason for the distinction, given in the authorities, is that a proclaimed blockade is deemed to continue until the blockade is raised by a declaration of the power that established it. But a simple or *de facto* blockade lasts only so long as the blockading squadron chooses to maintain it by a present and actual force. The reasons for constituting such a blockade may cease at any time, and a neutral vessel, on a peaceful voyage, and not carrying a contraband cargo, may lawfully sail for such a port, and if when she reaches it the blockade continues, is entitled to a warning.

Thus far it has been assumed that the *Adula* had actual knowledge of the blockade when she sailed from Kingston, and it has been shown that, in the case of a blockade of the character that this one is claimed to have been, namely, one created by and depending on the will of the commander of *the fleet, [394] the neutral was entitled to a warning, whether she had or not previous information that a blockade had existed some time before.

But, in point of fact, as I read the evidence, the *Adula* had not such previous knowledge, but approached Guantanamo bay, within the terms of the President's proclamation, without notice or knowledge of the establishment of a blockade, and was therefore entitled to be "duly warned by the commander of the blockading forces."

Captain Yeates, Purser Williamson, and Solis testified in direct terms that they had no knowledge or information before sailing that Guantanamo was blockaded. The only testimony to the contrary was that of Morris, a colored seaman, who said that about three days before he left Kingston he heard that Guantanamo was blockaded. He does not give the source of his information, or pretend that he made known the matter to the owners or to the officers of the vessel. Probably all he meant was that he had heard that the United States fleet was at Guantanamo. The other facts plainly corroborate the captain's testimony. Consider the direction contained in the instructions given the captain, and shown in the record: "On your

arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signaled to, immediately stop and communicate to the commanding officer the voyage you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port. . . . At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in." Such instructions are not consistent with knowledge, on the part of the general agent who gave them, that a blockade was actually in force, nor with any intention to violate it.

[395] So, too, the conversation that Solis, the charterer, had with the United States consul at Kingston, in which he sought to *obtain a passport for the voyage, and in which he informed the consul of the object of the voyage, and of his intention to ask permission of the American admiral to enter the port, shows that no clandestine or improper voyage was intended. A person designing to violate a blockade assuredly would not inform the consul of the nation whose vessels were maintaining the blockade of the time and circumstances of his voyage.

Solis further testified that he first heard of the blockade on the Adula on June 28th, that he then heard that on the 27th there was issued an order of the President of the United States declaring a blockade, etc. But as it is not pretended that the President had issued any such proclamation, it is evident that Solis was speaking of a mere rumor; and he immediately added: "I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side."

It is stated, in the opinion of the majority, that the American consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade. This statement is based on Forwood's recital of what passed between the consul and himself, in the following language: "Well, Forwood, I would not advise you to let the ship go. They won't let her into Guantanamo, and they will be watching for her." So far from this language importing a notification of an existing blockade, it rather implies the contrary—that the voyage would be fruitless because the consul believed that the ship would not be allowed to enter the destined port. It certainly cannot be regarded as an official notice of an existing blockade, as is claimed in the argument for the captors. The consul was right, in the existing circumstances, in declining to give the permit desired; but he had no power to declare a port to be in blockade, nor did he pretend to do so.

So far, therefore, as respects the matters
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urged as evidence that the Adula, her owners, master, or charterer, knew, or had any good reason to believe, that, at the time she sailed, there *was an existing blockade of [396] the port of Guantanamo, they seem to me to be "trifles light as air."

What this court said, through Mr. Justice Grier, in the *Prize Case*, 2 Black, 635, *sub nom. Preciat v. United States*, 17 L. ed. 459, may well be repeated here:

"All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law, and the character of a just government."

Some makeweights are attempted to be thrown into the scales by adverting to the fact that Solis had passports from the Spanish consul, and the following cases are cited in the majority opinion. *The Julia*, 8 Cranch, 181, 3 L. ed. 528; *The Aurora*, 8 Cranch, 203, 3 L. ed. 536; *The Hiram*, 1 Wheat. 440, 4 L. ed. 131, and *The Ariadne*, 2 Wheat. 143, 4 L. ed. 205.

The case of *The Julia* was thus stated by Mr. Justice Story:

"It is sufficient to declare . . . that we hold that the sailing on a voyage, under the license and passport of protection of the enemy in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war."

Surely; but in the present case there was no license or passport of protection for the voyage in furtherance of the views and interests of the enemy, but the obnoxious instrument was a personal passport to Solis, dated April 13, 1897, more than a year before the war, in the following terms: "Don José R. Solis Velasquez, native of Santiago de las Vegas, province of Havana, by profession a merchant, dwells in Marina street, No. —, and resides habitually in that ward and at that number." Were these personal passports, one given long before the war and the other a mere permission to enter cities on the island, at all similar to the case of the *Julia*, where, as the opinion in that case shows, "the master was a part owner of the vessel and cargo, and the regular depositary of all the papers connected with the voyage. It is utterly incredible that he should not recollect, on his examination, the existence of these British documents. They were put on board for the special safeguard and security of the vessel and cargo."

In the case of the *Aurora*, a formal passport or permit had *been given by the British [397] consul to "the American ship *Aurora*, William Augustus Pike, master, burthen 257½ tons, now lying in the harbor of Newburyport, etc., . . . requesting all officers commanding His Majesty's ships of war, or private armed vessels belonging to subjects of His Majesty, not only to suffer the said *Aurora* to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies," etc. The judgment of the court was thus stated: "The acceptance and use of an enemy's license on a voy-

age to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation."

In the case of the *Hiram*, the vessel was sailing under protection of an enemy's license to the vessel, and this was held to have been in principle an offense of trading with the enemy. In the case of the *Ariadne*, the vessel was sailing with a license or passport of protection from the enemy's admiral.

It is scarcely necessary to say that a personal passport given to *Solis*, a Cuban, more than a year before the war, cannot be regarded as intended as a passport or protection to a British vessel, sailing under a British flag, on an errand friendly to the United States and their allies. And as respects the permission *Solis* had obtained from the Spanish consul to enter the cities to which he was bound, "and take passengers, refugees," such permission was in furtherance of humanity, and not of any warlike object or interest.

The conclusions reached may be summarized thus:

(1) The port of Guantanamo was intentionally and as matter of policy left open and free to neutral commerce, not contraband, by the President's proclamations, and the *Adula* had a clear right to sail for and enter that port, even if aware that war vessels of the United States were in occupancy of the port. Such war vessels would, of course, have a right to prevent the *Adula* from entering the port if such entry would interfere with any military operation in hand.

(2) It was not competent for the commander of the fleet to extend the proclaimed blockade so as to include a port exempted by the President's proclamation, and to thus

[398] make prize *of war a neutral vessel approaching such port on a peaceful errand.

(3) If an immediate exigency—and none such is shown to have existed in the present case—justified the admiral of the United States in prohibiting the entrance of neutral vessels, sound principles of international law required that such vessels should be warned on approaching the port, and they could not be seized as lawful prize, unless they disregarded the warning and attempted again to enter.

This is no time, in the history of international law, for the courts of the United States, in laying down rules to affect the rights of neutrals engaged in lawful commerce, to extend and apply harsh decisions made a hundred years ago, in the stress of the bitter wars then prevailing, when the rights of the comparatively feeble neutral states were wholly disregarded. Still less should our courts, as it seems to me was done in this case by the district court, adopt strained and unnatural constructions of facts and circumstances, in order to subject vessels of nations with whom we are at peace to seizure and condemnation.

I am authorized to say that Mr. Justice **Gray**, Mr. Justice **White**, and Mr. Justice **Peckham** concur in this dissent.

JOHN E. ROLLER, *Plff. in Err.*,

v.

STEPHEN HOLLY *et al.*

(See S. C. Reporter's ed. 398-413.)

Due process of law—sufficiency of notice of foreclosure—notice served on nonresident in other state.

1. Personal service on nonresidents, outside the jurisdiction of the court, may be sufficient to constitute due process of law in a suit for the foreclosure of a lien upon land within the state.
2. The general provision for the institution of suits against absent and nonresident defendants, in Tex. Code, art. 1230, which does not specially mention any class of actions, is applicable to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants, and therefore includes a suit to enforce an equitable lien on land for purchase money.
3. Five days' notice to a nonresident in another state, of a suit to foreclose a lien on land, where it would require four days of constant traveling to reach the court, giving but one day, and that a Sunday, to make preparations for the trip, without any allowance for accidental delays, is insufficient to constitute reasonable notice or due process of law.
4. The insufficiency of a notice on a nonresident in another state to constitute due process of law is not affected by the fact that by the local practice there would be several days' additional time before the case could be called for trial or default taken, or that the court, in its discretion, would probably set aside a default judgment and permit a defense.

[No. 104.]

Submitted January 18, 1900. Decided February 26, 1900.

IN ERROR to the Court of Civil Appeals for the Fourth Judicial District of the State of Texas to review a judgment foreclosing a vendor's lien. *Reversed*.

See same case below, 13 Tex. Civ. App. 636, 35 S. W. 1074.

Statement by Mr. Justice **Brown**:

*This was an action instituted July 14, [399] 1894, by the plaintiff *Roller* in the district court of Limestone county, Texas, to recover a judgment against *Stephen Holly* and *William Holly* upon five promissory notes for \$228 each, dated January 1, 1890, payable to plaintiff, for the purchase price of a tract of 114 acres of land in that county, sold by him to them, and also to foreclose a vendor's lien upon the land to the amount of such notes.

NOTE.—As to what constitutes due process of law,—see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to what notice and hearing is required to constitute due process,—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194, and *Uiman v. Baltimore* (Md.) 11 L. R. A. 225.

To this action Joseph Peoples, H. W. Williams, and W. T. Jackson were also made parties defendant under an allegation that they were asserting an interest in the land, and a foreclosure of the vendor's lien was sought as against them. The defendants were all duly cited; the Hollys failed to answer, but the defendants Peoples, Williams, and Jackson filed an amended answer at the January term, 1895, of the court, in which they alleged that the plaintiff Roller bought the land in question from John W. and Cora E. Jordan in January, 1887, and gave in part payment therefor his note for \$216.17, due November 1, 1890, in which note as well as in the deed made to him a vendor's lien was retained; that before the maturity of this note the firm of McClintic & Proctor had become its owners, and on December 24, 1890, began in the district court of Limestone county a suit against the plaintiff for a foreclosure of the vendor's lien upon the land; that, "after due service being had," McClintic & Proctor on January 9, 1891, recovered a judgment against the plaintiff for \$276.65, with interest and costs of suit, and an order for the foreclosure of the vendor's lien; that an order of sale was issued, and on March 3, 1891, the land was sold by the sheriff of Limestone county for \$300, and bought by defendant Williams, who paid the amount to the sheriff, though the defendant [400] Jackson was interested with him *in the purchase, and on May 4, 1891, the two sold the land to their codefendant, Peoples.

Prayer: That in the event plaintiff recovered the land as against the defendants Williams, Jackson, and Peoples, they recover of plaintiff the \$300 paid for the land, and that the same be decreed a lien thereon.

To this amended answer plaintiff filed a first supplemental petition, consisting of demurrer, exceptions, and answer, containing—

First. A general denial.

Second. That at the time of the institution of the suit of McClintic & Proctor against him, plaintiff was a citizen of the state of Virginia, and resided in the county of Rockingham, said state.

That in January, 1890, he sold and conveyed the land in controversy to Stephen and William Holly by written instrument signed by him, and took the notes sued on as purchase price of the land.

That he put his said vendees in possession of the land, and that they were in possession of the land at the time of the institution of the McClintic & Proctor suit and had been in possession since the sale to them, and that neither they nor the Jordans were made parties to that suit.

That the McClintic & Proctor judgment was void as to plaintiff, because the district court of Limestone county, Texas, never acquired jurisdiction over him nor the property in question.

That the judgment was not obtained nor was the sale of the land made and obtained by due process of law, but was in contravention of the Fourteenth Amendment to the Constitution of the United States.

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That service of process on him in the McClintic & Proctor *suit was obtained without [401] the jurisdictional limits of the state of Texas, to wit, in the county of Rockingham and state of Virginia.

That no writ of attachment or other writ was levied on the land.

Third. That the proceedings in the McClintic & Proctor suit prior to the judgment and the allegations in the petition were ineffectual to confer jurisdiction on the district court of Limestone county over either the person of plaintiff or the land.

Fourth. That the time given him in which to answer the suit of McClintic & Proctor before the actual rendition of their judgment was not reasonable notice, nor such due and orderly proceedings, under the facts and circumstances as disclosed by the record thereon, as the law requires.

Fifth. That the lien attempted to be enforced in the McClintic & Proctor suit was an equitable lien, created by operation of law, and there has been no legislation in Texas authorizing such suit.

Upon an agreed statement of facts, substantially as above, judgment was rendered by default in favor of plaintiff against the Hollys for \$1,722.66, but the court refused to enforce the vendor's lien against the land, and gave judgment against plaintiff and in favor of Williams, Jackson, and Peoples for costs. Plaintiff appealed to the court of civil appeals, which affirmed the decree of the district court. (13 Tex. Civ. App. 636, 35 S. W. 1074.) Plaintiff thereupon applied to the supreme court of the state for a writ of error, which that court refused; whereupon he sued a writ of error from this court.

Messrs. John E. Roller and W. S. Laidley submitted the cause for plaintiff in error:

Due process of law requires both due notice and opportunity to be heard; and if the proceeding be found to be arbitrary, oppressive, and unjust it is not due process.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 712, 28 L. ed. 573, 4 Sup. Ct. Rep. 663, and cases cited.

Defendant must be properly brought into court, and must be given an opportunity to make his defense; and when this is not done there is no due process of law.

Bardwell v. Collins, 44 Minn. 97, 9 L. R. A. 152, 46 N. W. 315, 20 Am. St. Rep. 547, 556 and notes; *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794; *Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167; *Re Doyle*, 16 R. I. 537, 5 L. R. A. 359, 18 Atl. 159; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909, and cases cited.

In order that the process provided by the state for rendering a judgment on a personal demand against a nonresident owner may comply with the requirements of due process of law, it must afford the defendant reasonable or adequate notice of suit, and one which, from the nature of the process will be likely to reach him in time to defend the action.

Reno, Nonresidents, § 244.

The ancient practice under the common law tolerated no such unreasonable haste and speed.

2 Chitty, General Practice, p. 176.

Messrs. **W. T. Jackson, H. W. Williams, and Joe Peeples**, P. P. submitted the cause for defendants in error:

The original judgment is valid, and not obnoxious to the objection that the service of citation was in contravention of the provisions of the 14th Amendment to the United States Constitution.

1 Sayles's (Tex.) Civ. Stat. p. 417, art. 1228, and p. 418, arts. 1230, 1234, 1280-1282, 1340; *Battle v. Carter*, 44 Tex. 485; *Roller v. Holley*, 13 Tex. Civ. App. 636, 35 S. W. 1074; *Hewitt v. Thomas*, 46 Tex. 232; *Oswald v. Kampmann*, 28 Fed. Rep. 36; *Martin v. Pond*, 30 Fed. Rep. 15; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; 22 Am. & Eng. Enc. of Law, 143.

[401] *Mr. Justice **Brown** delivered the opinion of the court:

Briefly stated, the case is this: Roller, the plaintiff, who was a resident of Virginia, bought this land in January, 1887; gave a note in part payment for \$216.17, which passed into the hands of McClintie & Proctor, who brought suit thereon for a personal judgment against the plaintiff and for the [402] foreclosure *of a vendor's lien upon the land; served plaintiff with notice of the suit in Virginia, December 30, 1890, to appear in Texas January 5, 1891; and took judgment against him by default January 9, 1891, for \$276.65, and for a foreclosure of the lien. Upon a sale in pursuance of this foreclosure, March 3, 1891, the land was struck off to Williams and Jackson, and by them sold to Peoples.

Meantime, however, and on January 1, 1890, a year before the McClintie & Proctor suit was begun, plaintiff sold the land to the Hollys, who went into possession, and took from them five notes of \$228 each, and also reserved a vendor's lien, which he sought to foreclose in this suit. Williams, Jackson, and Peoples, who purchased the land under the sheriff's sale in the McClintie & Proctor suit, were made parties defendant, and now aver that the plaintiff's title passed to them, which plaintiff denies upon the ground that no process was served upon him within the state of Texas, or within a reasonable time before he was required to appear and answer.

The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham county, Virginia, December 30, 1890, to appear in Limestone county, Texas, on January 5, 1891, to answer the foreclosure suit is due process of law within the meaning of the Fourteenth Amendment? The Hollys, who bought this land and went into possession a year before the McClintie & Proctor suit was begun, were not made parties to that suit, probably because the deed from the plaintiff to them was not on record in Limestone county at the time of the in-

stitution of the suit, and their rights are not involved here. It is conceded that the McClintie & Proctor judgment is invalid as a personal judgment against the plaintiff under the case of *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569, and other cases in Texas of the same import.

1. The position of the plaintiff that, as there was no statute in Texas authorizing a suit against a nonresident to enforce an equitable lien for purchase money, and as there had been no seizure *in rem* of the lands, nor any notice to Roller's vendees, the Hollys, who were in possession, the jurisdiction of the Texas courts could not attach, and the whole proceeding was void, is unsound.

*In the case of *Hart v. Sansom*, 110 U. S. [403] 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, relied upon in support of this contention, an action of ejectment was brought against several defendants, who set up in defense a judgment against the plaintiff as one having some pretended claim or title to the lands, and other defendants holding recorded deeds thereof, which were averred to be fraudulent and void. Plaintiffs in that suit averred that these pretended deeds and claims cast a cloud upon their title, and that one of the defendants had ejected them from the lands and withheld possession from the plaintiffs. Due service was made on the other defendants, and a citation to Hart, who was a citizen of another state, was published as directed by the local statutes. All the defendants were defaulted, and upon a writ of inquiry the jury found that Hart claimed the land, but had no title by record or otherwise, and returned a verdict for the plaintiffs upon which judgment was entered for a recovery of the land, the cancellation of the deeds, and the removal of the cloud upon the title. It was held that this judgment was no bar to an action by Hart in the circuit court of the United States, to recover the land against Sansom, who held under a lease from the plaintiffs in the former suit. We held that none of that judgment was applicable to Hart, since that part which was for recovery of possession could not apply to him, as he was not in possession; and that part which was for the cancellation of the deeds set up in the petition was a decree *in personam* merely, and could only be supported against a nonresident of the state by actual service upon him within the jurisdiction of the state, and that constructive service by publication was not sufficient. Neither of the plaintiffs, however, was in possession of the land or claimed a lien thereon.

In *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, it was held directly that a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a nonresident defendant is brought into court by publication. It appeared in that case that a suit had been begun by a party alleging that he was the owner and in possession of the land in controversy, by virtue of certain tax deeds, against defendants claiming to have some title or interest

[404]in *the lands by patent from the United States, which title, as was alleged, was devested by the tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title, and that the suit was brought for the purpose of quieting such title. The defendants were brought in by publication, and a decree entered in favor of plaintiff quieting his title. The question was whether that decree was a bar to an action in ejectment between the grantees of the respective parties to the proceedings to quiet title. In other words, as put by the court: "Has a state the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant being a nonresident, is brought into court only by publication?" The question was answered in the affirmative. In delivering the opinion of the court Mr. Justice Brewer observed: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice. . . .

[405]Mortgage liens, mechanics' liens, *materialmen's liens and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

This case is readily distinguishable from that of *Hart v. Sansom* in the important fact that the plaintiffs in the judgment set up as a defense in that case were out of possession while the defendants were in possession, and the action was really in ejectment with a somewhat superfluous prayer for the cancellation of all the deeds under which the defendants claimed title. In *Arndt v. Griggs* the 176 U. S.

plaintiffs were in possession, under tax deeds, it is true, but having a prima facie valid title which they sought to vindicate against the former owners.

The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain state, he may institute proceedings against nonresidents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.

In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction, are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands, which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him, and it was held by this court that Reynolds's title to *the land had been devested [406] by the attachment proceedings, upon the ground that, in this class of cases, the levy of the attachment gave the court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the courts may enforce; and if a lien already exists, whether by mortgage, statute, or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.

It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the supreme court of Texas in *York v. State*, 73 Tex 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. R. Co.* 76 Tex. 686, 12 S. W. 698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328, and by this court in *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569. The article must then be restricted to actions *in rem*; but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants. In the case of *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. ed. 922, relied upon by the

plaintiff, a statute of Kentucky authorized suits in chancery against nonresidents "where any person or persons, their heirs or assigns, claim land as locator, or by bond or other instrument in writing;" and as the plaintiff in the case did not claim as locator, it was held that the court acted without authority, and that the decree was void for want of jurisdiction. Where the statute specifies certain classes of cases which may be brought against nonresidents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the

[407] *Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases, and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the court of civil appeals, and apparently by the supreme court of the state, and is obligatory upon this court as a construction of a state statute. *Battle v. Carter*, 44 Tex. 485; *Oswald v. Kampmann*, 28 Fed. Rep. 36, a Texas case; *Martin v. Pond*, 30 Fed. Rep. 15.

2. We are therefore remitted to the principal question in dispute between these parties, namely, the sufficiency of the notice given to the plaintiff of the *McClintic & Proctor* suit. In this connection our attention is called to certain articles of the Texas Code, the first one of which (art. 1228, Sayles's Tex. Civ. Stat.) provides generally for the service of process by giving five days' notice, exclusive of the day of service and of the return day. In addition to this there are the following sections:

Art. 1230. "Where the defendant is absent from the state, or is a nonresident of the state, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

Art. 1234. "Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this state."

[408] *Art. 1280. "The fifth day of each term of the district court and the third day of each term of the county court are termed appearance days."

Art. 1281. "It shall be the duty of the court on appearance day of each term, or as

soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

Art. 1340. "Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages, and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators, and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other states, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. In the case under consideration it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham county, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone county, Texas; that it would have required four days of constant traveling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit. It is true that, by articles 1280 and 1281, the case could not have been called for trial or default until the fifth day *of the term, January 9, and that Roller's de- [409] fault was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas courts in that particular, and was at liberty, even if he were not compelled, to construe the notice as it read upon its face. Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.

That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable

and adequate for the purpose. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist.* No. 108, 111 U. S. 701-712, 28 L. ed. 569-573, 4 Sup. Ct. Rep. 663. What shall be deemed a reasonable notice admits of considerable doubt. In the case of a witness subpoena the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual, contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense.

In 2 Chitty's General Practice, 175, it is said in reference to summary proceedings before justices of the peace: "The time appointed must always allow sufficient opportunity, between the service of the summons and the time of appearance, to enable the party to prepare his defense and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of court of King's Bench, if not be subject [410] to a criminal information. *The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should not be required, *omissis omnibus aliis negotiis*, instantly to answer a charge of a supposed offense necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defense." In vol. 2, page 144, it is said that the ancient practice was that a person residing at a considerable distance from a metropolis should be allowed more time for performing the act than a person within, or near, the metropolis, but that there is now no distinction between an arrest on process in London or Yorkshire, and in each case the defendant must appear or put in bail within eight days after the date of service or arrest. This, considering the small area of the kingdom, and the rapid means of transportation, seems just and reasonable.

While, as before stated, there is but little in the way of judicial authority upon the question, in the statutes of the several states regulating proceedings against absent and nonresident defendants, there is a consensus of opinion, which is entitled to great weight in passing upon the question of the reasonableness of such notice.

In the act of Congress providing for the enforcement of liens upon property as against nonresidents (Rev. Stat. § 738), the court is required to make an order fixing a

day certain, which shall be served on the absent defendant wherever found, or, if personal service be impracticable, such order shall be published once a week for six consecutive weeks, with a proviso that, if there be no personal service, he shall have one year after final judgment to enter his appearance, and set aside the judgment. The same proviso allowing the court to fix the time of appearance is found in the statutes of Massachusetts, New Hampshire, Pennsylvania, Alabama, Maryland, and Virginia.

*By the sixth rule of this court, a party [411] moving to dismiss must give a notice of at least three weeks, and where counsel to be notified reside west of the Rocky Mountains, a notice of at least thirty days.

By the Code of Civil Procedure of New York, § 440, the judge is required to make an order for publication once a week for six successive weeks, and in addition thereto the plaintiff, on or before the day of the first publication, is bound to mail a copy of the summons, complaint, and order for appearance to the nonresident defendant. By § 2525, citations from surrogate's courts must be served on nonresidents at least thirty days before the return day.

By the General Statutes of Vermont (1894), §§ 1641, 1643, nonresident defendants (served out of the state) are entitled to at least twenty days' notice before the time when they are required to appear.

By the practice in Michigan, the court orders the absent or nonresident defendant to appear in not less than three months, if he be a resident of the state, absent or concealed; and if a resident of some other of the United States or of the British provinces, in not less than four months; and if a resident of any foreign state, in not less than five months from the date of making the order; and if the order be not published for six successive weeks, defendant shall be personally served at least twenty days before the time prescribed for his appearance. 2 How. (Mich.) Ann. Stat. §§ 6670, 6671, and 6672.

By the Revised Statutes of Illinois (1899), chapter 22, § 14, there must be either publication or a personal service upon the nonresident defendant, "not less than thirty days previous to the commencement of the term at which such defendant is required to appear."

By the General Statutes of New Jersey (1895), vol. 1, page 405, the chancellor may order the nonresident defendant to appear not less than one nor more than three months from the date of the order; "of which order such notice as the chancellor shall by rule direct shall, within ten days thereafter, be served personally on such defendant," or be published for four weeks. This gives the defendant at least twenty days' personal notice.

*By the General Statutes of Arkansas [412] (1894), §§ 5677, 5678, a nonresident defendant is entitled to a copy of the complaint and the summons warning him to appear and answer "within sixty days after the same shall have been served on him."

By the Code of Georgia (1895), § 4979, the party obtaining an order for the appearance of a nonresident defendant shall file in the office of the clerk, at least thirty days before the term next, after the order for publication, a copy of the newspaper in which said notice is published, which the clerk is required to at once mail to the party named in the order; and, by § 4980, the judge is required to determine whether the service has been properly perfected.

By the Revised Statutes of Florida (1892), § 1413, the clerk must publish the order for the appearance of a nonresident defendant once a week for four consecutive weeks, and also, within twenty days after the making of the order, mail a copy to the defendant, if his residence be shown by the bill or affidavit.

By the Code of Montana (1895), § 638, publication must be made for four successive weeks, and, where the residence of the defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served at his place of residence. A similar practice also obtains in California.

By the General Statutes of Mississippi (1892), § 3432, publication may be dispensed with, if the summons be served upon the absent party at least ten days before the return day. This is the shortest length of notice to be found in any of the statutes.

By the Code of Oregon (1892), § 57, in case of publication, which must be not less than once a week for six weeks, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the postoffice, addressed to the defendant, if his place of residence be known; and "in case of personal service out of the state, the summons shall specify the time prescribed in the order for publication."

It may be said in general, with reference to these statutes, that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient. While, of course, these statutes are not obligatory here, they are entitled to consideration as expressive of the general sentiment of legislative bodies upon the question of reasonableness of notice.

Without undertaking to determine what is a reasonable notice to nonresidents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action.

The judgment of the Court of Civil Appeals, affirming the judgment of the District Court of Limestone County, must therefore be reversed, with instructions to re-

mand the case to that court for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE and Mr. Justice **Brewer** dissented from this opinion.

CARRIE MOSS, *Appt.*,

v.

RICHARD DOWMAN.

(See S. C. Reporter's ed. 413-422.)

Rights of settler on public land as against prior entry—effect of relinquishment of entry.

The rights of a settler in good faith, who takes possession of public land at a time when there is on record a homestead entry by another person who has never made any settlement, will attach instantly on the filing of a relinquishment of the prior entry, though at the same time one who has paid money for such relinquishment makes a new entry; and the settler may thereafter make an entry and perfect his right to a patent as against the prior entry made by a person not in possession.

[No. 141.]

Argued and Submitted January 31 and February 1, 1900. Decided February 26, 1900.

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decision of the Circuit Court dismissing a bill to establish a trust in a patent for public lands. *Affirmed.*

See same case below, 60 U. S. App. 69, 88 Fed. Rep. 181, 31 C. C. A. 447.

Statement by Mr. Justice **Brewer**:

*On March 17, 1897, a patent was issued [414] to the appellee, defendant below, for the southeast one quarter of section 22, in township 65 north, of range 4 west of the fourth principal meridian, in the state of Minnesota. Thereafter, and on March 23, 1897, the appellant, plaintiff below, filed her bill in the circuit court of the United States for the district of Minnesota, seeking to charge the defendant as trustee of the legal title for her benefit. To the bill as thus presented a demurrer was filed, which, on November 4, 1897, was sustained by the circuit court, and the bill dismissed. On appeal to the circuit court of appeals for the eighth circuit this decree was, on June 27, 1898, affirmed (60 U. S. App. 69, 88 Fed. Rep. 181, 31 C. C. A. 447), and to review this decision this appeal was taken.

The title of defendant, as disclosed by the bill and exhibits, is as follows: On September 19, 1890, he went upon the premises in controversy, then unoccupied, built a cabin, and continued to live therein (having on November 18, 1890, made formal homestead entry in the local land office) during all the proceedings in the land department, herein-

after stated, and until he had completed five years of occupancy, and then, upon proof of such continued occupancy, was awarded and received a patent on account of his homestead entry and occupation. The claim of the plaintiff, on the other hand, rests upon an entry in the land office prior to that of defendant, followed by a settlement on the land later than his. From 1885 to 1890 this tract, though never settled upon or occupied by anyone, was the subject of repeated entries at the local land office, such entries being made under the homestead law, the later ones being as follows: On May 7, 1890, Robert H. Doran made a homestead entry. Subsequently, the plaintiff paid to Doran [415] the sum of \$1,000 for a relinquishment *of his homestead entry, and on the 24th day of October, 1890, she filed in the local land office that relinquishment, and at the same time made a homestead entry in her own name. On April 22, 1891, two days less than six months after her entry, she appeared on the land, with assistants, material, furniture, etc., and commenced the construction of a home, completed, and occupied the same. A contest between the plaintiff and defendant in reference to the right to acquire title to this property was initiated in the local land office, and carried by appeal to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, resulting in a decision by the latter on December 19, 1894, in favor of the defendant; and in pursuance thereof the patent was issued to him.

Mr. James K. Redington argued the cause, and, with **Mr. Thomas J. Davis**, filed a brief for appellant.

Mr. Charles A. Towne submitted the cause for appellee.

The contentions of counsel sufficiently appear in the opinion.

Mr. Justice Brewer delivered the opinion of the court:

Repeated rulings of this court have settled that the decisions of the land department in contest cases on questions of fact are conclusive.

Defendant by taking actual possession on September 19, 1890, his entry in the land office on November 18, 1890, his continued occupation and proof thereof, was entitled to the patent which was thereafter issued to him, unless other facts found by the department show that as matter of law a superior right was vested in the plaintiff. Such facts, it is contended, are the successive formal entries in the land office unaccompanied by any actual possession of the land. It may be well to state some of these in detail: On May 11, 1888, following similar prior action, Lyman E. Thayer, of Wausau, Wisconsin, made a homestead entry. On November 10, 1888, one day less than six months [416] thereafter, Thayer relinquished, *and Julia McCarty made a like entry. On May 9, 1889, one day less than six months thereafter, McCarty relinquished, and Napoleon B. Thayer made a like entry. On November 9, 1889, exactly six months thereafter, Thayer relinquished, and John A. Murphy made a similar entry. On May 7, 1890, two days less than six months thereafter, Murphy relinquished, and Robert H. Doran made a like entry. On October 24, 1890, Carrie Moss paid Doran \$1,000 for a relinquishment of his entry, and on the same day, having obtained that relinquishment, she filed it in the land office and made her entry. Thereafter, and on April 22, 1891, two days before the expiration of six months, she went upon the land, and made improvements in the way of building and otherwise. As the secretary says in his opinion: "Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years in which it was entered and relinquished every six months." In other words, the findings of fact made by the land department show that the first person who made actual settlement upon the premises was the defendant, that his settlement and occupation continued for the term prescribed by the statute, and therefore that such settlement and occupation thus continued entitle him to a patent unless defeated by these proceedings in the nature of entries without settlement. In respect to them it was found that for five years this tract had been subjected to repeated entries, each entry made within six months of the prior entry and accompanied by a relinquishment of such prior entry, and thus for five years the land, without any settlement, without any occupation, was a football for homestead speculators, and withdrawn from actual settlement. Counsel for appellant thus states the question:

"The application of supposed law to this state of fact, in the determination by the Secretary of the Interior of the rights of the litigants respectively, was as follows: "The only question to determine in this case is whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For, although *Doran's entry was erroneously [417] allowed, being of record it segregated the land, and therefore no right could be initiated by reason of the settlement. But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it.

"In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not in good faith, under the established rulings of this department the settler Dowman's rights attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry."

"Upon this application of law to ascertained facts as recited, and upon no other or different facts, patent issued to appellee as hereinbefore recited."

We are content to take this statement, and upon it are clearly of the opinion that the

decision of the land department was correct. The obvious purpose of the pre-emption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation. While undoubtedly under the provisions of the statutes and the regulations of the land department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that in the eye of the public-land laws of the United States the speculator is never an object of favor. Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes make such a result necessary from a true construction [418] of their language it ought to be rejected. Again and again has this court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States. In *Lytle v. Arkansas*, 9 How. 314, 333, 13 L. ed. 153, 161, it was said:

"The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

So, also, in *Clements v. Warner*, 24 How. 394, 397, 16 L. ed. 695, 696:

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

Again, in *Bohall v. Dilla*, 114 U. S. 47, 51, 29 L. ed. 61, 63, 5 Sup. Ct. Rep. 782:

"Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon."

And again in *Anderson v. Carkins*, 135 U. S. 483, 487, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905:

"The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. . . . The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes."

These quotations might be multiplied, and nothing contradictory thereof can be found in our decisions. Their oft repetition simply accentuates the proposition heretofore stated, that the actual settler is the one for whose benefit the homestead and pre-emption laws were enacted.

*Counsel say that "a prima facie valid entry of record operates to appropriate the land covered thereby and to reserve it, pending the existence of such prior entry, from all subsequent disposition;" that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months; "that from 1859 to 1885, a period of over twenty-six years, an uninterrupted chain of cases held that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong, and that any such pretended claim was invalid and of no effect against another entry made at the time of cancellation."

We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a certain length of time in which to perfect his settlement and improvement. The Revised Statutes in terms give no such right. It is true that § 5 of the act of May 20, 1862 (12 Stat. at L. 393, chap. 75), carried into the Revised Statutes as § 2297, provides—

"If at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government."

But that section simply authorizes the government to annul an entry if thereafter it appears that the homesteader has actually changed his residence or abandoned the land for more than six months. But the very phraseology, "changing residence," "abandoning land," implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, § 2291, Rev. Stat., providing for final proof, requires an affidavit that the applicant has "resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit." In other words, the one section contemplates an immediate settlement and occupation, and the other provides for temporary abandonment. [420]

It is also true that on March 3, 1881, said § 2297 was amended by adding this proviso: "That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe." 21 Stat. at L. 511, chap. 153.

But this contemplates a separate ruling for specific reasons in particular cases, and no such ruling was applied for in the present case. It may be argued, it is true, that in view of the practice of the department it was a congressional recognition of its validity and an enlargement of the time in the particular cases specified.

But, as we have said, we do not feel called upon to decide upon the validity of any ruling or practice which secures to one making a homestead entry the right to perfect that entry by subsequent settlement and occupation.

In the case at bar every right which Doran possessed was ended on October 24, 1890, by the filing of his relinquishment in the local land office. 21 Stat. at L. 140, chap. 89, provides—

"That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

[421] At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. It is true he must perfect his right of settlement by making an *entry in the land office, and § 3 of the act of May 14, 1880 (21 Stat. at L. 140, chap. 89), heretofore referred to, provides—

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

Within less than thirty days from the filing of Doran's relinquishment Dowman made a formal entry in the land office, and that entry, based upon actual possession, is entitled to preference over an entry without possession.

Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry,

and that homestead entry has by lapse of time or relinquishment, or otherwise, been ended, anyone in actual possession as a settler and occupier of the land has a prior right to perfect title thereto. We indorse in this respect what was said by the learned judge of the circuit court [82 Fed. Rep. 810]:

"That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser, makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual, but a lawful, settler. There was no evidence of *mala fides* about Dowman's settlement which should affect the legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishment every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts, he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settlement *as the Secretary finds as a fact that [422] it was made, in good faith."

For these reasons we are of opinion that the judgment of the Court of Appeals was right, and it is affirmed.

UNITED STATES, Appt.,

v.

LUIS MARIA ORTIZ and Tomaz Ortiz.

(See S. C. Reporter's ed. 422-448.)

Private land claims—Mexican grant—burden of proof of validity of grant—power of surveyor general—hearing additional testimony as to claim recommended by predecessor—competency to testify as to signatures on land grant—comparison of signatures—use of enlarged photographic copies.

1. An applicant for confirmation of a private land claim is charged by the act of Congress of March 3, 1891, § 13, with the duty of tendering proof as to the existence, regularity, and archive record of the grant, as well as his connection with it,—such as possession, ownership, and other related incidents,—of sufficient probative force to create a just in-

NOTE.—As to use of photographs in evidence,—see *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 802, and note.

As to use of enlarged copies of handwriting in evidence,—see note to *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 813.

As to expert and opinion testimony as to handwriting,—see note to *Dresler v. Hard* (N. Y.) 12 L. R. A. 456.

As to conclusiveness of expert opinions with respect to handwriting,—see note to *Hull v. St. Louis (Mo.)* 42 L. R. A. 771.

As to proof of handwriting or signature,—see note to *Rogers v. Ritter*, 20 L. ed. U. S. 417.

- ference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from him to the United States.
2. The function of the surveyor general under the act of Congress of 1854 (10 Stat. at L. 308) was merely advisory, and until action by Congress had supervened on a recommendation for the confirmation of a private land claim made by his predecessor in office it was not only the right, but the duty, of that official, on proper suggestion being made to him, to hear additional evidence and transmit it for the consideration of Congress.
 3. The supplementary proceeding before a surveyor general to whom additional testimony is presented in respect to a petition for the confirmation of a land claim which was recommended by his predecessor, but has not yet been acted upon by Congress, is within the provisions of the act of 1891, § 5, permitting the use in evidence of proceedings before such officer.
 4. A person who has acquired great familiarity, during a long course of official action, with the official records and the signatures of a Mexican governor and his military secretary on grants of land, is qualified as an expert to testify as to the genuineness of such signatures.
 5. Signatures of Mexican officials on documents produced from official archives, the genuineness of which has never been challenged, and which are officially treated as authentic, may be admitted in evidence as standards of comparison, when there is an issue as to the forgery of the signatures of the same persons on an alleged grant.
 6. Enlarged photographic copies of an alleged forged signature and a signature offered as a standard of comparison are admissible in evidence on proof by the photographer of the accuracy of the method pursued and the results obtained by him in making the copies.

[No. 20.]

Argued October 11, 1899. Decided February 26, 1900.

A PPEAL from the Court of Private Land Claims to review a decision confirming an alleged Mexican land grant. *Reversed.* The facts are stated in the opinion.

Mr. William H. Pope argued the cause and, with **Solicitor General John K. Richards** and **Mr. Matthew G. Reynolds**, filed a brief for appellant.

Mr. T. B. Catron argued the cause and filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

[423] *Mr. Justice **White** delivered the opinion of the court:

Did the court below err in confirming an alleged Mexican land grant? is the inquiry which arises on this record.

The asserted grant is designated as the "Sierra Mosca," and embraces many thousand acres of land situated in the county of Santa Fé, New Mexico. The official proceedings had in relation to the grant prior to the commencement of this suit were as follows: In 1872 a petition was filed before the surveyor general of New Mexico, asking the confirmation of the grant in the name of "the

heirs and those holding under them of Juan Luis Ortiz, deceased." No other or fuller description of the persons asserting the right appeared in the proceedings. The surveyor general, after hearing, forwarded his recommendation that the grant be confirmed, to the Commissioner of the General Land Office in October, 1873, and the papers were in the same year submitted by the Secretary of the Interior to Congress. The proceedings before the surveyor general and the resulting official action, as above stated, were by virtue of the act of Congress of July 22, 1854. 10 Stat. at L. 308, chap. 103. No action having been taken by Congress, in December, 1876, certain persons alleging themselves to be part owners of a claimed Spanish grant of land, which it was averred conflicted with the one in question, petitioned the then surveyor general of New Mexico to hear additional testimony as to the reality of the grant which had been recommended for confirmation, on the ground that the testimony when heard would establish that the grant had been erroneously recommended for confirmation, because, among other reasons stated, it was a forgery. Whilst intimating a doubt as to his power to review the action of his predecessor in office, the surveyor general yet ordered the inquiry to be made, and, after some lapse of time on due notice, testimony was taken. In consequence of the notice given, the attorney for the petitioners, on the original application to confirm, appeared and cross-examined the witnesses. Subsequently acting upon such evidence, the then incumbent of the surveyor general's office transmitted the proceedings to the Commissioner of the General Land Office with *the[424] recommendation that the grant be rejected on the ground that it was affirmatively shown by the proof to be a forgery. This supplementary report and papers were also, in December, 1887, submitted by the Secretary of the Interior to Congress for its consideration.

No action having been taken by Congress upon either the original or supplementary report, the present suit was commenced, in the court of private land claims, to obtain the confirmation of the grant. The petition by which the cause was initiated was filed in the name of Luis Maria Ortiz and Tomaz Ortiz, and averred that the alleged Sierra Mosca grant had been made on June 4, 1846, by Manuel Armijo, the then governor of the territory of New Mexico, to Juan Luis Ortiz, and that the grantee had on June 8, 1846, been placed in legal possession of the granted land by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in the Republic of Mexico. It was averred that "the original papers relating to this said grant of land are now on file in the office of the surveyor general of the territory of New Mexico, known in that office as private land claim No. 75, for the Sierra Mosca tract, and are not in the control of the plaintiffs, so that they can file them therewith." A copy, however, with a translation of the papers thus referred to, was annexed to the petition. The petition

ers asserted their right under the grant as follows: "The plaintiffs are the owners in fee in and to the said land grant by inheritance from their father, Gaspar Ortiz, who acquired his title thereto, as they are informed and believe, by inheritance from his father and their grandfather, Juan Luis Ortiz, the original grantee, and by purchase from the other heirs of the same." No enumeration of the other heirs and no more precise specification of the date and character of the alleged purchase was contained in the petition.

The petition was generally traversed, and subsequently an answer was filed, specifically averring that the alleged granting papers were forgeries, and denying that delivery of possession had ever been made by a justice of the peace, as stated in the petition. After trial upon these issues, the grant was confirmed, Murray, J., dissenting.

[425] *Inverting the order in which they have been discussed at bar, and stating them in a condensed form, the questions presented for decision are: First. Does the proof establish that the grant in question was made, and that delivery of juridical possession thereunder was operated by a Mexican official charged with such duty? Second. If it be found that the grant was made, was there legal power in the then governor of New Mexico to make it, and, if so, was the power so executed as to authorize the court to enter a decree of confirmation? The first of these questions opens for consideration, not only the issue of forgery, but also involves deciding whether the proof is of such a character as to engender the affirmative conviction of the genuineness of the granting papers. The second raises several questions of law—that is, as to the power of the governor, at the date when the alleged grant is averred to have been made, the necessity of approval of his action by the departmental assembly, and other legal issues. Necessarily, all the questions coming under the second head arise only in the event the objections to the confirmation of the grant embodied in the first proposition are found to be untenable.

Before analyzing the evidence in order to develop and weigh the proof tending to show the existence of the grant, it will subserve clearness of statement, at the outset, to determine upon whom is cast the burden of showing the existence of the grant, and in a general way to consider briefly the *quantum* of proof required for that purpose. By the first subdivision of § 13 of the act of March 3, 1891, constituting the court of private land claims, that court and this court are commanded not to allow a claim "that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico," etc. The statute authorizes no presumption in favor of the genuineness of a title from the mere fact that the claimant for confirmation presents a paper which is asserted to be a grant from a Mexican official. The command of the statute is not that the United States, when an alleged Mexican title is presented for confirmation, shall be put to the burden of showing that the title in question is not genuine, but that

the evidence presented in favor of the asserted *title shall be of such persuasive and preponderating force as to convince the court that the title is real, and, besides, possesses the legal attributes which the statute requires as essential to confirmation. It is clear, then, that the law casts, primarily, upon the applicant for confirmation, the duty of tendering such proof as to the existence, regularity, and archive record of the grant, as well as his connection with it, such as possession, ownership, and other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant before the burden of proof, if at all, can be shifted from the claimant to the United States. This construction which arises from the text of the act of 1891 is sustained by considering that previous to that enactment there had been many decisions of this court rendered under the California act of 1851, construing that act as imposing upon the claimants for confirmation the primary burden of proof, although the provisions of the California act were not as explicitly mandatory as are those of the act of 1891. Thus from the date of the decision in *United States v. Cambuston*, 20 How. 64, 15 L. ed. 830, announced in 1857, to the ruling in *Berreyesa v. United States*, 154 U. S. 623, and 23 L. ed. 913, 14 Sup. Ct. Rep. 1179, rendered in 1876, it was often decided that the burden of proof to sustain a Spanish grant rested upon the claimants, and that the failure to show that the official archives contained evidence that the grant had been made, and the fact of the production of the original title papers solely from the custody and possession of the grantee, were circumstances so suspicious as to create a presumption against the genuineness of the grant, calling for the production by the grantee of more than slight evidence to overthrow the presumption. *Luco v. United States*, 23 How. 515, 528, 16 L. ed. 545, 547; *Peralta v. United States*, 3 Wall. 434, 440, 18 L. ed. 221, 223. Indeed, this burden of proof resting upon the grantee had been frequently declared by this court, prior to the enactment of the law of 1891, to be essentially necessitated by the situation and as the sole means of avoiding the danger of imposing upon the United States by means of forged or fabricated grants. *United States v. Teschmaker*, 22 How. 392, 405, 16 L. ed. 353, 357; *United States v. Pico*, 22 How. 406, 16 L. ed. 357; *Fuentes v. United States*, 22 How. 443, 16 L. ed. 376; *Luco v. United States*, 23 How. 515, 528, 16 L. ed. 545, 547; *United States v. Bolton*, 23 How. 341, 347, 16 L. ed. 569, 571; **Palmer v. United States*, 24 How. 125, 16 L. ed. 609; *United States v. Knight*, 1 Black, 227, *sub nom.* *United States v. Moorehead*, 17 L. ed. 76; *United States v. Neleigh*, 1 Black, 298, 17 L. ed. 144; *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232; *White v. United States*, 1 Wall. 660, 17 L. ed. 698; *Romero v. United States*, 1 Wall. 721, 743, 17 L. ed. 627, 633; *Pico v. United States*, 2 Wall. 279, 281, 17 L. ed. 856, 857; *Peralto v. United States*, 3 Wall. 434, 440, 18 L. ed. 221, 223.

It is preliminarily necessary to dispose of

certain exceptions taken to the admissibility of evidence, and which are pressed on our attention.

1. The petitioners in opening their case offered in evidence the original proceedings before the surveyor general, including the testimony of the witnesses then examined, after having made the prerequisite proof of death of such witnesses in accordance with the requirements of § 5 in the act of 1891. 26 Stat. at L. 854, chap. 539. Subsequently, the defendant, in proving its case, offered the supplementary proceedings which had been had before the surveyor general (including the testimony of the witnesses taken in that proceeding—proper foundation also having been laid for the introduction of such testimony), the finding of the surveyor general made in the proceedings, and the forwarding of the whole to the Commissioner of the General Land Office, and the submissions made of all the matters in question by the Secretary of the Interior to Congress. All this was objected to on the ground that the power of the surveyor general was exhausted by the original investigation and report, and that therefore a succeeding incumbent of the office was without legal authority to have further considered the grant or to have taken any additional testimony as to its genuineness or validity.

But the function of the surveyor general, under the act of 1854 (10 Stat. at L. 308, chap. 103), was merely advisory, and, until action by Congress had supervened, it was not only the right, but the duty, of that official, on proper suggestion being made to him, to hear additional evidence and transmit it for the consideration of Congress, in a claim pending for confirmation. The act of the surveyor general in making the supplementary investigation was certainly either directly or impliedly authorized or ratified by his official superiors, since the knowledge of

[428] *the investigation was conveyed to the Commissioner of the General Land Office, and not only the action taken by the surveyor general, but all the papers relating thereto, were by the Secretary of the Interior laid before Congress. Obviously, the purpose of the 5th section of the act of 1891, in permitting the use, subject to the restrictions and qualifications found in the act, of the proceedings had before the surveyor general, was to allow all the proof then existing to be received and to be given such weight as it was entitled to have. The court below therefore properly admitted the supplementary proceedings.

2. William Tipton was called as a witness for the government. The witness, after stating that he was appointed by the Department of Justice to assist in preparing the defense of cases coming before the court of private land claims, proceeded to say that for a long period of time, covering about sixteen years, he had been previously employed in the office of the surveyor general of New Mexico; that in such employ as clerk, copyist, translator, and custodian of the archives, he had constant official occasion to examine, translate, and consider the Spanish and Mex-

ican archives extant in the office; that, in consequence of these facts, he was entirely familiar with the signatures of Governor Armijo and Secretary Vigil, the signatures of whom purported to be affixed to the grant relied upon; that his knowledge on the subject had been derived from examining not less than seventy-five or eighty signatures of Governor Armijo, and not less than one hundred and twenty signatures of Secretary Vigil, found in the archives, which were either attached to grants, to the journals of the territorial deputation and departmental assembly, and to other official documents. Besides the familiarity of the witness with the signatures in controversy, he was examined as to his capacity as a general handwriting expert, the whole as a basis for eliciting from him his opinion as to the genuineness of the signatures referred to. Objection was made to allowing the witness to testify on this subject, because it was contended the proof did not lay an adequate foundation therefor, and the overruling of this objection was excepted to.

*It is unnecessary to decide whether the [429] witness was competent to express an opinion as a general scientific expert on handwriting, or to consider the limitations as to the admissibility of testimony of that character, since the special qualifications of the witness resulting from his great familiarity, acquired during a long course of official action, with the official records and the signatures of Governor Armijo and Secretary Vigil, qualified him beyond question to testify as an expert as to the genuineness of the signatures found upon the alleged grant. The case is directly within the principle decided in *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417, where it was held that witnesses who in the course of administration of the duties of an official position had acquired a familiarity with a certain signature, although they had never seen the party write and had never corresponded with him, were competent to express an opinion on the subject of the genuineness of a signature purporting to have been made by that person. The court said (p. 322, L. ed. p. 419):

"It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information, and if the court on the preliminary examination of the witness can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject."

Referring to the testimony of the wit-

nesses showing knowledge derived from the connection with the official archives which were undoubtedly genuine, the court added:

[430] "The three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of *Sanchez, than if they had only received one or two letters from him, or saw him write his name once."

The court below did not err in admitting the testimony.

3. The witness Tipton produced fifteen signatures of Governor Armijo, and several of Secretary Vigil, written approximately about the time when the alleged grant in question purported to have been made, taken from among the signatures of these officers contained in the archives, and they were offered as standards of comparison with the signatures found on the grant in controversy. It is objected that the genuineness of these signatures had not been adequately proved, and therefore they should not have been admitted to be used as standards of comparison.

They were correctly received. The whole testimony of the witness demonstrated that the signatures in question were upon documents which the witness produced from the archives, the appropriate place for them, and the genuineness of the papers to which they were annexed had never been challenged and were officially treated as authentic. This justified their admission, at all events in the absence of any suggestion of proof as to their nongenuineness.

4. The defense caused the signature of Governor Armijo to the alleged grant and one existing on one of the documents offered as a standard of comparison to be photographically enlarged. After proving by the photographer by whom the photographs were made the accuracy of the method pursued and the results obtained by him, the enlarged photographs were tendered, and were admitted in evidence over objection. The ruling was correct. *Marcy v. Barnes*, 16 Gray, 161, 163, 77 Am. Dec. 405.

The petitioners offered in evidence the alleged granting papers, which are reproduced in the margin.† Postponing for after con-

sideration the determination of the legal value *of the documents so offered, we come [431] to review the evidence relied upon to show that the asserted grant had been actually executed. Having proved the death of all the witnesses who *testified before the sur- [432] veyor general in 1872, offer was then made of all the proceedings, including such testimony. Upon this evidence and the testimony of one witness tending to show the possession at one time in the original grantee of the granting papers, the claimants in opening rested.

The witnesses who testified before the surveyor general in 1872 were as follows: Antonio Sena, who was for some time prior to December, 1845, prefect of the department in which the land in question was situated, and who ceased to hold that office about the month stated, and after an interregnum again held the office after the end of March, 1846; Ramon Sena y Rivera, who in 1846 was an employee in the office of the military commandancy of New Mexico, under the official direction of Donaciano Vigil, military secretary of Governor Armijo in June, 1846, and prior thereto; Pablo Dominguez, who was also employed as clerk in the same office with Ramon Sena y Rivera, and Joab Houghton, Esq., an attorney residing at Santa Fé, who had been United States vice consul, chief justice and associate justice of the supreme court of the territory, and register of the United States land office. Of these witnesses, the two first (the Senas) testified *that the grant was genuine, from the [433] fact that they had seen it executed, one besides swearing that he was present at the delivery of juridical possession by Jose Dolores Trujillo, the alleged justice of the peace. The other two witnesses (Houghton and Dominguez) testified to their familiarity with the signatures of Governor Armijo and the civil Secretary Vigil, from having seen them write and sign, and that the signatures to the alleged grant were in their opinion genuine.

The defense offered the proceedings before the surveyor general on the supplementary hearing, in 1878, including the testimony then taken of witnesses since deceased, and

†[Translation.]

Alleged Documents of Title.

Most excellent governor and commanding general of the Department of Mexico:

I, Juan Luis Ortiz, a resident of Pojoaque, before the superiority of your excellency, with the highest respect and in the most ample form allowed by law and proper for me, appear and state: That, desiring through the most legitimate and proper means to encourage agriculture, so much recommended of the laws, and finding myself at this time with land so considerably restricted as not to furnish a fair subsistence for the support of the large family I provide for, and having seen and examined with great care a tract of public land which is situated near the place of my residence, which I describe to your excellency under the following boundaries: On the east by a mountain called the Mosca, or Panchuelo slope; on the west one fourth of a league below the waterfall on the Little Springs Meadow; on the north a little flat mountain and some arroyos running between [434] north and west; and on the south a rocky hill situated above the Chupadero valley, or boundary of the citizens of Tesuque river; and finding in the said tract, which I solicit of your excellency, the advantage of containing fertile lands for cultivation, pastures, and water sufficient, and else which is needed necessary for raising stock; and, satisfied, as I am, that it is public and unappropriated land, as I have already stated, I have not hesitated to apply to the justice of your excellency, asking, very respectfully, that for the sake of, and in justice, you be pleased to grant me the said possession, which I ask in the name of the Mexican nation, to which we have the honor to belong, protesting that I do not act in dissimulation, and whatever be necessary, etc., stating to your excellency at the same time that my petition is not upon paper of the proper stamp, there being none in this city; but I promise to attach one cancelled as soon as there shall be any.

Most excellent sir, Juan Luis Ortiz.
Santa Fé, June 3, 1846.

then offered other proof, oral and documentary, tending to make out the defense. The only evidence directly relating to the genuineness of the signatures was that of Donaciano Vigil and William Tipton, the signatures of Armijo and Vigil introduced for the purposes of comparison, and the enlarged photographs heretofore referred to. The question then is, Did the evidence offered by the petitioners make out a case, and if so, did the defense rebut the proof, if any, which arose from the evidence upon which the claimants rested?

Without reference to the testimony of the witnesses on either side, a comparison of the signatures of Governor Armijo and Secretary Vigil, as found on the alleged grant, with the signatures on the documents offered for the purposes of comparison, engenders, in our minds, a very strong conviction against the genuineness of the grant relied upon. And this conclusion is not at all shaken by a comparison of the signatures to the grant with those which were introduced by the petitioners in rebuttal, also for the purposes of comparison. Without elaborating the reasons by which the conviction of want of genuineness is suggested, by the comparison, it suffices to say that the entire characteristics of the signatures to the grant present such saliently suspicious features, when the comparison is made, as to leave it impossible for the mind to resist, if not the absolute conviction, in any event the grave doubt which irresistibly arises. It is worthy of being noted that the surveyor general before whom the first proceedings were had considered that the mere inspection of the [434] signatures to the *grant created such a doubt of its genuineness that he would not have been able to have recommended confirmation on the face of the papers, but for testimony taken before him. He said:

"I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth; but the testimony brought before me, especially of the two last witnesses, who, beyond all ques-

tion, are highly respectable men, has set my mind at rest on that point."

By the application of the rule which we have at the outset referred to, casting upon the claimant the burden of sustaining the validity of an asserted grant, we are compelled to refuse to affirm the judgment of confirmation, unless the testimony offered for the claimants removes the doubt in question.

Now, the testimony as to the grant as we have seen was twofold in its nature. First, Joab Houghton and Pablo Dominguez, who, from a knowledge of the handwriting of the officials, testified that in their opinion the signatures on the grant were genuine, and that of the two Senas who swore that they had personally witnessed the execution of the grant, and therefore gave direct testimony to the genuineness of the signatures. Let us consider whether these two classes of evidence dispel, if not the conviction, at least the grave doubt which has arisen, as above stated.

The testimony of Mr. Houghton, whose sincerity we do not doubt, embodied but his opinion of the genuineness of the signature. That the appearance, however, of the signatures was, to his mind—as it was to that of the surveyor general—suggestive of suspicion, is, we think, manifest from his testimony. Thus, on being shown the alleged decree or grant, and on being asked by counsel for claimant whether the signatures of Armijo and Vigil were genuine or not, the witness said: "I recognize Armijo's signature as being genuine on this document, as I do that of Juan B. Vigil, though signed somewhat differently from his usual way." Being interrogated by the surveyor general, and after stating that he did not know that Mexican officials used steel pens at Santa Fé in 1846, the witness testified as follows:

*Q. Was Governor Armijo in the habit of [435] becoming intoxicated?

A. I think not. I have seen him often, but never saw him intoxicated.

Santa Fé, N. M., June 4th, 1846.

What is stated by the petitioner in the foregoing petition, asking that there be granted to him the public land which he describes in the same, being true, and this government being convinced of the good reasons he sets forth, the petitioner will apply to the proper justice that he may place him in possession of the land solicited in entire conformity to the laws in the premises.

Juan B. Vigil y Alarid, Sec. Armijo.

At this place, our Lady of Guadalupe of Pojoaque, on the eighth day of the month of June, one thousand eight hundred and forty-six, before me, Citizen Jose Dolores Trujillo, justice of the peace at said place, appeared Citizen Juan Luis Ortiz, resident of the same, who presented me the foregoing superior decree of Manuel Armijo, most excellent governor and commanding general of the Department of New Mexico, placed upon the margin of the present petition, dated on the 4th instant, in which I am notified to place the said Juan Luis Ortiz in possession of the land he requests be granted him, in conformity with the laws of possession; wherefore, I, said justice of the peace, accompanied by my

attending witnesses, proceeded to put in execution the said superior decree, which I fulfilled, designating the boundaries set forth: On the east a high mountain called the Mosca, or Pachuelo slope; on the west a fourth of a league below the waterfall on Little Springs Meadow; on the north a small flat mountain, some arroyos running between west and north; and on the south a rocky hill, which stands above the Chupadero valley, or boundary of the residents of Tesuque river; and having complied with what I am directed to do by the most excellent governor and commanding general aforesaid, I gave him to understand that said favor and donation has been conferred upon him in the name of the Mexican nation, to which we have the honor of belonging. And in due testimony, as well in the present as in the future, I executed to him the present document of possession, signed by myself and my attending witnesses, with whom I act specially for lack of a notary public, there being none in this department. To all of which I certify.

Jose Dolores Trujillo.

Attending: Ygnacio Alarid.

Attending: Miguel Gonzales.

Q. Have you ever seen him in a condition of excitement or nervousness, such as would be likely to affect his handwriting if using a kind of pen he was unfamiliar with?

A. Yes; I have seen him frequently in such a condition, particularly at the time of the battles in Mexico in 1846, and of the approach here of the American troops during the summer of 1846.

The testimony of Dominguez also but expressed his opinion. The probative force of the opinion of this witness as to the signatures in question is greatly weakened, however, by his statements on other subjects, such as the possession under the grant and the official capacity of Trujillo as justice of the peace, which, as will be hereafter seen, are entirely irreconcilable with the facts, which, if not conclusively established, are in any event sustained by a preponderance of proof.

In conflict with the opinion of Houghton and Dominguez is that expressed by Donaciano Vigil in his testimony on behalf of the government. He, as has been stated, was military secretary of Governor Armijo at the time the grant was alleged to have been made, and Dominguez was a clerk in Vigil's office. With respect to the signatures upon the decree, purporting to have been made by Armijo, the witness said that he had been intimate with Governor Armijo, and had seen him write, and was well acquainted with his handwriting, and, while unwilling to swear positively that the signature "Armijo" on the decree was not genuine, because the witness had not actually seen the name written, the witness swore that Governor Armijo always wrote his name like the signature upon a document exhibited by the witness, which he had seen Armijo write, and further stated that he (the witness) had never seen a genuine signature of Governor Armijo like that on the decree of grant, and that, in his judgment, "the signatures is not the same Armijo was accustomed to write."

[436] The testimony of this witness conveys an impression of conscientious *circumspection, the absence of which is particularly to be remarked in the testimony of Dominguez with which Vigil conflicts. The document produced by Vigil as a type of the signature of Armijo has been certified up, and placing it in juxtaposition with the signature of Armijo on the alleged grant fortifies and strengthens the doubt arising from the comparison previously referred to.

The testimony of Vigil is fortified by that of Tipton, who, in lucid and cogent reasons, supports the opinion which he unequivocally expressed, that the signatures of both Armijo and Vigil y Alarid were not genuine. The proof on this branch of the case, in the best view which may be taken of it for the petitioners, comes, then, to this: The genuineness of the signatures to the grant as a matter of opinion is supported by two witnesses, the testimony of one of whom at once suggests the doubt which arises on the face of the paper, and the statements of the other one of whom is weakened by his declarations

on other subjects which, as will be hereafter seen, have been substantially overthrown. On the other hand, the proof of want of genuineness as a matter of opinion is sustained by two witnesses, one of whom (Vigil) based his opinion from an intimate official and personal relation with Governor Armijo which existed at the time the alleged grant was made and prior thereto, and the other of whom, Tipton, by a long official relation with documents containing the signatures of Governor Armijo and Secretary Vigil, had apt and valuable means of forming a correct and reliable opinion, and whose testimony is so clear and so intelligent as to carry great weight with it. This state of the proof certainly, instead of removing the doubt suggested by the inspection and comparison, greatly confirms it.

What, then, is the effect of the testimony of the two witnesses (the Senas) who in the first proceeding before the surveyor general testified to their personal knowledge of the signing of the grant?

Antonio Sena, after stating that he was prefect in June, 1846, of the first district of New Mexico, on being asked whether a grant had been made, and, if he replied yes, to say by whom and to whom, testified as follows:

*"There was a grant made for this property [437] in June, 1846, by Governor Armijo to Juan Luis Ortiz; and the decree now here is the original one, signed by Governor Armijo, in my presence, on the 4th day of June, 1846. I now mean the paper in this case marked 'Sierra Mosca grant—original.' In the month of June, 1846, there was no stamped government paper here, and we had to use common paper."

Ramon Sena testified to an intimate acquaintance with the governor and secretary, and on being asked to state whether the signatures to the decree were genuine, and whether Juan Luis Ortiz was placed in possession, answered:

"I have examined the signatures of Armijo and Vigil y Alarid, upon the document mentioned, and am satisfied that they are both genuine. In the year 1846—I think in the month of June—I was requested by Juan Luis Ortiz to go with him to present to Governor Armijo a petition for land, and the petition of said Ortiz shown me on said document A is the petition, and bears the genuine signature of said Ortiz. Governor Armijo directed a clerk (I don't remember who) to write the decree, the same on the margin of the document shown me as document A, which decree he then and there signed, as did also Senor Vigil y Alarid; the governor then handed the document to Ortiz, who requested me to proceed with him to the alcalde at Pojoaque, to be by him placed in possession of the land, and who did place Ortiz in possession, executing the act in my presence, and the record of that act borne by said document A is the act of possession I refer to, and the signature of Jose Dolores Trujillo, which it bears, is his genuine signature. . . . The petition of Ortiz to the governor was presented to him in duplicate, and when he had acted upon them he handed one

of the documents to Ortiz and the other he handed to Senor Vigil y Alarid, to be placed among the archives."

It is worthy of remark that it was not shown when, if dead, the attesting witnesses to the act of possession had died, and they were not called upon to testify before the surveyor general or at the trial below—a circumstance which necessarily greatly detracts from the weight of the testimony of Ramon Sena.

[438] *Both the Senas were sons-in-law of the alleged grantee, Juan Luis Ortiz. One was certainly a clerk with Dominguez in the office of Donaciano Vigil at the very time the grant is asserted to have been executed, and yet Vigil, who was military secretary of Armijo, says that he never heard at the time anything concerning the alleged execution of the grant. It is suggestive of doubt, therefore, that a grant for many thousand acres of land should have been made by Armijo to Juan Luis Ortiz, an acquaintance of Vigil, and yet that the fact should have been witnessed and known by a clerk in Vigil's office without any information having been conveyed to the head of that office. It is worthy also of remark that Ramon Sena says that when the grant was executed he took such an interest in it that he left the office where he was employed and went to the place where the land was situated to witness the delivery of juridical possession made by the justice of the peace, although, as already stated, Ramon Sena's name does not appear upon the act of possession as an attesting witness thereto.

In addition to the peculiarities in the testimony of the witnesses, to which attention has been called, there is a conflict between their statements which the record leaves wholly unexplained. Thus, Antonio Sena explicitly says that but one paper was signed by Governor Armijo, and that the decree shown him was the *original* grant, and he makes no reference to any duplicate original petition being presented to the governor, whilst Ramon Sena affirms that duplicate originals of the certificate were made and presented to the governor, and that he acted upon both.

Despite the inconsistencies in, and the improbabilities suggested by, the testimony of the Senas above stated, let it be conceded, *arguendo*, that their statements of personal knowledge of the execution of the grant, standing alone, would be sufficient to overthrow the doubt engendered by the appearance of the signatures to the grant, and by the other testimony on the subject, still such admission cannot be here controlling because of the fact that the testimony of the Senas is shown to have been incorrect in other partic-

[439] ulars *so important as to deprive it of the weight which otherwise might be attributed to it.

A direct issue was made in the pleadings in this case as to the official existence of the person by whom the act of juridical possession purported to have been executed. The petition presented for confirmation to the

surveyor general in 1872 alleged on this subject as follows:

"The said Juan Luis Ortiz was placed in the legal possession of said grant by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in said republic, governing the making, granting, and placing persons or grantees in possession of lands granted to them."

In the asserted granting papers Trujillo specifically describes himself as "justice of the peace at said place" (Pojoaque), and grants the juridical possession in his capacity as such officer. On the subject of this official, Antonio Sena, on being shown the act of juridical possession, testified as follows:

Q. Who was, if you can state, the justice of the peace at Pojoaque at that time?

A. It was Jose Dolores Trujillo.

Q. Do you know the signature of Jose Dolores Trujillo? If so, please examine the signature on the document marked "Sierra Mosca grant—original," purporting to be his, and state whether it is genuine.

A. I know the signature; and have examined the one referred to; and it is his genuine signature. I, as prefect, had authority to appoint the justices of the peace in my district, and I appointed him for the precinct or demarcation of Pojoaque.

By necessary implication in the passage already quoted from the testimony of Ramon Sena, he also affirms the official character of Trujillo as an *alcalde* or justice of the peace.

By the Mexican law in force at the time of the making of the alleged grant a justice of the peace exercised his authority over a designated area known as a demarcation. Contemplating the contingency of the absence or inability from other cause of such an appointed official to act, there was an official known *as a *juez de paz suplente* or sub-[440]stitute justice of the peace. The area embraced within the demarcation over which the jurisdiction of the justice of the peace extended was subdivided into precincts, for which an inferior official was appointed, known as a *juez de barrio*.

It is unnecessary to consider the difference, if any, between the authority of these officials, as the question is not what was the power of Trujillo, as an officer, but whether the proof shows that he was an official, or at all events whether it does not give rise to such serious doubt, on the subject, as to cause us to be unable to sustain the alleged delivery of juridical possession.

It is clearly proved that in 1846, at the time the alleged granting papers purport to have been executed and long prior thereto, there was no justice of the peace for the demarcation of Pojoaque, as there was no such demarcation. At that time Pojoaque was a small town within the demarcation of San Ildefonso, that demarcation being subdivided into four *barrios*, as follows: El Rancho, Cuyamungue, Jacona, and Pojoaque.

Now, the proof is that in 1845, and also in the year when the grant was alleged to have been made (1846), the justice of the

peace of the demarcation of San Ildefonso was Jesus Maria Serrano. This fact is established by official documents in the record, and is conceded by the defendants in error. It is also shown by official documents, and is not denied, that in 1845 the substitute of Serrano for the demarcation of San Ildefonso was Teodoro Gonzales. Whilst there is no official record of the reappointment of Gonzales as *juez de paz suplente* for the demarcation for the year 1846, Gonzales—who was examined before the surveyor general in 1878—testified positively to that fact, and said that in 1846 he and he alone was such officer. Another witness also, Jesus Maria Ortiz y Baca, who was examined before the surveyor general at the same time, but who again testified at the trial, confirmed this statement of Gonzales. The uncontradicted statements of these witnesses were corroborated by those of other witnesses living in the vicinage of Pojoaque, who said that they knew Serrano to have been justice of the peace, and Gonzales to have been his substitute in June, 1846, and that *although they were personally acquainted with Jose Dolores Trujillo, they never heard of his laying any claim to any one of these offices or exercising or pretending to exercise any of the functions thereof.

[441] It is impossible to deduce any reasonable conclusion favorable to the contention that Trujillo was a *juez de paz suplente* in 1846 upon the assumption that lapse of time had led these witnesses to confound one year with another, since the testimony shows that both in 1845 and subsequently in 1846 no person of the name of Trujillo held that office.

What is the state of the proof as to the *juez de barrio* of Pojoaque in 1846, when the alleged grant was made?

Those officials, it would seem, were recommended for appointment by the justice of the peace of the demarcation, through the prefect of the district, to the governor of the department for confirmation, their commissions going to them through the justice of the demarcation. It is shown by official evidence—which is undenied—that in 1845 the *jueces de barrios* for the four precincts within the demarcation of San Ildefonso were as follows:

At El Rancho, Don Joaquin Lujan.

“Jacona, Don Jesus Lujan.

“Cuyamungue, Don Jesus Maria Ortiz.

“Pojoaque, Don Miguel Trujillo.

In December, 1845, it is shown that the then prefect of the department, Santiago Flores, addressed a letter to Serrano, as justice of the peace of the demarcation of San Ildefonso, advising him that it had been seen fit to “re-elect” him “justice of the peace for the coming year,” and directing him: “As soon as you receive this to appoint the precinct justices which there ought to be within the limits of the demarcation under your charge, reporting to this prefecture with the greatest possible promptness as to whom you have appointed to those positions, in order that they be approved by his excellency the governor.”

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No documentary proof was adduced showing that Serrano complied with this order, although of course the assumption would be either that the incumbents held over, or that a *vacancy was not allowed to exist, and the appointments were promptly made as directed. Now, as Trujillo was not even a *juez de barrio* in the previous year, he could not have held over, and the testimony excludes the implication that he could at that time have been appointed to fill a vacancy and acted as such officer without the knowledge of the residents at the place where his functions would have been exercised.

Santiago Flores was not the incumbent of the office of prefect on January 12, 1846, as on that date one Jose Francisco Baca y Terrus was acting as prefect, and he appears from the record to have continued to be prefect as late as March 27 following, his successor in the office being Antonio Sena. Assuming, then, that Sena's testimony can be construed as relating to the office of *juez de barrio*, it would have to be further assumed that the appointments for the year 1846 had not been made as commanded by the prefect and as required by law, and that therefore either the offices had been vacant from the close of 1845 until Sena's assumption of the prefecture in April, 1846, or that a vacancy had occurred in the office of *juez de barrio*, at Pojoaque, as to which, however, no proof has been offered. True it is that counsel for the petitioners who conducted the cross-examination of the witnesses before the surveyor general in the proceedings initiated in 1872, testified that when the files of the former demarcation of San Ildefonso were produced before the surveyor general in 1878, in looking over them he saw a paper, not among the records as produced at this trial signed by Antonio Sena from the prefect's office, “in which he designated or appointed Jose Dolores Trujillo as *alcalde suplente*, located at Pojoaque, in the jurisdiction of San Ildefonso,” the witness afterwards correcting his testimony by stating that the document which he recollected to have seen “was dated either the very last days of the month of December, 1845, or in the first three or four months of the year 1846, and it was a document appointing Jose Dolores Trujillo as *alcalde* or *juez de barrio suplente* of the jurisdiction of San Ildefonso at Pojoaque.” In the brief, however, our attention is called to the fact that there is a mistake in the record, and that the word “*suplente*” in the quotation *just referred to is erroneously [443] placed after the words “*juez de barrio*” instead of following the word “*alcalde*,” and that the statement should read “*alcalde suplente* or *juez de barrio*.” Although one of the questions pending before the surveyor general in 1876 was whether Trujillo had ever been appointed by Sena as a justice of the peace, it is conceded this paper was not when seen offered in evidence, nor was the attention of the surveyor general called to it, nor was any copy taken of it. The course pursued, it is said, having been taken because it was deemed that the investigation before the surveyor general could have no

legal force, and because it was feared that if attention was directed to the document it might be abstracted. On this subject, also, there is testimony from the counsel who appeared for the petitioners in the supplementary proceedings referred to, showing that when the records were then produced he also made a critical examination of them, and no such paper as the one described was seen by him. But no conflict need necessarily arise from the statements of the two witnesses, for it might well be that a paper was seen by one of the witnesses at one time, and was not seen by the other at another time, because it may have been surreptitiously placed on the files, and thereafter abstracted unknown to either counsel. This is fortified by the fact that the custodian of the archives who produced them at the supplementary hearing, and who had the custody of them long prior to that occasion and was familiar with them, had never heard of or seen any such paper. If surmises were compelled, in view of the high position of counsel, the direction which conjecture would take may be indicated by the suggestion that Sena was alive at the time of the supplementary hearing, and that Gaspar Ortiz not only was alive, but on one occasion was present in an adjoining room when the testimony of witnesses was being taken before the surveyor general, although not called as a witness. Considering the paper as testified to, its presence would accentuate rather than assuage the grave suspicion which the other facts to which we have alluded give rise.

[444] Certainly, it could not have been a contemporaneous paper, if Sena purported to have acted as prefect in December, 1845,* and as such to have appointed Trujillo as *alcalde suplente* for the year 1846, because the official documents in the record show that on December 6, 1845, Santiago Flores, and not Sena, was prefect, and that Flores was such officer prior to that date appears in his official communication to justice of the peace Serrano, of date December 6, 1845, showing that before that date as prefect Flores had nominated Serrano to the governor to serve as justice of the peace for the year 1846. Nor could it have been genuine if the appointment was of Trujillo as *alcalde suplente* or *juez de barrio* during any time from the beginning of December, 1845, up to the close of the month of March, 1846, because during all that time the record shows that Sena was not prefect. Besides, if the paper as testified to was now here just as it is described in the testimony, it would not help the situation, for it would vary from the declarations in the act of possession and from the testimony of Sena. In the paper as to the delivery of possession, Trujillo represents himself, not as *juez de barrio*, but as a justice of the peace, and Sena testified as follows: "I, as prefect, had authority to appoint the justices of the peace in my district, and I appointed him for the precinct or demarcation of Pojoaque." Now, as a former prefect, he was familiar with the designation of minor

officials, and would not therefore have confounded a justice of the peace with a *juez de barrio*. The official correspondence of Sena contained in the record shows that the designation "justice of the peace" was applied by Sena to the justice of a demarcation, and the term *juez de barrio* he applied to a justice of a precinct within the demarcation. And a like practice is shown by the record to have been pursued by the successor of Sena.

And on this subject the record contains a very suggestive fact.

It is shown that at a time subsequent to the date of the alleged grant the demarcation of San Ildefonso was divided, and from the territory of which it was composed there were established two demarcations, one that of San Ildefonso and the other that of Pojoaque, and that the records of the former demarcation were kept at Pojoaque. This, of course, necessarily gave rise to two justices of the peace, one of the demarcation *of San Ildefonso and the other of Pojoaque. The new demarcations thus created, if they did not continue up to the trial below, certainly so continued for many years. The description of the capacity of Trujillo found in the alleged act of possession and of his official character given by Sena, is more aptly appropriate to the demarcation of Pojoaque as it existed after the division and subsequent to the making of the alleged grant. From this circumstance may well arise the reflection that if the papers were not executed until at or about the time their existence was publicly asserted in 1872, the mind of the draughtsman might inadvertently have taken into consideration the demarcation of Pojoaque created after June, 1846, and which had many years obtained, and have thus overlooked the state of things existing in 1846. [445]

2. The impossibility of deducing from the testimony of the two Senas proof sufficient to overcome the grave doubt as to the genuineness of the grant already engendered by the proof referred to is further confirmed by considering the state of the evidence on the subject of possession.

In the petition for grant Ortiz is represented as living at Pojoaque, and as asserting that he found himself at that time "with land so considerably restricted as not to furnish a fair subsistence for the support of the large family" he provided for, and it was further represented that the tract which was solicited possessed "the advantage of containing fertile lands for cultivation, pasture and water sufficient, and else which is needed for raising stock." In the proceedings instituted before the surveyor general in 1872 the land embraced within the boundaries mentioned in the grant was marked on a sketch filed with the petition as aggregating about 115,200 acres, while a survey made by the United States in 1876—asserted by petitioners in their petition filed below to be incorrect—gave the area as 33,250.39 acres. The brief for defendants in error, however, now declares that the claim is limited to not

exceeding 11 leagues, the claim as confirmed by the court below. In the petition of 1872 it was averred that from the date Ortiz was placed in possession he "and his heirs had cultivated a portion of said grant [446] and the rest they have used in *herding their animals and in obtaining wood." The only proof, however, introduced by the petitioners before the surveyor general in 1872, bearing upon the occupancy or cultivation of the tract in question by Ortiz and those claiming under him, were statements contained in the depositions of Antonio Sena, Ramon Sena, and Pablo Dominguez. These witnesses, however, spoke only in general terms. Antonio Sena and Dominguez simply testified that Juan Luis Ortiz and his heirs had always occupied the land and it had always been reputed to be theirs, while Ramon Sena thus expressed himself:

"Ortiz lived upon the land during his lifetime, and his heirs have continued to occupy it since his death, and it has been continuously occupied by him and them, and they have always been the reputed owners of the land, and respected as such."

The evidence introduced at the trial below, however, tended to show that the upper portion of the tract in question had been claimed by the heirs of the father of Juan Luis Ortiz under an alleged prior grant to their ancestor, and that portions of such tract had been occupied and cultivated by some of said heirs, under such claim; and a number of witnesses, relatives and neighbors of Juan Luis Ortiz during his lifetime, testified, not merely that they had never known Juan Luis Ortiz to have occupied or cultivated the land, but that the existence even of the alleged grant of 1846 was not known or heard of in the neighborhood until its presentation in 1872 to the surveyor general for confirmation. Further, it is established, though Juan Luis Ortiz may have lived at Pojoaque in June, 1846, he took up his residence at Santa Fé in the house of his son Gaspar not very long after the date named. In fact, the widow of Gaspar in her testimony said that Juan Luis Ortiz died about 1861 or 1862, and that he resided at her house in Santa Fé for about twenty to thirty years before his death. If, however, we accept the statement of another witness, a relative named Jose Ortiz, aged fifty-eight years at the time he testified, Juan Luis Ortiz died in 1859 or 1860, and lived with his son Gaspar, and clerked in the store of that son in Santa Fé for ten or twelve years before he (Juan Luis Ortiz) died. It would thus appear that Juan Luis Ortiz left Pojoaque [447] and the vicinity of this grant for *Santa Fé, if not before, at least very soon after, the date of the asserted grant. The widow of the son Gaspar, however, did not give any evidence tending to show any knowledge on her part of any cultivation or use of the tract by or on behalf of Juan Luis Ortiz, during her acquaintance with him, which must have extended back at least to the time

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of her marriage to the son, which she stated to have been in 1848. Particularly she did not explain how he could have so occupied and cultivated when living at her house in Santa Fé and acting as clerk for her husband.

Despite the great weight of the adverse testimony above referred to, the claimants in the court below introduced no evidence whatever as to possession, cultivation, or improvement of the alleged granted land, except that in the opening of their case there was introduced the *ex parte* testimony of the witnesses before the surveyor general on the first investigation.

3. The foregoing considerations, weighing against the validity of the asserted grant, are fortified by the fact that although Juan Luis Ortiz and his son Gaspar lived, prior to 1854 and subsequent thereto, in Santa Fé, where was located the office of the surveyor general of New Mexico, and the act authorizing the presentation of claims of that official was passed in 1854, it was not until 1872 that the alleged grant made its public appearance. There are also many other facts and circumstances in the record casting the gravest doubt on the genuineness of the alleged grant, and tending to contradict the testimony of the Senas. To avoid too much prolixity, however, we shall not refer to them.

All the foregoing considerations render it unnecessary to examine the questions which are pressed in argument as to the form of the alleged grant here relied on, the claimed inattention to the requirements of the regulations of 1828, and the nonproduction of an *expediente* or of a *testimonio* of title, upon which questions we refrain from expressing any opinion whatever. *Luco v. United States*, 23 How. 528, 16 L. ed. 547; *United States v. Castro*, 24 How. 346, 16 L. ed. 659; *United States v. Knight*, 1 Black, 227, *sub nom. United States v. Moorehead*, 17 L. ed. 76; *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221; *Van Reynegan v. *Bolton*, 95 [448] U. S. 33, 35, 24 L. ed. 351. The view we have taken of the proof also conclusively negates the premise of fact upon which it is argued that there was archive evidence of the grant (as this premise must rest upon the testimony of Ramon Sena alone), and therefore bring the case directly under the rule laid down in *United States v. Cambuston*, 20 How. 59, 15 L. ed. 828; *United States v. Castro*, 24 How. 346, 16 L. ed. 659; *United States v. Knight*, 1 Black, 227, *sub nom. United States v. Moorehead*, 17 L. ed. 76, and *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221.

It results that it becomes unnecessary to examine the legal questions to which at the outset attention was called, and that the court below erred in confirming the grant, and its *decree* so doing is *reversed*, and the cause remanded to that court with directions to enter a decree rejecting the claim and dismissing the petition, and it is so ordered.

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GUARANTY SAVINGS BANK, *Plff. in Err.*,

v.

ALBERT BLADOW.

(See S. C. Reporter's ed. 448-459.)

Cancellation of homestead entry—rights of mortgagee of entryman to notice of proceeding—cancellation made on application of grantee of entryman—fraud in cancellation—right of bona fide encumbrancer to issue of patent.

1. The cancellation of a homestead entry upon due notice to the entryman and after a hearing in the case cannot be regarded as a mere nullity, when set up against his mortgagee, because the latter had no notice of the proceeding, but the entry no longer constitutes prima facie evidence in favor of such mortgagee.
2. A mere grantee by deed of the interest of one who has made a homestead entry does not take the title under the entryman, within the meaning of the rule which prevents one who takes title under another from questioning that other's title, but such grantee may make a contest of his grantor's entry before the Land Department.
3. Proceedings to contest a homestead entry, without any notice to a mortgagee of the entryman's interest, though commenced by a subsequent grantee of such interest, do not amount in law to a fraud on the mortgagee's rights.
4. The right of a bona fide encumbrancer of land to the issue of a patent under the act of Congress of March 3, 1891, § 7, does not extend to an encumbrancer of the interest of an entryman whose entry had been canceled before the passage of the act.

[No. 134.]

Submitted January 31, 1900. Decided February 26, 1900.

IN ERROR to the Fourth Judicial District Court in and for Richland County, State of North Dakota, to review a decision in favor of the defendant in a suit to foreclose a mortgage and holding that the mortgage should be canceled as a cloud upon the title of the defendant. *Modified and affirmed.*

See same case below, 6 N. D. 108, 69 N. W. 41.

Statement by Mr. Justice **Peckham**:

This action was brought to foreclose a mortgage, owned by the plaintiff in error, upon certain land in North Dakota which the defendant in error claimed was his, and not subject to the lien of the mortgage. It [449] was brought in the proper state court, and the trial resulted in a judgment in favor of the defendant, declaring him to be the owner of the land, that the mortgage of the plaintiff in error was no lien upon it, and that it should be canceled as an apparent cloud upon the title of the defendant.

The plaintiff appealed from this judgment to the supreme court of the state, where it was affirmed (6 N. D. 108, 69 N. W. 41), and the case was brought here on writ of error.

The material facts are as follows: On

January 6, 1881, one Anderson filed in the proper land office at Fargo, in the then territory of Dakota, his homestead application to enter the land which is involved in this action. On July 20, 1881, he appeared before the register and receiver, and, under § 2301, Revised Statutes, commuting his homestead to a pre-emption entry, made final proof of his claim, which was allowed and a final certificate issued, which was filed in the office of the register of deeds of the proper county on July 25, 1881. After the filing of proof, and on July 20, 1881, Anderson mortgaged the land to one H. E. Fletcher, who, on June 20, 1882, assigned the mortgage to the plaintiff. Both the mortgagee and the assignee acted in good faith, and each instrument was executed for a valuable consideration.

On May 8, 1882, Anderson conveyed the land to one R. M. Ink, who on April 7, 1883, conveyed the same to one J. S. Ink, and on January 6, 1885, J. S. Ink conveyed the premises to the defendant.

All of the above were warranty deeds and duly recorded.

On March 14, 1882, after the final proof had been made by Anderson and passed upon by the register and receiver of the land office, and the record had been transmitted to the General Land Office at Washington, the commissioner held the entry of Anderson upon said land, and directed the register and receiver of the local land office to hold the entry for cancellation, upon the ground that the testimony in the final proof made by Anderson for the land in question was evasive and failed to show six months' residence.

On January 22, 1886, the defendant filed in the land office at Fargo his application and affidavit to contest the entry of *Anderson upon the land on the ground that the proof furnished by Anderson upon that entry was false and that the entry was fraudulent, and in that affidavit he set forth that Anderson had never established his residence upon the land and had never resided thereon and never made the same his home as provided by the homestead laws of the United States. [450]

The Commissioner of the General Land Office thereupon ordered a hearing before the register and receiver at Fargo between the defendant and Anderson as to the truth of the allegations in defendant's affidavit and application for contest. Due notice of the hearing was given to Anderson by publication, in accordance with an order of the register, which was granted upon an affidavit that personal service could not be made upon him.

At such hearing the defendant appeared with his witnesses and gave evidence tending to establish the truth of the allegations in his affidavit of contest, but no appearance was made or testimony offered by Anderson, and after the hearing the evidence taken thereon was transmitted to the Commissioner of the General Land Office at Washington who, on the 14th day of November, 1887, directed the entry of Anderson to be canceled as a fraudulent entry, which the register

and receiver of the land office at Fargo there-after did, and the entry was duly canceled of record as a fraudulent entry, and the defendant was notified thereof. From this decision Anderson took no appeal.

After the final decision of the Commissioner of the General Land Office upon the contest and after the cancellation of the entry of Anderson, the defendant made his homestead entry upon the land, and on the 26th of April, 1893, submitted his final proof therefor, which was passed upon by the register and receiver and placed of record on that date, and a final certificate in due form was then issued to him by the register and receiver, and thereafter, on July 6, 1893, the government issued to him a patent for the land, which was recorded on October 25, 1893.

[451] No notice of the cancellation of the homestead entry and certificate of Anderson was ever given to H. E. Fletcher, *the mortgagee, or to the plaintiff herein, his assignee, and the cancellation was made without actual notice of the decision of the Commissioner of the General Land Office to either Fletcher or the plaintiff, and neither Fletcher nor the plaintiff was served with any notice of the contest of defendant involving the land, nor was either made a party defendant in that contest.

After the cancellation and on June 15, 1891, plaintiff filed in the United States land office at Fargo proof of its interest as assignee of the mortgage, and moved that a patent be issued under the provisions of § 7 of the act of March 3, 1891 (26 Stat. at L. 1095, 1098, chap. 561), which motion was denied by the Commissioner of the General Land Office on August 13, 1891, and, on appeal, by the Secretary of the Interior on July 15, 1892.

The notes secured by the mortgage not having been paid, this action was brought to foreclose the same, and the defendant set up as a defense the facts in relation to the entry of Anderson and its cancellation and the issuing of the patent to him as above set forth.

Mr. S. B. Pinney submitted the cause for plaintiff in error. *Messrs. F. B. Morrill and Edward Engerud* were with him on the brief.

The power of the commissioner of the general land office to cancel an entry of public lands before patent is not arbitrary, unlimited, or discretionary, but must be exercised in accordance with law.

Bogan v. Edinburgh American Land Mortg. Co. 27 U. S. App. 346, 63 Fed. Rep. 192, 11 C. C. A. 128; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Lindsey v. Hawes*, 2 Black, 554, 17 L. ed. 265; *Stimson v. Clarke*, 45 Fed. Rep. 760; *Parsons v. Venzke*, 164 U. S. 90, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635.

The land embraced in the final certificate and receipt issued to Anderson became subject to all the incidents of private ownership, including taxation; and he could legally

mortgage or transfer it before the issuance of a patent from the government.

Carroll v. Sufford, 3 How. 450, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575.

Due process of law is law in the regular course of administration through courts of justice, after due notice and an opportunity to appear and be heard.

2 Kent. Com. 13; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Bank of Columbia v. Okely*, 4 Wheat, 235, 4 L. ed. 559; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Leeper v. Texas*, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577.

In this country, property rights of an individual cannot be lawfully divested without granting him a hearing.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; *Lewis v. Shaw*, 57 Fed. Rep. 516; *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. ed. 922; *Woodruff v. Taylor*, 20 Vt. 65.

Where the land department has mistaken the law or committed error, courts of justice have always had the power to inquire into and correct mistakes, injustice, and error.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Lindsey v. Hawes*, 2 Black, 554, 17 L. ed. 265; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Widdicombe v. Childers*, 124 U. S. 400, 31 L. ed. 427, 8 Sup. Ct. Rep. 517; *Bernier v. Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

Mr. William H. Standish submitted the cause for defendant in error. *Mr. W. E. Purcell* was with him on the brief.

A mortgage lien is not an estate or interest in the land.

Power v. Bowdle, 3 N. D. 107, 21 L. R. A. 328, 54 N. W. 404.

This lien, like other equitable liens, is not an interest in the land, is neither a *jud ad rem*, nor a *jus in re*, but merely an encumbrance.

1 Pom. Eq. Jur. 368, p. 503.

The Commissioner of the General Land Office may review and set aside the action of the register and receiver before the patent issues, where their decision is induced by fraud, perjury, or mistake, or results from an erroneous view of the law.

Bogan v. Edinburgh American Land Mortg. Co. 27 U. S. App. 346, 63 Fed. Rep. 192, 11 C. C. A. 128, and cases cited.

An entryman making a fraudulent entry of public land acquires no vested right of property in it.

American Mortg. Co. v. Hopper, 29 U. S. App. 12, 64 Fed. Rep. 553, 12 C. C. A. 293; *League v. De Young*, 11 How. 185, 13 L. ed. 657; *Parsons v. Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; *United States v. Steenerson*, 4 U. S. App. 332, 50 Fed. Rep. 507, 1 C. C. A. 552.

The doctrine of bona fide purchaser is not applied to protect an equity, but to protect the legal title against a prior equity by uniting with such legal title an equity arising

from the payment of money and securing the conveyance without notice and a clear conscience.

Boone v. Chiles, 10 Pet. 211, 9 L. ed. 400.

[451] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

When Anderson obtained the decision of the register and receiver upon his application for the land it was subject to the power of the land department to review the judgment of those officers, and, upon facts showing that the entry was fraudulent, the department had power to cancel it. This could be done upon the same evidence which was before the register and receiver, and, at least upon notice to the party entering the land. Although the power to review and to cancel is not arbitrary or unlimited, and does not

[452] prevent *judicial inquiry in regard to its exercise, in some appropriate form, yet it is unquestionable that the power of reviewing and setting aside the action of the local land officers does exist in the general land department. *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635, where many of the cases upon the subject are gathered in the opinion of the court.

In this case the Commissioner of the General Land Office at Washington held the entry of Anderson upon the land, and directed the register and receiver of the local office to hold such entry for cancelation, upon the ground that the testimony in the final proof was evasive and failed to show six months' residence. Subsequently, and upon sufficient notice to him, the defendant contested the entry of Anderson as fraudulent, on the ground that the proof furnished by him to procure it was false; that Anderson had never established his residence upon the land, and never had, in fact, resided thereon, and had never made the same his home, as provided by the laws of the United States.

A hearing was had before the register and receiver at Fargo, due notice whereof was given to Anderson, who did not appear, and the evidence taken upon the hearing was transmitted to the commissioner at Washington, who, on November 14, 1887, directed that the entry of Anderson upon the lands should be canceled, and thereafter, in the due and usual course of business, the register and receiver of the local office at Fargo did cancel that entry of record.

If this were all no question could be raised in regard to the regularity and sufficiency of the proceedings which ended in the cancelation of Anderson's entry.

The difficulty, however, arises from the fact that before the entry was canceled, and on July 20, 1881, Anderson mortgaged his interest in the land to Fletcher, the mortgagee, who subsequently, as stated, assigned the mortgage to the plaintiff in error. Through various mesne conveyances, the defendant, on the 6th of January, 1885, became the owner of whatever interest Anderson had in the land by virtue of his above-mentioned entry. Thereafter the defendant filed his papers for a contest as to the validity of the entry of Anderson, and although Ander-

son *was duly notified of the proceedings,[453] neither Fletcher nor his assignee, the plaintiff in error, had any notice of the same. The plaintiff, therefore, contends that the whole proceeding in the General Land Office, including the hearing on the contest before the register and receiver at Fargo, was, so far as it was concerned, an absolute nullity, and the cancelation of Anderson's entry had in law no effect upon its claim to use the certificate as evidence of Anderson's right to a patent. In our opinion this contention is not well founded.

The favorable decision of the register and receiver of the local land office upon the claim of Anderson was, under the statute, reviewable by the officers of the General Land Office, and the officer of that department who directed the cancelation of the entry had by law jurisdiction to make that direction. The certificate was prima facie evidence of the right of the entryman to a patent, but the power rested with the land department, upon proper notice, to set it aside and cancel the entry, and thus take away from him that prima facie evidence. *United States v. Steenerson*, 4 U. S. App. 332, 50 Fed. Rep. 504, 1 C. C. A. 552; *American Mortg. Co. v. Hopper*, 56 Fed. Rep. 67; *S. C. on Appeal*, 29 U. S. App. 12, 64 Fed. Rep. 553. 12 C. C. A. 293. If the entry were canceled arbitrarily and without evidence or notice to him, it would not conclude him, and he would, notwithstanding the decision, have the right to show that his entry was valid, and that he was entitled to a patent. And when the entry has been canceled upon due notice to the entryman and after a hearing in the case, so that the cancelation is conclusive against him everywhere upon all questions of fact, it cannot be regarded as a mere nullity, when set up against the mortgagee of the fraudulent entryman, even though such mortgagee had no notice of the proceeding to cancel the certificate. The cancelation of the entry being valid as against Anderson, it left him without the right to avail himself of it in any future claim he might make for a patent, and it left his mortgagee also without the right to use that entry as prima facie evidence of Anderson's claim. The mortgagee, as was remarked by the court below, had no vested right to use the certificate as prima facie evidence of the right of the entryman to a patent, and after *its cancelation the plaintiff in [454] error could not so use it because it had been validly extinguished and canceled in a proceeding against the mortgagor, although the mortgagee had no notice of such proceeding.

This result follows by reason of the character of the entry, and of the certificate given thereon. It does not transfer the title to the land from the United States to the entryman, and it simply furnishes prima facie evidence of an equitable claim upon the government for a patent, and the use of the certificate for that purpose is subject to be destroyed by the cancelation thereof under direction of the department. This is the legal effect of such certificates, and all who deal in them or found any right upon them

must be held to do so with full knowledge of the character of such papers.

But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been canceled. Had the mortgagee taken either of these courses, it might have demanded in the one case, upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or if a patent had been issued, the mortgagee might then have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in court to hold him as trustee. Although the mortgagee might have taken either of the courses above suggested (and perhaps others), it took neither of them. It relied on the absolute nullity of the cancellation and proceeded to foreclose the mortgage as if the certificate still subsisted and was evidence of the validity of the entry. This was a conclusion not well founded.

[455] *If the plaintiff in error, even in this foreclosure suit, had alleged that the entry had been canceled and that a patent for the land had been thereafter issued to the defendant, and had asked that the patent so issued to him should be held by him in trust and as security for the payment of the plaintiff's mortgage on the ground that the entry had been improperly canceled as to it, and had proved on the trial that Anderson's entry was legal, it may be that it would have been entitled to a judgment decreeing the defendant a trustee of the title under his patent from the government and providing for the sale of the land in order to pay the mortgage, or some other appropriate relief might have been granted. But this was not done, and the case must be decided upon the record before us.

It is erroneous to state, however, that plaintiff in error has admitted the entry was fraudulent. The facts are that in the statement agreed upon by the parties it was admitted that in the contest and upon the evidence therein submitted the register and receiver of the local land office decided, as a conclusion of fact, that Anderson's entry was fraudulent. This is plainly no admission of the fact itself, and in no way is the plaintiff in error thereby precluded from showing that the entry was valid.

It is further contended that the defendant could not himself take the title of Anderson and then contest before the land department the validity of Anderson's entry, nor could he, having succeeded in obtaining the can-

celation of such entry, himself take proceedings under the pre-emption or homestead act to obtain the same land. Having procured the title of Anderson and then instituted the contest in the land department, notice of which was given solely to Anderson, it is contended that Anderson had no longer any interest in defending his entry, and that the defendant occupied the position of being the only party to both sides of the contest, and could not therefore be permitted, after securing the cancellation, to himself make an entry and obtain a patent for the land; that by reason of these facts the cancellation was as to the mortgagee an absolute nullity, and the mortgagee could maintain its action to foreclose and sell the land under its *judg- [456] ment of foreclosure the same as if no cancellation had taken place.

But it must be remembered that Anderson was a grantor of the land upon a warranty of title, and it is not clear he had no interest in supporting his right of entry as valid and sufficient. Ink had himself conveyed with warranty. Whether the defendant could avail himself of the warranty under the facts regarding his own action in being a mover in the proceeding to cancel the entry, might be doubtful; but, at any rate, there was a question which might cause Anderson to endeavor to uphold his entry. It will be remembered, too, that nearly three years prior to the conveyance to the defendant the Commissioner had held Anderson's entry for cancellation on account of fraud. The defendant thus stood in danger of a cancellation of that entry without notice to him, and, if an entry were then made by someone else, the defendant would be without right to thereafter make an entry for himself. Could he not anticipate that danger, and himself commence the contest?

As a mere grantee by deed, which conveyed the interest of Anderson, the defendant did not take title under him, within the meaning of the rule, which prevents one who takes title under another from questioning that other's title, like a tenant taking under his landlord. A simple grantee in a deed can set up another title in a third party, and can himself claim title under such party, and can deny the title of his grantor. He takes no title under the grantor, and is at full liberty to deny the title of the latter.

When the defendant, therefore, took his conveyance from Ink, it may be assumed that he took all the title which came through Ink from Anderson, but he was under no obligation to Anderson or to his mortgagees to admit the validity of Anderson's entry, and had the right to deny its validity and to make a contest before the land department. The only objection to be urged against his proceeding is that he gave no notice of the contest to the mortgagee. But it was not the duty of the defendant to direct who should have notice in such contest, for that was a matter for the officials of the *department, be- [457] fore whom the contest was inaugurated, to decide. It was for them to determine who, if anyone, should be notified of the contest, and the duty was not imposed upon the defend-

ant. Of course, he could give notice if he chose. If he did not, the person who had any rights, if not notified at all, either by him or by the department, could not be concluded by the decision of the contest, and we hold now that the mortgagee was not thereby concluded, and had the right, if possible, to subsequently show that Anderson's entry was valid. But the cancelation of the entry and certificate was not rendered a nullity because the mortgagee had no notice.

The character of the proceeding before the department must be kept in mind. It is not like a proceeding in court. It is administrative in its nature, and when the proceedings are conducted in accordance with the provisions of law creating the department and giving it jurisdiction, they may be upheld, and the decisions of the officers supported when not made arbitrarily and without evidence.

If the defendant in inaugurating his contest were guilty of any fraud, by means of which notice to the mortgagee was omitted or Anderson induced not to defend his entry, and the defendant was thus enabled to procure a decision as to the fraudulent character of that entry, it might perhaps be that in such case the mortgagee would have the right to make use of the original entry as still *prima facie* evidence of Anderson's right to a patent, the same as if the certificate had not been canceled. But there is no allegation of those facts in the bill, nor is there any proof in this record which would sustain them if they had been alleged. The action is not brought for that purpose nor upon any such theory. Unless the facts that the defendant had taken this conveyance of Anderson's interest, and had subsequently commenced the proceedings for a contest in regard to the entry of the latter, of which the mortgagee had no notice, amount in law to a fraud by the defendant upon such mortgagee, which nullifies those proceedings and leaves the entry the same as if it had not in fact been canceled, then the cancelation made after notice to Anderson was valid, and it deprived the mortgagee of the use of the certificate as evidence of Anderson's right to the patent, while not in any way interfering with the mortgagee's right to prove it by other evidence. In our opinion the facts stated do not prove fraud, as a legal conclusion, on the part of the defendant, who had the right to take the proceedings he did.

Plaintiff in error also contends that the motion made by it on June 15, 1891, for the issuing of a patent to it, as a bona fide encumbrancer of the land, under the provisions of § 7 of the act of March 3, 1891, entitled "An Act to Repeal Timber-Culture Law, and for Other Purposes" (26 Stat. at L. 1095, 1098, chap. 561), should have been granted.

It will be seen that at the date of the passage of this act the entry of Anderson no longer existed, because on November 14, 1887, it had been canceled. The case of *Parsons v. Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27, decides that the act of 1891 applies only to entries existing at the time of

its passage. The claim of the plaintiff in error that the cancelation was wholly void for all purposes cannot, as we have seen, be supported.

Our conclusion upon the whole case is that the cancelation of the entry was valid as regards Anderson, and that the effect of such cancelation was to prevent the plaintiff in error from using the entry as *prima facie* evidence of the right of Anderson to a patent, and under the pleadings the plaintiff in error had no right to a judgment of foreclosure. As the case was not brought or tried on the theory that the defendant had only the legal title to the land under his patent, and that such patent should be decreed to be held by him in trust for the plaintiff to the extent of its mortgage because the entry of Anderson was in fact valid and proper, the plaintiff in error ought not to be obstructed in the pursuit of any remedy which it may be advised it is proper to take, by the use of the judgment herein as a conclusive adjudication against it. We therefore think it proper to modify the judgment by striking out that portion which cancels the mortgage, and, as modified, affirming the same without prejudice to the right of the mortgagee to seek such other relief as it may be advised, notwithstanding the adjudication of the judgment, and it is so ordered.

*UNITED STATES, *Appt.*,

v.

MRS. GUE LIM, Ah Tong, Yee Yuen, and Ah Quong.

(See S. C. Reporter's ed. 459-469.)

Right of wife or minor child of Chinese merchant to enter the United States—necessity of certificate.

The wife and minor children of a Chinese merchant who is domiciled in this country may, under the act of Congress of 1884, construed in connection with the treaty of 1880, enter the country by reason of the right of the husband and father, without the certificate mentioned in the act.

[No. 123.]

Submitted January 29, 1900. Decided February 26, 1900.

APPEAL from a judgment of the District Court of the United States for the District of Washington discharging Chinese persons arrested for entering the country without certificates. *Affirmed.*

See same case below, 83 Fed. Rep. 136.

Statement by Mr. Justice Peckham:

Distinct appeals were taken direct to this court from the judgment of the district court of the United States for the district of Washington, northern division, in the case of the above defendant in error, Mrs. Gue Lim, and from the judgment of the western division of that court in the cases of Ah

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Tong, Yee Yuen, and Ah Quong, under the fifth clause of the 5th section of the act creating the circuit court of appeals (26 Stat. at L. 826, 828, chap. 517), because the cases involve, among other questions, the construction of the treaty between the United States and China, entered into in 1880 (22 Stat. at L. 826, article second, as affected by the third article of the treaty of December 8, 1894, 28 Stat. at L. 1210). The various appeals were heard here as one case.

The facts in regard to Mrs. Gue Lim were agreed upon in the court below, and it appears therefrom that she is the lawful wife of Fook Kee, a Chinese merchant engaged in buying and selling merchandise in the city of Seattle and state of Washington, under the firm name of Fook Kee & Company. He was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, for over one year next preceding the date of his last departure from the United States, which was in April, 1896, and was in all respects a Chinese merchant lawfully domiciled in the United States. He arrived at the port of Tacoma, Washington, from China, accompanied by his wife, this being her first arrival in the United States, and [460] the collector of customs, *acting under general instructions from the Secretary of the Treasury, allowed her to land on the — day of May, 1897, without the production of the certificate mentioned in § 6th of the act of July 5, 1884 (23 Stat. at L. 115, chap. 220). Complaint was subsequently made to the district court that she was a Chinese laborer, and was found unlawfully in the United States, in the county of King, in the district of Washington, on the 2d day of October, 1897, without having been registered as a Chinese laborer, and without having in her possession a certificate of registration as such laborer, and without having any other legal right or authority to be and remain in the United States.

A warrant was issued by the district court, upon which she was arrested, and after hearing evidence on behalf of the plaintiff and defendant the court decided (83 Fed. Rep. 136) that she was not a Chinese laborer, but the wife of a Chinese merchant lawfully domiciled and doing business as a merchant, and was not excluded by the laws of the United States from coming to or remaining in the United States, and she was therefore discharged from custody and the cause dismissed.

The other defendants in error had been admitted by the collector of customs at Port Townsend, and were thereafter adjudged by the United States commissioner, upon complaint made before him, to be Chinese laborers unlawfully in the United States, and the commissioner thereupon ordered them to be deported to China. They appealed from such decision, and the United States district court for the district of Washington, western division, after hearing the evidence, decided that the defendants were minor children of Chinese merchants, and that they

were lawfully entitled to be and remain in the United States.

The facts were agreed upon in the court below, and they are stated in the record as follows:

(1.) The defendants were born in China of parents lawfully married, and had resided in that country up to the time they came to the United States to live with their respective fathers, and were still minors under the age of fifteen years.

(2.) The fathers of these boys were, and for a long time prior *to the coming of the [461] boys to this country, had been, bona fide Chinese merchants, lawfully residing and doing business in the city of Walla Walla, in the state of Washington, and had sent for their sons to come from China to live with them in Walla Walla, where they were residing with their fathers when arrested by a United States immigration officer.

(3.) The boys had never procured any certificate under § 6th of the act of July 5, 1884 (23 Stat. at L. 115, chap. 220, *supra*), but relied entirely upon the status of their fathers as merchants here to entitle them to come to this country, and upon that claim had been admitted by the collector of customs at Port Townsend.

A judgment discharging the defendants having been entered, the United States appealed to this court.

Assistant Attorney General Hoyt submitted the cause for appellant and filed a brief, the contentions of which sufficiently appear in the opinion.

No counsel for appellees.

*Mr. Justice Peckham, after stating the [461] facts, delivered the opinion of the court:

The question here arising in regard to the correctness of the decision of the district court in the case of the married woman depends for its solution upon the construction to be given to the 6th section of the act of Congress of 1884 (23 Stat. at L. 115, chap. 220), which is set forth in the margin.†

†Sec. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by

[462] *That section must be construed in connection with the treaty concluded between this country and China in November, 1880. 22 Stat. at L. 826.

It is contended on the part of counsel for the government that by the subsequent treaty of March, 1894 (28 Stat. at L. 1210), the two governments have agreed that the requirements of a certificate as provided for in the 6th section of the act of Congress shall apply to all permitted Chinese subjects who must, without exception, produce such certificates. Article two of the treaty of 1880 and article three of the treaty of 1894 are set out in the margin.†

[463] *We do not think the treaty of 1894 alters the result flowing from the treaty of 1880

him prior to and at the time of his application as aforesaid. . . . The certificate provided for in this act and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséed by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate viséed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

†Treaty of 1880.

Article II.

Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

Treaty of 1894.

Article III.

The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their government or the government where they last resided viséed by the diplomatic or consular representative of the United States in the country or port whence they depart.

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and the act of 1884. The question is, whether under the act of 1884, construed in connection with the treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, because she is the wife of such merchant.

Although the third article of the treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband who himself enjoys the right is not enough for the wife, the fact being proved or admitted that she is such wife. Possibly the result of the treaty of 1894 may be held to be, instead of simply prohibiting the entrance of Chinese laborers, to restrict the right of entry to those classes who are specially named in the third article of the treaty. But the question would still remain whether the wives of the members of the classes privileged to enter were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the act of 1884.

There has been some difference of opinion among the lower courts as to the true construction to be given to the treaty and the act of Congress. The judges in some cases have taken the view that the wife and minor children of a Chinese merchant, who is himself entitled, under the second article of the treaty of 1880 and § 6th of the act of 1884, to come within and dwell in the United States, were entitled to come into the country with him or after him as such wife and children without the certificate prescribed in that section. Other judges *have held that [464] they were not entitled to enter the country without the production of the certificate mentioned in the act.

Those cases holding the right of the wife to enter without a certificate are *Re Chung Toy Ho*, 42 Fed. Rep. 398, 9 L. R. A. 204, in the circuit court, district of Oregon, May, 1890, in which case the opinion was delivered by Judge Deady; *Re Lee Yee Sing*, 85 Fed. Rep. 635, decided in 1898 in the district court for the state of Washington; also in this case, *United States v. Gue Lim*, 83 Fed. Rep. 136, district court of Washington, 1897.

Those adverse to the doctrine are *Re Ah Quan*, 21 Fed. Rep. 182, 186; decided in 1884 in the circuit court, district of California; *Re Ah Moy*, 21 Fed. Rep. 785, in the same court, September, 1884; *Re Wo Tai Li*, 48 Fed. Rep. 668, in the district court, northern district of California, August, 1888; *Re Lum Lin Ying*, 59 Fed. Rep. 682, district court of Oregon, February, 1894; *Re Li Foon*, 80 Fed. Rep. 881, circuit court, southern district of New York, 1897.

Some of the latter cases do not involve the exact point now before the court, but they are in the direction stated.

It is not necessary to review these cases in detail. It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge Deady. *Re Chung Toy Ho*, 42 Fed. Rep. 398, 9 L. R. A. 204. In our judgment the wife in this case was entitled

to come into the country without the certificate mentioned in the act of 1884.

The act of 1882, of which that of 1884 was an amendment, was passed, as is stated in its title, "to execute certain treaty stipulations relating to Chinese," and therefore we must assume that the body of the act has that purpose.

[465] This court has already sustained the power of Congress to provide for excluding or expelling Chinese, even in contravention of a treaty; also the power to intrust the final determination of the facts upon which the individual is to be expelled, to an executive officer. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977. But it is not the power of Congress over the subject with which we are now dealing. The question is, What did Congress *mean by the act of 1884? Some light upon that question can be derived from the treaty of 1880, which must be read in connection with it. By article two of the treaty, Chinese subjects proceeding to the United States, either as teachers, students, merchants, or from curiosity, together with their body and household servants, were to be allowed to go and come of their own free will and accord, and were to be "accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." It was for the avowed purpose of carrying these treaty stipulations into effect that the act of 1882 (22 Stat. at L. 58, chap. 126), and the amended act of 1884 (23 Stat. at L. 115, chap. 220), were passed.

It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty. As was stated by Mr. Justice Harlan in delivering the opinion of the court in *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255: "The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted." We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions, of the treaty.

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There is nothing in the act of 1884, which, in terms, enumerates and provides for the admission of particular classes of *persons.[466] It speaks in the 6th section of those who may be entitled under the treaty or under the act to come within the United States, but the act does not assume to enlarge the number or character of the classes specially named in the treaty as entitled to admission. It is plain that in this case the woman could not obtain the certificate as a member of any of those specially enumerated classes. She is neither an official, a teacher, a student, a merchant, nor a traveler for curiosity or pleasure. She is simply the wife of a merchant, who is himself a member of one of the classes mentioned in the treaty as entitled to admission. And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty.

Does the 6th section mean that in such case the wife must obtain the certificate therein provided for? We think *not. Although the section provides that every Chinese person, other than a laborer, who may be entitled by the treaty or by the act to enter the United States must have a certificate, the contents whereof are therein stated, yet when we come to look at the particulars which it directs shall be set forth in the certificate, we see that the section was not drawn with the view of embracing the case of one who claims the right of admission simply as the wife of a person entitled to enter and remain in this country. She may have had no former, and may have no present, occupation or profession within the meaning of the section, and, of course, in that case, it cannot be stated when and where and how long it has been pursued.

The section assumes that the applicant for a certificate has some occupation or profession which has been theretofore pursued at some place, which is not the case here.

Various other provisions in the section render it plain to our minds that it was never intended to extend to the wives of persons who were themselves entitled to entry. A certificate that should only state that the person therein identified was the wife of a member of the admitted class, and had no occupation *or profession, it seems to[467] us would not be a compliance with the section, and if not, then it would not be possible to comply with its provisions in this case, and the consequence would be that (if a certificate were necessary under the 6th section) the statute would exact, as a condition of entrance into the country, that which the person could not perform, although otherwise entitled to enter.

While the literal construction of the section would require a certificate, as therein stated, from every Chinese person, other than a laborer, who should come into the country, yet such a construction leads to what we think an absurd result, for it requires a cer-

tificate for a wife of a merchant, among others, in regard to whom it would be impossible to give the particulars which the statute requires shall be stated in such certificate.

"Nothing is better settled," says the present Chief Justice, in *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517, 520, "than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The purpose of the 6th section, requiring the certificate, was not to prevent the persons named in the second article of the treaty from coming into the country, but to prevent Chinese laborers from entering under the guise of being one of the classes permitted by the treaty. It is the coming of Chinese laborers that the act is aimed against.

It was said in the opinion in the *Lau Ou Bew Case*, in speaking of the provision that the sole evidence permissible should be the certificate: "This rule of evidence was evidently prescribed by the amendment as a means of effectually preventing the violation or evasion of the prohibition against the coming of Chinese laborers. It was designed as a safeguard to prevent the unlawful entry of such laborers, under the pretense that they belong to the merchant class or to some other of the admitted classes."

It was also held in that case that although the literal wording of the statute of 1884, § 6, would require a certificate in the case of a merchant already domiciled in the United States and who had left the country [468] for temporary purposes, **animo revertendi*, yet its true and proper construction did not include his case, and the general terms used in the act were limited to those persons to whom Congress manifestly intended to apply them, which would be those who were about to come to the United States for the first time, and not to those Chinese merchants already domiciled in the United States who had gone to China for temporary purposes only, with the intention of returning. The case of *Wan Shing v. United States*, 140 U. S. 424, 35 L. ed. 503, 11 Sup. Ct. Rep. 729, was referred to, and attention called to the fact that the appellant therein was not a merchant, but a laborer, who had acquired no commercial domicile in this country, and was clearly within the exception requiring him to procure and produce the certificate specified in the act. The ruling was approved, and the differences in the two cases pointed out by the chief justice.

To hold that a certificate is required in this case is to decide that the woman cannot come into this country at all, for it is not possible for her to comply with the act, because she cannot in any event procure the certificate even by returning to China. She must come in as the wife of her domiciled husband or not at all. The act was never meant to accomplish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly and reasonably construed, it does not do so. If we hold that she is entitled to come in as the

wife, because the true construction of the treaty and the act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife.

In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities, that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned *in the treaty as entitled to enter, [469] then that person is entitled to admission without the certificate.

These views lead to the affirmance of the judgments, and they are accordingly affirmed.

JOHN J. WALSH, *Plff. in Err.*,
v.

COLUMBUS, HOCKING VALLEY, & ATHENS RAILROAD COMPANY.

(See S. C. Reporter's ed. 469-481.)

Appeal—Federal question—impairing obligation of contract—claim of third person under contract.

1. A decision by the state court that the act of Congress of May 24, 1828, granting land to the state of Ohio for the construction of canals, did not constitute a contract for the perpetual maintenance of such canals, and that the contract thereby made was not impaired by Ohio act May 18, 1894, abandoning a canal and leasing it to a railroad company, raises a Federal question which will sustain a writ of error from the Supreme Court of the United States.
2. A contract for the perpetual maintenance of the canals for which lands were granted by the act of Congress of May 24, 1828, to the state of Ohio, was not created by the acceptance of the grant, with the provision that the canals, "when completed or used, shall be and forever remain public highways;" but this imposes the obligation to maintain the canals as public highways only so long as they are "used" as such.
3. A proprietor of lands crossed by a canal which the state has contracted with the Federal government to maintain cannot take advantage of a default of the state in this particular, when he was not a party to the contract.

[No. 90.]

Submitted December 13, 1899. Decided February 26, 1900.

NOTE.—As to Federal jurisdiction to review judgments of state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment reversing a decision of the lower court and ordering an injunction to be granted against entering upon lands for railroad purposes until the right to do so was acquired by condemnation. *Affirmed.*

See same case below, 58 Ohio St. 123, 50 N. E. 442.

Statement by Mr. Justice Brown:

This was a petition filed in the court of common pleas of Franklin county, Ohio, by the plaintiff, Walsh, to enjoin the defendant railroad company from entering upon the property of the Lancaster Lateral Canal Company, and upon plaintiff's premises, and from constructing a railroad thereon, and [470] for *a decree declaring a certain act of the general assembly of Ohio giving it permission to do so to be null and void.

The case was determined upon demurrer to the petition, which set forth substantially the following facts: On February 4, 1823, the general assembly of the state passed "An Act to Provide for the Internal Improvement of the State of Ohio, by Navigable Canals" (23 Ohio Stat. 50), among which was the Ohio canal, extending from the mouth of the Scioto river, through the state of Ohio, to Lake Erie, and passing through the village of Carroll, in the county of Fairfield. On February 8, 1826, the Lancaster Lateral Canal Company was incorporated by act of the general assembly (24 Ohio Laws, 71), and authorized to construct and operate a canal "from the town of Lancaster to such point of the Ohio canal as shall be found most eligible." The village of Carroll was fixed upon as the terminus.

On May 24, 1828, Congress passed an act to aid the state of Ohio in the construction of its canals (24 Stat. at L. 305), by the 5th section of which act (printed in full in the margin) †Congress granted to the state 500,000

†Sec. 5. And be it further enacted, That there be, and hereby is, granted to the State of Ohio five hundred thousand acres of the lands owned by the United States, within the said state, to be selected as hereinafter directed, for the purpose of aiding the state of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said state in the construction of the canals within the same, undertaken under the authority of the laws of the said state, now in force, or that may hereafter be enacted, for the extensions of canals now making; which land, when selected, shall be disposed of by the legislature of Ohio, for that purpose, and no other: *Provided*, The said canals, when completed or used, shall be and forever remain public highways for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States or persons in their service passing along the same: *And provided further*, That the said canals, already commenced, shall be completed in seven years from the approval of this act; otherwise the state of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the state by such sales shall not be affected by that failure.

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acres of land in that state for this purpose, with a proviso that "the said canals, when completed or used, shall be and forever remain public highways *for the use of the gov-[471] ernment of the United States, free from any toll or charge whatever, for any property of the United States or persons in their service passing along the same. The 7th section of the act declared that "this act shall take effect, *provided*, the legislature of Ohio at the first session thereof, hereafter to commence, shall express the assent of the state to the several provisions and conditions hereof; and unless such expression of assent shall be made this act shall be wholly inoperative."

Pursuant to this act, the general assembly of the state of Ohio on December 22, 1823, passed an act expressly declaring the assent of the state, to the provisions and conditions of the act of Congress. Under these acts the state received and took possession of the 500,000 acres of land provided by the grant, and from time to time sold and disposed of the same, and received from the proceeds of such sale somewhat more than \$2,200,000.

The Lancaster Lateral Canal Company, incorporated as above stated, proceeded to construct and operate its canal under its charter until December 22, 1838, when it sold and conveyed the same to the state of Ohio, under an authority conferred upon the board of public works, by an act passed March 9, 1838, for the sum of \$61,241, which was paid to the company out of the funds realized by the state from the sale of the congressional land grant. The canal was subsequently, under an act of the legislature, extended from its terminus in Lancaster to the town of Athens, in Athens county, was opened as a continuous line of canal for navigation purposes prior to January 1, 1842, and this extension was also paid for by moneys realized from the sale of the land grant.

The complaint further averred that "ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been and still is a public highway, which has been used for the use of the state of Ohio and the government of the United States, in pursuance of the several acts of Congress and of the general assembly of the state of Ohio, hereinbefore set forth."

On April 12, 1894, the Columbus, Hocking Valley, & *Athens Railroad Company, defend-[472] ant herein, was organized and incorporated for the purpose of building a railroad from the city of Columbus, through the counties of Franklin, Fairfield, Hocking, and Athens, to the city of Athens, and on the 18th day of May, 1894, the general assembly of the state passed an act for the abandonment of the Hocking canal for canal purposes, and for leasing the same to this railroad company. 91 Ohio Laws, 327. The act is printed in full in the margin.† The 4th section of the act

†An Act to Provide for the Abandonment of the Hocking Canal for Canal Purposes and for Leasing the Same to the Columbus, Hocking Valley, & Athens Railroad Company.

Sec. 1. Be it enacted by the general assembly of the state of Ohio, that the Hocking Canal,

[473] provided that the railroad *company should have the exclusive right during the term of the lease (ninety-nine years) "to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining, and operating a railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the state harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad."

The plaintiff further averred that the defendant was making preparations to build its road upon the line of the canal, and was threatening to take possession of his property without having acquired the rights and interests in the said lands and tenements belonging to the plaintiff, whose lands are located on both sides of the Hocking canal, about 5 miles north of the city of Lancaster, in Fairfield county, and without having purchased or acquired by condemnation or otherwise the right to enter upon said lands and to construct said railroad. That such road will constitute a permanent trespass upon plaintiff's property, and will place large additional *burdens upon his lands, which will render the same inconvenient and difficult of access; and great and irreparable injury will be done in the premises unless the defendant be restrained by an order of the court from taking possession of said canal and the said premises of plaintiff and constructing this railroad thereon.

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from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

Sec. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining, and operating over, upon, and along the Hocking canal and property of the state of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations, and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley, & Athens Railroad Company, its successors and assigns, for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the state of Ohio, on the 1st day of July, 1894, of the sum of \$50,000, and on the 1st day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of \$10,000 annual rental.

Sec. 3. Said instalment of \$50,000 shall be paid into the state treasury before the construction of said railroad is begun, and for the remaining instalments of rental the state of Ohio shall have a first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the state of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley, & Athens Railroad Company shall further execute unto the state of Ohio, to be approved by the auditor of the state, secretary of state, and at-

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The gist of the complaint lies in the allegation that the act of May 18, 1894, authorizing the abandonment of the canal, conflicts with that clause of the Constitution which provides that "no state shall pass any law impairing the obligation of contracts," and also with several provisions of the Constitution of Ohio not necessary to be here enumerated.

A general demurrer was filed to this petition, which was sustained by the court, and the petition dismissed. Plaintiff appealed the case to the circuit court, which also sustained the demurrer, whereupon plaintiff appealed the case to the supreme court of the state, which reversed the judgment of the circuit court, and ordered that the railroad company be enjoined from entering upon the lands of the plaintiff until it had condemned and paid for the additional burden of constructing and operating the railroad on the land, according to law. 58 Ohio St. 123, 50 N. E. 442.

Upon motion of the plaintiff the court certified that in the rendition of this judgment it became material to determine whether the act of May 18, 1894, was repugnant to the contract clause of the Constitution, and ordered it to be further certified that the court adjudged that it was not in violation of or repugnant to such clause, and that such act was valid and binding upon the plaintiff. Whereupon plaintiff sued out a writ of error from this court.

Mr. J. B. Foraker submitted the cause

torney general, or any two of them, a good and sufficient bond in the sum of \$100,000, conditioned that said company will faithfully build said railroad in compliance with the condition and terms of this act, and upon failure to build said road within the time herelu specified, they shall be liable to the state of Ohio in the full sum of \$100,000 as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

Sec. 4. In consideration of the payments aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining, and operating a railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the state harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad: *Provided*, That when said railroad, its successors and assigns, cease to use said canal for railroad purposes, said canal property shall revert to the state for canal purposes.

Sec. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this state.

Sec. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

Sec. 7. This act shall take effect and be in force from and after its passage.

for plaintiff in error. *Messrs. T. E. Powell and D. J. Ryan* were with him on the brief.

U. S. Rev. Stat. § 709, includes all cases involving rights protected by the Federal Constitution, laws, and treaties, however created; and when a Federal question is clearly raised there is jurisdiction, however frivolous the objection.

New Orleans v. DeArmas, 9 Pet. 224, 9 L. ed. 109; *Hall v. Jordan*, 15 Wall. 393, 21 L. ed. 72.

When a writ of error is asked on the ground that a state law impairs the obligation of a contract, this court must determine whether a contract exists, and what is its construction and obligation.

Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977.

A Federal question arises when the allegation is that by statute a state made a contract, and by another violated it, and the state court holds the latter statute valid.

The Binghamton Bridge, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Delmas v. Merchants' Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387.

Where the question raised is a Federal question, this court will not sustain a motion to dismiss.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

Mr. J. B. Foraker filed a further brief for plaintiff in error, the contentions of which sufficiently appear in the opinion.

Messrs. C. H. Grosvenor and D. L. Sleeper submitted the cause for defendant in error. *Mr. John J. Stoddart* was with them on the brief.

To longer maintain the canals would be no benefit to the United States government. That railways would supplant canals could not have been in contemplation of the parties, and the state would not be held by the general words of the act of Congress donating the aid.

Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779.

Since the parties to this arrangement are satisfied, and the United States is not objecting to this change of use, no other persons can object.

Grinnell v. Chicago, R. I. & P. R. Co. 103 U. S. 744, 26 L. ed. 458; *Van Wyck v. Knevals*, 106 U. S. 369, 27 L. ed. 204, 1 Sup. Ct. Rep. 326.

Mr. C. H. Grosvenor filed a separate brief for defendant in error:

Abandonment of her public canals by the state creates no liability on her part to respond in damages resulting therefrom to parties holding leases of surplus water.

State ex rel. Richards v. Pittsburgh, C. O. & St. L. R. Co. 53 Ohio St. 189, 41 N. E. 205; *State v. Snook*, 53 Ohio St. 521, 42 N. E. 544; *Malone v. Toledo*, 34 Ohio St. 541; *Hubbard v. Toledo*, 21 Ohio St. 379; *Fox v. Cincinnati*, 33 Ohio St. 492.
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The right to abandon follows necessarily from the right to build. Every lessee of power takes his lease and puts up his improvements with full notice of the reserved right of the state to discontinue the canals and stop the supply of water.

Fox v. Cincinnati, 104 U. S. 783, 26 L. ed. 928.

Mr. Justice Brown delivered the opinion of the court:

*1. Motion was made to dismiss the writ^[475] of error in this case for want of a Federal question. The decision of this motion was postponed to the merits, and we are now of opinion that it must be denied.

The position of the plaintiff is that the act of Congress of May 24, 1828, granting to the state of Ohio 500,000 acres of land for the construction of canals, and providing that such canals, "when completed or used shall be and forever remain public highways for the use of the government of the United States," and the acceptance thereof by the general assembly, constitute a contract by the state for the perpetual maintenance of such canals as public highways, at least until they were given up by consent of the United States, and that the subsequent act of the general assembly of May 18, 1894, providing for the abandonment of such canals without such consent being given, was obnoxious to that provision of the Federal Constitution declaring that no state shall pass a law impairing the obligation of contracts.

The main question, then, is whether the acceptance of this act of Congress of 1828 by the general assembly of Ohio should be interpreted as raising a contract by the state for the perpetual maintenance of these canals as public highways. We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation, it is for this court to determine whether such contract existed, as well as the question whether the subsequent legislation has impaired it. *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571. This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubted that the construction put by state courts upon their own statutes will be followed here. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

We cannot say that it is so clear that the statute in question is not open to the construction claimed that we ought to dismiss the writ as frivolous, within the meaning of the cases *which hold that, where the question^[476] is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dis-

missed. *Milligan v. Hartupce*, 6 Wall. 258, 18 L. ed. 829; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 87, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353. If the statute were given the construction claimed by the plaintiff, it would be difficult to avoid the conclusion that the abandonment of the canal under the act of 1894, and its lease to the defendant railroad company, were a repudiation of the duty of the state to maintain it as a public highway; though the question would still remain whether the plaintiff would be in a position to take advantage of such default.

2. In disposing of this case the supreme court of the state of Ohio held (1) that the defendant railroad corporation had the power to build a railroad between the termini named, and to acquire by purchase or condemnation a right of way for its road, and other property necessary for its operation; (2) that the act of Congress of 1828, donating land to the state for the construction of canals, and the act of the general assembly of the state accepting the same, did not constitute a contract for the perpetual maintenance of such canals; (3) that if such a contract existed, the plaintiffs in these suits were not parties to it; (4) that the Lancaster Lateral Canal Company did not acquire a fee simple in the lands, but a title for the uses and purposes of the canal, and the company could not, when the use ended, sell them to others, but the lands reverted to the owners of the freehold; (5) that by leasing the lands for the purposes of a railroad the original casement in the lands was not extinguished, but passed to the purchaser, who took it subject to the duty of making compensation to the owner of the freehold for the additional burden imposed on the land, and such damages as might result to him from the new use.

[477] We are concerned only with the second and third of these conclusions, which turn upon the construction to be given to the act of Congress of 1828. If by the acceptance of this act by the general assembly of the state of Ohio, the state *became irrevocably bound to keep up the canals for all time, for the use, not only of the government, but of everyone who incidentally profited by their preservation, it is impossible to escape the conclusion that their subsequent abandonment impaired the obligation of such contract. But we think the supreme court of Ohio was clearly right in its interpretation of the statute. The principal object of the act was a donation of lands to aid the state in works of internal improvement, which were then being extensively contemplated in the newer states of the west. Canals, at that time, embodied the most advanced theories upon the subject of internal transportation. Congress annexed as a condition to the grant that the canals built by its aid should, "when completed or used, be and forever remain public highways for the use of the govern-

ment." Counsel for the defendant insists that, under the terms of the proviso, the obligation to maintain these canals as public highways existed only so long as they were "used" as such, and this was evidently the opinion of the supreme court of Ohio. Counsel for plaintiff insists, upon the other hand, with much reason, that the proviso, that "the said canals, *when completed or used*, shall be and forever remain public highways," marks the beginning of the time when the obligation was intended to operate; that is, if the canals were completed, or, without being completed, were so far completed as to be capable of use, and were *used*, the obligation to maintain them in perpetuity attached. Whatever be the proper interpretation of these words,—and they are by no means free from ambiguity,—the dominant idea of the proviso was evidently to compel the state to maintain the canals as *public* highways, and to allow the government free use of them "for any property of the United States or persons in their service passing along the same." Whether the canals should be maintained forever as such, or should give place to more modern methods of transportation, was a matter of much less moment to the United States than to the state. The general government was only interested in securing their use for the public and the free transportation of its own servants and property. The object of the act was to facilitate and encourage public improvements, *but not [478] to stand in the way of the adoption of more perfect methods of transportation which might thereafter be discovered. Had the question of internal improvements arisen ten or fifteen years later, when railways began to be constructed, it is quite improbable that the state would have embarked upon this system of canals, or that Congress would have aided it in the enterprise. Waiving the question whether the state could have abandoned the lands upon which these canals were built, as public highways, we think it entirely clear that Congress could not have intended to tie the state down to a particular method of using them, when subsequent experience has pointed out a much more practicable method, which has supplanted nearly all the canals then in use. There was no undertaking to keep up the canals for all time, and we think the proper construction of the proviso is that the government should be entitled to the free use of the canals so long as, and no longer than, they were maintained as public highways, and that the act of 1894, leasing these lands to the defendant for an analogous purpose, does no violence to the contract clause of the Constitution.

Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the supreme court of Ohio, through several changes in its personnel, holding it to be within the power of the state to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damaged by it (*Hubbard v. To-*

ledo, 21 Ohio St. 379; *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Fox v. Cincinnati*, 33 Ohio St. 492, affirmed by this court, 104 U. S. 783, 26 L. ed. 928; *Hatch v. Cincinnati & I. R. Co.* 18 Ohio St. 92; *Malone v. Toledo*, 28 Ohio St. 643; *State ex rel. Fanger v. Board of Public Works*, 42 Ohio St. 607; *Pennsylvania & O. Canal Co. v. Portage County Comrs.* 27 Ohio St. 14; *McCombs v. Stewart*, 40 Ohio St. 647; *State v. Snook*, 53 Ohio St. 531, 42 N. E. 544); but the state of Ohio does not stand alone in affirming this principle. *People v. Kerr*, 27 N. Y. 188; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497; *West v. Bancroft*, 32 Vt. 367; *Haldeman v. Pennsylvania C. R. Co.* 50 Pa. 425; *Chase v. Sutton Mfg. Co.* 4 Cush. 152.

[479] *In addition to this, however, the plaintiff stands in no position to take advantage of a default of the state in this particular. He was not a party to the contract between the state and the Federal government; his rights were entirely subsidiary to those of the government; and if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain. He can only sustain this bill upon the theory that his rights are equal to those of the government, and that he can call upon the state to maintain the canal for his benefit.

The case of *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456, is pertinent in this connection. That was an action in ejectment brought by a railroad company to recover certain parcels of its land grant, upon which the defendants had settled and asserted rights under the homestead and pre-emption laws of the United States. Their defense was that the company had no title, because it had lost whatever right it had to the lands by a change in the location of the road, and because locating the road as it was completed did not bring these lands within the limits of the land grant act. The court held that, the lands being within the limits of the first location, the construction of the road on the new line did not annul or defeat, without further action on the part of the United States, the title thus vested; that Congress had consented to the change without any declaration affecting the title already vested in the company by the first location, and that defendants were bound thereby. In delivering the opinion of the court Mr. Justice Miller observed: "Another point equally fatal to the plaintiffs in error is that the assertion of a right by the United States to the lands in controversy was wholly a matter between the government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the government desires to be re-invested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of everyone who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which the par-

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ties interested did not desire to be started. It might be otherwise if the legal title was in the government. Then the land would be subject to homestead or pre-emption rights."

A similar case is that of *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336. In that case the railroad company had filed a map of definite location, and the Land Department had withdrawn the odd-numbered sections appropriate thereto; but in constructing the road the company departed from the line indicated. The lands in dispute were within 10 miles of the road as built and of the line delineated on the map. They were entered by Van Wyck, who received a patent for them, and Knevals, who had acquired his rights from the railroad company, filed a bill against Van Wyck seeking to charge him as trustee for the lands, and the court decreed a conveyance accordingly. The defendant attacked the right of the company to the grant, alleging that it never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior it changed the route of the road for a part of the distance. The court held, however, that the company had constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of Congress; that if the whole of the proposed road had not been completed any forfeiture consequent thereon could only be asserted by the United States through judicial proceedings or through the action of Congress. "A third party cannot take upon himself to enforce conditions attached to the grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property."

The only contract in this case was between the state of Ohio and the United States. Plaintiff was neither party nor privy to such contract. It was within the power of the government to prosecute the state for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course, and has deemed it proper to acquiesce in the abandonment of the canals and in the state turning them over to the railroad company, [481] it does not lie in the mouth of the plaintiff to complain. This disposes of every question called to our attention in the briefs of counsel.

The plaintiff is amply protected by the decree of the supreme court enjoining the railroad company from entering upon his lands until payment has been made, after proper proceedings, for the increased burden caused by the use of the lands for the railroad. If any taking of the lands consequent upon the remanding of the cause for the purpose stated should suggest ulterior questions, they do not arise there, and would not be concluded by an affirmance of the decree now before us for review.

The decree appealed from is therefore affirmed.

MICHAEL VOUGHT, *Plff. in Err.*,
v.
COLUMBUS, HOCKING VALLEY, &
ATHENS RAILROAD COMPANY.

(See S. C. Reporter's ed. 481.)

[No. 92.]

*Submitted December 13, 1899. Decided
February 26, 1900.*

IN ERROR to the Supreme Court of the State of Ohio.

See same case below, 58 Ohio St. 123, 50 N. E. 442.

The facts are stated in the opinion.

This case was argued and decided by the same counsel and at the same time as the preceding case.

Mr. Justice **Brown** delivered the opinion of the court:

This was also a petition by a landowner for damages which he avers will be caused by the abandonment of the canal. The case took the same course as the case of Walsh, and the same judgment was rendered. So far as the constitutional question is concerned, the cases are precisely alike, and the judgment is accordingly affirmed.

ROBERT WRIGHT, *Plff. in Err.*,
v.
COLUMBUS, HOCKING VALLEY, &
ATHENS RAILROAD COMPANY.

(See S. C. Reporter's ed. 481-483.)

The Federal question set up in the assignment of errors in this case being precisely the same as in the cases preceding, the decision is the same as in those cases.

[No. 91.]

*Submitted December 13, 1899. Decided
February 26, 1900.*

IN ERROR to the Supreme Court of the State of Ohio to review a judgment affirming a decision of the lower court sustaining a demurrer and dismissing the plaintiff's petition. *Affirmed.*

See same case below, 58 Ohio St. 123, 50 N. E. 442.

Statement by Mr. Justice **Brown**:

[482] *This was also a petition in the same court to enjoin the railroad company from entering upon or taking possession of the canal property and constructing a railroad thereon, but in certain particulars differs from the case already considered.

Plaintiff averred that he is the owner in fee simple of a certain tract of land in the county of Hocking, through and along which said canal passes; that he is also the owner of a mill located on said land on the south side of the canal, which is now and has been

for many years past operated by water power supplied by the canal; that such mill was originally constructed before the location and construction of the Hocking canal, and was run and operated by water power from the Hocking river until the canal was constructed, when it became necessary to appropriate the Hocking river and the water power which had been used to supply his mill for the purposes of the canal; that at that time the land and the mill were owned by one Worthington, who entered into a contract with the state, by which the latter agreed to enlarge and forever maintain the dam across the Hocking river above the grist mill, in order to afford an ample supply of water, in consideration of his granting to the state the right to construct the canal through his lands; that the canal was constructed and the dam built in pursuance of such contract, and that all the water power necessary to operate the mill has been supplied from the said canal and the Hocking river up to the present time; that the plaintiff is the present owner of the land by deeds from Worthington, and that the grist mill has been supplied by such power from the Hocking river and the canal from the date of the construction of the canal, a period of fifty-seven years; that, relying upon such contract, he has made improvements and repairs upon said mill, put the same in excellent condition, and is doing a large and profitable business; that if the defendant is permitted to enter upon the canal and construct its railroad the water power will be cut off and destroyed, and the property rendered of little value; that he is also the owner of other lands on both sides of the canal for a long distance, to the amount of *1,000 acres, and that the [483] construction of the railroad will place increased burdens upon his lands, and cut off and destroy his access to parts of them through the highways, and that he will be deprived of watering privileges for his stock.

A general demurrer was filed to this petition, which was sustained by the court and the petition dismissed. Plaintiff appealed to the circuit court, which also sustained the demurrer and dismissed the petition. Whereupon plaintiff appealed the case to the supreme court of the state, which affirmed the judgment of the circuit court, whereupon plaintiff sued out writ of error from this court.

Mr. **J. B. Foraker** submitted the cause for plaintiff in error. Messrs. **T. E. Powell** and **D. J. Ryan** were with him on the brief.

Messrs. **C. H. Grosvenor** and **D. L. Sleeper** submitted the cause for defendants in error. Mr. **John J. Stoddart** was with them on the brief.

For contentions of counsel see briefs as reported in *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, ante, 548, 20 Sup. Ct. Rep. 393.

*Mr. Justice **Brown** delivered the opinion [483] of the court:

Plaintiff insisted before the supreme court that he made the improvements on his mill

with reference to the contract between the state and the Federal government, but the supreme court was of opinion that he had no legal right to make investments on the faith of a contract between others, and to which he was not a party or privy, and insist for that reason the contract should be observed by either of the parties; that, so far as related to the contract between Worthington and the state, his remedy would be in damages for breach of the contract, and not an injunction against the company entering upon the lands purchased from the state in which he had no interest. The decree against him was therefore affirmed.

The Federal question set up in the assignment of errors was precisely the same as in the other cases, and the issues which arise from such assignments are the only ones called to our attention by counsel. *The judgment of the Supreme Court is therefore affirmed.*

[484] *STANTON WARBURTON, *Plff. in Err.*,
v.

MATILDA B. WHITE and Amelia McDonald.

(See S. C. Reporter's ed. 484-497.)

Federal question as to existence of contract—effect of state decisions—rule of property—system of community property in Washington.

1. Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the Supreme Court of the United States in considering the nature of the contract right relied upon.
2. State decisions establishing a rule of property will be followed by the Supreme Court of the United States when called upon to interpret the state law, if it is possible to do so.
3. The community system of property was not destroyed, so as to make it impossible for community or common property to exist, by Wash. act 1893, giving the administration and disposition of the community property to the husband.

[No. 101.]

Argued January 16, 1900. Decided February 26, 1900.

NOTE.—As to state laws as rules of decision in Federal courts,—see notes to *Wilson v. Perlin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; and *Griffin v. Overman Wheel Co.* 9 C. C. A. 548.

As to construction and effect of state laws and constitutions and state decisions in regard to same,—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to when the United States Supreme Court follows decisions of state courts,—see note to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to when United States courts do not follow state decisions,—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

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IN ERROR to the Supreme Court of the State of Washington to review a decision affirming a decree sustaining a claim to community property by the heirs of the surviving wife. *Affirmed.*

See same case below, 18 Wash. 511, 52 Pac. 233, 532.

Statement by Mr. Justice White:

This case involves the title to a lot of land in the city of Tacoma, in the state of Washington. The pertinent facts presenting the controversy are as follows:

Prior to 1877, Eli G. Bacon and Sophia D. Bacon were husband and wife and citizens and residents of the then territory of Washington. In the year named, Bacon, the husband, with community funds, that is, with money acquired after his marriage with his wife, Sophia D. Bacon, purchased the real estate in question and took title thereto in his own name, the property being used as the residence of the husband and wife.

At the time of the purchase the laws of the territory of Washington provided, with reference to community or "common" property, as it was termed in the earlier statute, as follows: By an act approved November 14, 1873 (Laws of 1873, Wash. Terr. p. 450), the property acquired after marriage by either husband or wife, except such as might be acquired by gift, bequest, devise, or descent, was declared to be "common property," and it was further provided that the husband should have the entire management and control of such property, "with the like absolute power of disposition as of his own separate estate." There was also in force an act approved November 12, 1875 (Laws of 1875, Wash. Terr. p. 53), providing that upon the death of the husband or wife the whole of the "community" property, subject to the community debts, should go to the survivor. [485]

Subsequently to the purchase of the real estate in question, by an act approved November 14, 1879 (Laws of 1879, Wash. Terr. p. 77), it was, however, provided that one half of the community property should be subject to the testamentary disposition of the husband or wife, subject respectively to the community debts, and in default of such testamentary disposition that the share of the deceased husband or wife should descend to his or her issue, and if there was no such issue, should pass to the survivor. On July 28, 1880, Mrs. Bacon died intestate, leaving surviving her the following children, her only heirs at law, viz.: Matilda B. White and Amelia McDonald, two daughters by a first marriage, and Ellen T. Nelson, a daughter by the marriage with Mr. Bacon.

In August, 1892, twelve years after the death of his wife, Bacon became indebted to Stanton Warburton, plaintiff in error, and the latter recovered a judgment upon such indebtedness in April, 1895. Upon an execution issued on the judgment, a judicial sale was made on March 2, 1896, to Warburton of the interest of Mr. Bacon in the property in controversy; and—after confirmation by the court and the expiration of the time allowed by law for redemption—a deed was

duly made to Warburton by the sheriff of Pierce county, Washington, on May 4, 1897. Twenty days thereafter Warburton instituted an action in the superior court of said Pierce county, against the aforementioned children and heirs of Mrs. Bacon, to quiet his title to said lot against alleged adverse claims of said heirs. A joint answer to the complaint was filed on behalf of all the defendants, setting up the facts as to the acquisition of the property by Bacon, the death of Mrs. Bacon intestate while the title to the community property was still in Bacon, and asserting that the defendants had an undivided interest therein as heirs of their mother.

[486] *Thereafter, on October, 12, 1897, Mrs. Nelson conveyed to the plaintiff whatever interest she had in the property. An amended answer was filed on behalf of the two remaining defendants, reiterating the main allegations of the former answer; setting up that the defendant, Amelia McDonald, for a valuable consideration, had sold and conveyed to her codefendant and sister, Mrs. White, before the commencement of the action, all her interest in said real estate; and it was prayed that the latter might be adjudged the absolute and unqualified owner in fee simple of an undivided one third of the property. A reply was filed to this amended answer, admitting that the lot in question was purchased with community funds, "and that the said property became then and there the community property" of Mr. and Mrs. Bacon, and that Bacon still held title thereto on the decease of his wife.

The cause was heard by the court without a jury upon an agreed statement which embodied the facts above recited, and the additional fact that intermediate the purchase by plaintiff at the sheriff's sale and the purchase by him from Mrs. Nelson, Bacon had died intestate. Each of the parties submitted conclusions of law to be deduced by the court from the facts stated. To a proposition submitted for the defendant, upholding her claim to an undivided one-third interest in the property, the plaintiff duly excepted as follows:

"II. Plaintiff excepts to the proposed conclusion of law numbered II. on the ground that it is contrary to the findings of fact and the law; on the further ground that, under the laws in force at the time the property was purchased and the deed taken, E. G. Bacon was the owner of the property, and was entitled to the succession to all the property in case of the prior death of Mrs. Bacon, and that at the death of Mrs. Bacon, in 1880, Mr. Bacon was the owner in fee simple of all said property; that to give the law of 1879, entitled 'An Act Regulating and Defining the Property Rights of Husband and Wife,' approved November 14, 1879, the construction, effect, and force given by the court, to wit, that it took away from Mr. Bacon the right of succession to the whole of the property and the right to dispose of it, would

[487] be to give it a retroactive force, contrary to § 31 of said act, and to give it such a retroactive force and take away the right of survivorship

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in said property and take away the right to dispose of it would be contrary to article 1, § 10, of the Constitution of the United States, in that it would impair the obligation of the deed or contract by which Mr. Bacon acquired said property, and would deprive said Bacon, his successors and assigns, of the right of survivorship in the property in controversy, which was a vested right under the contract or deed and the laws in force in the territory at the time the property was acquired. Plaintiff further excepts to said conclusion on the ground that if said law is given said effect and force above mentioned it would be depriving Mr. Bacon, his successors and assigns, of property without due process of law, and contrary to and in contravention of amendments of the Constitution of the United States, and plaintiff claims the protection of both said provisions of the Constitution of the United States."

The court decided as matter of law that the defendant Mrs. White was, as claimed by her, the owner of an undivided one-third interest in the property, and was entitled to a decree quieting her title thereto. From the decree thereupon entered, so far as it sustained the claim of said defendant, the plaintiff appealed to the supreme court of the state of Washington. That court affirmed the judgment and denied a petition for rehearing. 18 Wash. 511, 52 Pac. 233, 532. A writ of error having been allowed, the cause is now here for review.

Mr. Stanton Warburton, P. P., argued the cause and, with Mr. Frederic D. McKenney filed a brief for plaintiff in error.

Mr. Charles S. Fogg argued the cause and, with Mr. James Hamilton Lewis, filed a brief for defendants in error.

The contentions of counsel sufficiently appear in the opinion.

*Mr. Justice White, after making the [487] foregoing statement, delivered the opinion of the court:

The law of the territory of Washington approved November *14, 1879, provided that [488] in case of intestacy the share of the deceased husband or wife in community property should pass to the legal issue of the intestate, and in default of such issue should go to the surviving husband or wife, as the case might be. It is undoubted that if the decision of this cause is to be controlled by this enactment, there is no error in the record.

The error asserted is predicated on the claim that, under the laws of the territory of Washington existing at the time the property was bought, there was in fact no such thing as community property, since by those laws property bought during marriage with community funds was subject to the disposition of the husband as if it were his separate property, and he was entitled to the whole of the community property in case of the death of his wife before him. The effect of this state of the law in force at the time of the purchase, it is claimed, was in substance to make him the real owner of the property.

The argument is that if the provisions of the law of 1879, previously referred to, conferring on the husband or wife testamentary power to dispose of his or her interest in the community property subject to the community debts, and also providing that in case of intestacy such interest, subject to the debts aforesaid, should descend to the children of the deceased and should only pass to the survivor in default of issue, be given a retroactive effect so as to be operative upon property acquired before the act of 1879, the consequence will be to impair the obligations of the contract of purchase made by the husband, which is at issue in this case, and besides to deprive him of his property without due process of law. This, it is asserted, will be the necessary legal effect, since to cause the statute of 1879 to be operative upon community property bought by the husband before the enactment of that statute will be the equivalent of giving to one person the testamentary power to dispose of the property of another person, or in the absence of a will amounts to providing that the death of one person intestate shall transmit to the issue of such person property not owned by the deceased intestate, but which belongs to another and distinct living person.

[489] *It is manifest that this proposition rests upon the assumption that the act of 1873, which was in force when the property was bought by the husband with community money, made the property so bought solely and exclusively that of the husband, and hence that the wife had no community interest in it. This follows because if, under the act of 1873, the wife had a community interest in property bought with funds of that character, then the transmission of the wife's estate in accordance with the act of 1879, and contrary to the rule of descent provided by the act of 1875, in force at the time the property was purchased, cannot possibly bring about the consequences upon which the argument is based. The result just stated must be the case, since if, when the property was acquired, the wife had an interest in it, the mere change of the law or rule of inheritance existing when the property was bought would be lawful. Manifestly the proposition that the territory of Washington had a right to regulate both the power of testamentary disposition of property and the passage thereof in case of intestacy is too elementary to require more than mere statement.

The fallacy which is involved in the contention that under the laws in force at the time the property was bought by the husband, with community money, it became exclusively his, and that the wife had no community interest therein, is plainly demonstrated by a consideration of the import of the laws of Washington existing at the time the purchase was made, as construed both by the supreme court of the territory and of the state of Washington. To these adjudications we shall now refer.

The nature of common or community property within the territory of Washington
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ton, as such property was constituted by the act of 1873, and the operation of the act of 1879 upon property of that character acquired prior to the passage of the latter act, was considered in 1882 in the case of *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 Pac. 841. The question for decision in that case was whether, while the act of 1879 was in force, a husband could, without his wife joining, make a valid contract to sell community property acquired prior to 1879. In deciding* this question in the negative the court, [490] in the course of the opinion, said (p. 238 'ac. p. 841):

"By the provisions of the husband and wife acts passed in 1879, and previously, the husband and wife are considered as constituting together a compound creature of the statute called a community. . . . In it the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blended, but identified. It is *sui generis*—a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon husband and wife together. As the husband's, 'like absolute power of disposition as of his own separate estate,' bestowed by the 9th section of the act of 1873, was a mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done."

In 1893, the supreme court of the state of Washington, in the case of *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, considered the nature of common or community property under the act of the territory approved December 2, 1869, defining the rights of husband and wife. The provisions of the acts of 1869 and 1873, it may be added, were identical, the act of 1869 having been repealed by an act passed in 1871. The suit was for partition* of land which had been acquired by a husband with community funds, while the act of 1869 was in force. The husband still held title to the community property in 1883, when the wife died, leaving a child and her husband surviving. It was contended that the power to dispose of the common property conferred by § 2 of the act of 1869 upon the

husband was a vested right which could not be taken away by any subsequent statute. Replying to this contention, the court said (p. 38, Pac. p. 145):

"But it is not necessary to decide this point. The act of 1869 having declared certain property 'common property,' did not make provision for the disposal of such property upon the death of either spouse, as was done by later laws on the same subject; but we think that, without anything further than was contained in that act, the courts of the territory would have been bound to administer upon such property, after the death of husband or wife, according to the established rules of those states and countries where common or community property laws had existed. The first and cardinal of such rules was that the community was dissolved by the decease of either spouse; next the right of disposal in either spouse was ended; and, third, the property became vested by moieties in the survivor and the children. Therefore, upon the death of Mrs. Hill, in 1883, even if the act of 1869 was the only law applicable to this land, the right of the husband to dispose of the whole estate terminated."

In the subsequent case of *Mabie v. Whitaker*, 10 Wash. 656, 39 Pac. 172, the provisions of the law of 1869 were again considered. Land had been purchased on August 10, 1871, by one Mabie, with community funds, during the existence of the act of 1869. While Mabie held the legal title, the legislature repealed the act of 1869, and on November 29, 1871, an act was approved which, in § 12, provided that the husband should have the management of all the common property, but should not have the right to sell or encumber real estate without the joinder of his wife. By § 22 it was provided that common property should be partnership property, and that the share of the wife should be one half thereof, and should be to *her and her heirs forever. On October 25, 1874, after the death of his wife leaving issue, Mabie executed a deed purporting to convey all of the land to one Hallett. Ejectment was brought by the surviving child to be let into possession of the land as tenant in common, etc. It was contended for the defendants, that whatever the nature of the interest of Mrs. Mabie in the land, the right of Mabie under the act of 1869, in force when the land was purchased and title taken by Mabie, to convey the entire title, could not be impaired by subsequent legislation. The court, however, said (p. 658, Pac. p. 173):

"But, leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title, under the former law, after her death, and cut off her heirs, we think the subsequent act took away his power to do so. It was immaterial whether the record title to the community lands stood in the name of the husband or of the wife, or of both of them, when considered with reference to the power of the legislature to authorize either or both of them to convey. The legislature could as well have provided that

the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less. Furthermore, prior to the conveyance to Hallett the community in question had been dissolved by the death of the wife, and at the time of her death the law of 1871, relating to the descent of community property, was in force. Section 22, p. 73 (Abbot, Real Prop. Stat. p. 478), provided that: 'The common property being partnership property, the wife's share shall be one half thereof and shall be hers and her heirs forever; and her share of the common property may be increased so as to be more than one half, by the wife's compliance with the provisions of section five of this act.'"

In the course of the opinion, discussing and overruling a further contention, based upon the common law, that Mabie and wife held the land in question as joint tenants with a right of survivorship, the court said (p. 659, Pac. p. 173):

*"The act of 1869 did not fix the status of [493] such property, other than to declare it to be common property, and made no provision for its descent. Nor was there at that time, nor for some time thereafter, any express legislative recognition of estates in joint tenancy.

"The statute of 1871 did not undertake to divest any right which had become vested. Mabie, receiving this conveyance under the act of 1869, thereby became the owner of an undivided one-half interest in the land, and his wife thereby became the owner of the other half. Her right was as much a vested right as his. Under the weight of authority, the legislature had power to change the law of descent, and could take away the right of survivorship, as to estates in joint tenancy, and make the same applicable to lands already acquired. Cooley Const. Lim. (5th ed. 440, 441; Freeman Cotenancy & Partn. § 36, and cases cited by each; also *Miller v. Dennett*, 6 N. H. 109. Section 22, aforesaid, is substantially a statute of descent. It has the technical and apt words of such a statute, 'hers and her heirs forever,' which indicate the legislative intent. There was also a general statute of descent in force, which could more logically be applied to community estates than could the doctrine of joint tenancy. Laws 1862, p. 261; Abbot, Real Prop. Stat. pp. 375-378. Subsequently, another act was passed to regulate the descent of real property. Laws 1875, p. 55. Section 2 provided: 'Upon the death of husband and wife, the whole of the community property, subject to the community debts, shall go to the survivor.' This statute continued in force until November, 1879, when an act was passed (Laws 1879, p. 77), § 13 of which was as follows: 'In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their

bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor subject to the community debts, and to the exclusion of collateral heirs, the family allowance, and the charges and expenses of administration.' *In [494] neither of these acts were community lands referred to as being held in joint tenancy, and the only reference of the kind thereto is contained in the act aforesaid, passed in 1885, subsequent to all of them."

Next discussing the proposition that a partnership was not a joint tenancy, the court, after calling attention to the fact that by the act of 1871 provision was made for the descent of the wife's share in community property, thus cutting off the husband's right of succession as survivor, concluded on that branch of the case as follows (p. 662, Pac. p. 175) :

"We know of no instance, judicial or otherwise, where such doctrine of joint tenancy has been recognized or applied, in the history of the state and territory, and none has been called to our attention. We are of the opinion that the universal belief and course of acting has been contrary thereto, and that the right of taking by survivorship has at no time existed, as to community lands, here, except under the statute of 1875, providing for such descent."

The rule announced in the foregoing cases was reiterated in the opinion delivered in the case at bar, it being held that Bacon did not become the sole owner of the property in question by the purchase in 1877, but that it became and continued community property so long as the community existed, and that the descent of such property was subject to regulation at will by the legislature.

Now, it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the legislature of Washington, whether territorial or state, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage with community funds became an acquet of the community, and not the sole property of the one in whose name the property was brought, although by the law existing at the time the husband was given the management, control, and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property [495] when *sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community.

The argument of the plaintiff in error then comes to this: That although the statutes of the territory of Washington, which were continued in force within the state on the organization of the state government, have been construed by the state court contrary to the view now urged upon this court, nevertheless this court should disregard such judicial construction and treat the statutes 176 U. S.

as conferring rights which the highest tribunal of the state has held never arose from them. It is claimed that where a contract is asserted to have been impaired by a subsequent statute it is the duty of this court to determine for itself the nature and extent of the contract, where the subsequent legislation has been by the decision of the court held operative upon or enforced against the alleged contract rights. The doctrine is elementary, but the principle which it embodies is subject to a well-settled qualification, which is, that where it is asserted that a contract has been entered into on the faith of the state laws, existing at the time when it was made, the construction of such laws, which was settled at the time of the making of the contract, by the court of last resort of the state, will be adopted and applied by this court in considering the nature of the contract right relied upon. This rule, however, it is argued, is not applicable in this case, because it is said that all the decisions of the supreme court of Washington referred to were announced since the contract of purchase by the husband was made, and therefore the interpretation, which these decisions expound, cannot be considered as having entered into and formed a part of the contract, since they were not in existence when the contract was made. From this it is argued that the decisions in question do not, therefore, relieve this court of the duty of interpreting for itself, as a matter of first impression, the laws of the territory or of the state of Washington which are here involved, and upon the faith of which, it is asserted, the obligations arising from the contract took being.

While, abstractly considered, the proposition is conceded, it *is not apposite to the [496] controversy here presented. The rule is subject to a limitation which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Miller v. Ammon*, 145 U. S. 423, 36 L. ed. 761, 12 Sup. Ct. Rep. 884.

Applying the principle just stated to the case before us, we feel no hesitation in construing the contract of purchase, which is here in question, in accordance with the nature and extent of community property, as settled by the decisions of the supreme court of Washington, interpreting the laws which were in existence when the purchase was

made. Obviously, the reasoning of the plaintiff in error, upon which the assumption that community property bought during the existence of the act of 1873 was solely the property of the husband, involves not only a contradiction in terms, but invokes at the hands of this court, in order to overthrow the rule of property in the state of Washington, an interpretation of the statutes of that state which is not only confusing, but self-destructive. It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated the community system, and that in consonance therewith the statute referred to treated property acquired during marriage with community money as community or common property. Although this is patent, the argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and render it impossible, under the statute, for community

[497] or common property *to exist. In other words, the interpretation relied upon asked us to say that because of a provision which simply pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about a result which was contrary to its express language, providing for the existence of the community system. It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquet during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property. As the property in question had not been sold by the husband, but on the contrary was held by him at the date of the death of the wife, no question is presented in this record of the nature and scope of his authority during the existence of the marriage, and we intimate no opinion on that subject.

We have been cited to a decision of the supreme court of California (*Spreckels v. Spreckels*, 116 Cal. 339, 36 L. R. A. 497, 48 Pac. 228), construing an act somewhat similar to the Washington act of 1873, which it is claimed is in conflict with the views enunciated by the courts of Washington in determining the proper construction of the statute of 1873 and the nature of an estate vested in a husband by virtue of that act. But the case referred to involved only the validity of the exercise by a husband, during the existence of a community, of the power of dominion and control over the community property, and the right of the legislature to modify such authority and control with respect to prior acquired community property. We are therefore unable to perceive the pertinency of that decision to the question arising

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for determination on this record, and we need not therefore review or consider it.

There being no error in the judgment of the Supreme Court of the State of Washington, that judgment is affirmed.

*BALTIMORE & OHIO SOUTHWESTERN [498]
RAILWAY COMPANY, *Plff. in Err.*,

v.

WILLIAM VOIGT.

(See S. C. Reporter's ed. 498-521.)

*Carriers—express messenger as passenger—
public policy as to contracts limiting liability for negligence.*

An express messenger occupying an express car, in charge of express matter, in pursuance of a contract between the railroad company and the express company, is not a passenger within the meaning of the rule of public policy which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence, and cannot recover of the railroad company for injuries sustained in a collision, where the contract between the companies exempts the railroad company from such liability, while his own contract, voluntarily entered into as a condition of employment, assumes all such risks and stipulates that he will indemnify and hold his employer harmless from all liability for such accident or injury.

[No. 88.]

*Argued December 20, 21, 1899. Decided
February 26, 1900.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit asking if an express messenger is a passenger within a rule which prevents exemption of liability for negligence. *Answered in the negative.*

NOTE.—As to contracts exempting carriers from liability for negligence,—see note to *Chicago, M. & St. P. R. Co. v. Sloan*, 42 L. ed. U. S. 668.

As to limitation of liability by carriers for injuries to passengers and baggage,—see note to *Clark v. Geer*, 32 C. C. A. 301.

Express messengers as passengers.

An express agent or a newsboy permitted to ride under a contract without paying fare is regarded, according to the weight of authority, as an ordinary passenger, and the carrier is liable for any injury caused to such person by the negligence of the carrier's employees. *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71.

A railroad company which undertakes to carry an express messenger in a car provided by it for the use of the express company is bound to use every reasonable precaution to carry him safely. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597.

An express messenger in accepting his employment assumes the risk of accident incident to the nature of the business, but not the risk resulting from negligence in the management of its trains by a railroad company which was carrying him under a contract with the express

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Statement by Mr. Justice **Shiras**:

[499] *The following statement and question were certified to this court by the judges of the circuit court of appeals for the sixth circuit:

"This was an action brought by William Voigt, the defendant in error, against the Baltimore & Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which—a fast passenger train—he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was traveling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above-mentioned contract between his company and the railway company. The answer of the railway company set up two grounds of defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he

was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defense, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

***"For a second and separate defense the [500] railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio, engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to; and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint-stock company duly authorized by law to carry on the express business and to enter into such contract; and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line; and that it was part of said contract that one or more employees of said express company should accompany said goods in said cars over the said line of said railroad, and for such purposes should be transported in said cars free of charge; and that

company. *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585.

But a person acting in the dual capacity of express messenger and baggageman under an arrangement between the railroad company and the express company, who was required by the nature of his employment to occupy a place in the baggage and express car, was not entitled to the rights of a passenger, and cannot recover in an action against the railroad company for injuries occasioned by the negligence of its employees. *Baltimore & O. R. Co. v. McCamey*, 12 Ohio C. C. 543.

And a party who is not in the employ of the express company, riding in the express car, attempting to learn the route and assisting the messenger, is not entitled to the rights of a passenger. *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475.

The carrier is liable to an express messenger for injuries occasioned by the negligence of its employees, although the express company has released the carrier and guaranteed against any liability for damage to its agents. *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324.

So, where the contract was that the carrier assumed no liability. *Blair v. Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55.

Such a contract, to be binding upon the messenger, must be brought to his notice. Thus, in *Chamberlain v. Pierson*, 59 U. S. App. 55, 87 Fed. Rep. 420, 31 C. C. A. 157, it was held that an express messenger was not bound by a contract between a railway company and the express company, by which he was to be considered an employee of the former, and was to be accorded free transportation at his own risk, where he had no knowledge of the provisions of the contract and had not acquiesced in its terms.

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A railroad company has the right, in taking an express company and its business and employees upon its road, to make a contract that it shall not be liable for the negligence of its employees; and such a contract is binding upon an express messenger who, in his contract of employment, assumes the risk of all injuries occasioned by the negligence of any corporation operating any railroad. *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332.

This is the doctrine laid down in the principal case, and is in exact accord with two decisions of the Indiana supreme court upon an almost incidental state of facts. *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464.

But a railroad company cannot enforce a contract between a messenger and an express company that the railroad company shall not be held liable for accidental injuries to the messenger, where the railroad company had no knowledge of the existence of such a contract. *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796.

A contract between a railroad company and an express messenger, the holder of a season ticket giving him all the rights of a passenger, by which he assumes the risk resulting from riding in baggage cars, in consideration of being permitted to ride there to conduct the express business, is a valid and sufficient defense to an action against the railroad company for injuries to which his presence in the baggage car contributed. *Bates v. Old Colony R. Co.* 147 Mass. 255, 18 N. E. 633.

Under such a contract the messenger assumes the risk of all injuries received while riding in the baggage car, even though his presence in the car did not contribute to such injuries. *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652.

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it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees, or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars; and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred; and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger; and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and *injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company) upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands, and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employees of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over

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its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company, and not otherwise.'

"To this second defense a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a *defense to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record, finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 561. The decision of the court went upon the ground that, although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier, and, further, that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff, and the damages were assessed at the sum of \$6,000, and judgment was thereupon entered that the plaintiff recover that sum, with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defense of the answer of the defendant; and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company which, for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employees, and to which the employee agrees upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employee of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself from liability or the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and therefore upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

"Question.

"*A railroad company engaged as common carrier in the business of transporting passengers and freight for hire entered into a contract in writing with an express company authorized by law to do and actually

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doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities, and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities, and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employees of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employees, or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of the company between which and such express company a contract as aforesaid existed; and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and

[504] did undertake and agree to indemnify *and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise; and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers

for hire, so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employees of the railroad company?"

Mr. Edward Colston argued the cause and, with Messrs. Judson Harmon, A. W. Goldsmith, and George Hoadley, Jr., filed a brief for plaintiff in error:

Voigt was not a passenger of the railway company, nor even its employee.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464; *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Bates v. Old Colony R. Co.* 147 Mass. 255, 18 N. E. 633; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *Hughson v. Richmond & D. R. Co.* 2 App. D. C. 98; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 4 Atl. 261.

The railroad company was not a common carrier of the express company, itself a common carrier, nor of the express company's goods, nor of its messengers.

Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628.

There are other cases in which a railway company performing a transportation service is not deemed to act as a common carrier.

Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 22 N. W. 215; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 31 N. E. 650.

Contracts like the one in question have been held valid in the state of Massachusetts.

Bates v. Old Colony R. Co. 147 Mass. 255, 18 N. E. 633; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652.

The same appears to be the law in the province of Ontario.

Jennings v. Grand Trunk R. Co. 15 Ont. App. Rep. 477.

The cases cited by the circuit court to show that an express messenger is a passenger do not sustain that contention where there are contracts between the railway company, the express company, and the express messenger, such as exist in this case.

Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; *Blair v. Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324; *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718, 28 S. W. 883; *Jennings v. Grand Trunk R. Co.*

15 Ont. App. Rep. 477; *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 248; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280.

Mr. Charles M. Cist argued the cause and, with Mr. Edgar W. Cist, filed a brief for defendant in error:

The proposition that the rights of an express messenger are those of an ordinary passenger for hire of a common carrier is supported by an almost unanimous consensus of authority.

Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Blair v. Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324; *Kennedy v. New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 248; *Chamberlain v. Piereson*, 59 U. S. App. 55, 87 Fed. Rep. 420, 31 C. C. A. 157; *Jennings v. Grand Trunk R. Co.* 15 Ont. App. Rep. 477; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718, 28 S. W. 883; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280.

Hutchinson, Car. §§ 564, 565: Ray, Imposed Duties, Passengers, Car. 9; Am. & Eng. Enc. of Law, 512.

There is an unbroken current of authority to the effect that a postal clerk is a passenger for hire.

Arrowsmith v. Nashville & D. R. Co. 57 Fed. Rep. 165; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Norton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Magoffin v. Missouri P. R. Co.* 102 Mo. 540, 15 S. W. 76; *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36, 16 S. W. 849; *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718, 28 S. W. 883; *Hammond v. North Eastern R. Co.* 6 S. C. N. S. 130, 24 Am. Rep. 467; *Hale v. Grand Trunk R. Co.* 60 Vt. 605, 1 L. R. A. 187, 15 Atl. 300; *Libby v. Maine C. R. Co.* 85 Me. 34, 20 L. R. A. 812, 26 Atl. 943; *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82, 35 S. W. 264; *Baltimore & O. R. Co. v. State use of Wiley*, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Collett v. London & N. W. R. Co.* 16 Q. B. 984.

The relation of an express messenger to the railroad company as a passenger for hire of a public or common carrier is not changed by his entering into a contract releasing the railroad company from liability for negligence.

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New York C. R. Co. v. Lockwood, 17 Wall. 376, 21 L. ed. 639.

Even if the express company's contract with the railroad company were treated as a private contract, the express messenger, whose right to ride on the train was thereby secured, would none the less sustain to the railroad company the relation of passenger for hire to a common carrier.

Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; *Delaware, L. & W. R. Co. v. Ashley*, 28 U. S. App. 375, 67 Fed. Rep. 209, 14 C. C. A. 368.

No contract or consent whereby one person stipulates for immunity in unlawfully or negligently injuring another is invalid.

Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Louisville & N. R. Co. v. Orr*, 91 Ala. 554, 8 So. 360; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514, 8 So. 776; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808; *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 11 S. E. 829; *Purdy v. Rome, W. & O. R. Co.* 125 N. Y. 212, 26 N. E. 255; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. Rep. 782; *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 305, Affirmed in 40 U. S. App. 448, 76 Fed. Rep. 440, 22 C. C. A. 264; *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185; *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869; *Narramore v. Cleveland, C. C. & St. L. R. Co.* 96 Fed. Rep. 298, 37 C. C. A. 499, 48 L. R. A. 68; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 427, 12 L. ed. 501.

*Mr. Justice Shiras delivered the opinion[504] of the court:

The question we are asked to answer is whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by *in-[505]voking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence.

The circuit judge thought the case could not be distinguished from the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, where a recovery was maintained by a drover injured while traveling on a stock train of the New York Central Rail-

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road Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465:

[506] "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of *New York C. R. Co. v. Lockwood*:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to

passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the *Lockwood Case* as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. *He cannot afford to higggle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

[508] We have here to consider not the case of an individual *shipper or passenger dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the *Express Cases*, 117 U. S. 1, *sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, and from the opinion in that case we shall make some pertinent extracts:

"The express business . . . has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life.

"When the business began, railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started, that it has not been encouraged by the railroad companies, and it is no doubt true . . . that 'no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter.' Express companies have undoubtedly invested [509] their capital and built up their business *in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time

of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in this record, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. . . . The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have, from the beginning, been provided for *the [510] transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On

important lines one company will at times fill all the space the railroad company can well allow for the business. . . . In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 28,000 miles; and the Southern, ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements *with each other and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The goodwill of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases from the opinions in which are taken the foregoing extracts were suits brought by certain express companies which had been doing business on certain railroads under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with [512]an entire copy of *the contract, between the plaintiff in error, the Baltimore & Ohio 176 U. S.

Southwestern Railway Company, and the United States Express Company, but it is sufficiently disclosed in the statement made by the judges of the circuit court of appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employees of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employees of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car specially adapted to the uses of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express *company. He was on the train, not [513]by virtue of any personal-contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him or to each other for injuries he might receive in the course of his employment was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of

such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no legal compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused as would appear to have been the present case, by the negligence of fellow servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine *of public policy than was justified by the facts and reasoning in the *Lockwood Case*.

This subject has received attentive consideration in several of the state courts.

In *Bates v. Old Colony R. Co.* 147 Mass. 255, 17 N. E. 633, it was held that if an express messenger holding a season ticket from a railroad company, and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under this contract as construed in this case. See *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 4 Atl. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. . . . The fact that the plaintiff was riding in the

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baggage car as an express messenger in charge of merchandise which was being transported there shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as *those of the baggage-master, and[515] would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652.

Robertson v. Old Colony R. Co. 156 Mass. 526, 31 N. E. 650, was an action brought for personal injuries caused to the plaintiff, an employee of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring; and it was held that, as the defendant company was under no common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

Griswold v. New York & N. E. R. Co. 53 Conn. 371, 4 Atl. 261, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains, and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The supreme court of Michigan, in *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 22 N. W. 215, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo *to Detroit on[516] cars belonging to the plaintiff, stopping at

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certain named points for exhibition, the plaintiff paying a fixed price therefor, held that such transportation was not a transaction with a common carrier as such, that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the circuit court of appeals of the seventh circuit, citing *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 22 N. W. 215, and *Robertson v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 650, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from *New York C. R. Co. v. Lockwood*: "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger, and the railroad company were in terms similar to those existing in the present case, and the defense was the same as that made here. It was held that the contracts were valid and that the defense was good. It was said:

"Under the doctrine declared in the *Express Cases*, 117 U. S. 1, *sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known *to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the space set apart in the baggage car for that purpose. Under the authorities cited it was not the duty of

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appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the supreme court of Indiana, in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employee of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by employees of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employee of such express company.

A precisely similar question was presented in the case of *Blank v. Illinois C. R. Co.* and was decided the same way by the appellate court for the first district of Illinois, in an opinion rendered March 14, 1899. 80 Ill. App. 475. The court cites the *Express Cases*, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the supreme court of Illinois. 182 Ill. 332, 55 N. E. 332.

The same doctrine prevails in the state of New York. *Bissell v. *New York C. R. Co.* 25 [518] N. Y. 442, 82 Am. Dec. 369; *Poucher v. New York C. R. Co.* 49 N. Y. 263, 10 Am. Rep. 364. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *New York C. R. Co. v. Lockwood* to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of everyone to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Scybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the mes-

messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

[519] *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified and protected against from all risks and liabilities. But the court put its judgment against the railroad company *expressly upon the ground that the messenger had no knowledge or information of the contract between the companies, and was not himself a party to the agreement to exempt the railroad company.

Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422, 26 N. E. 626, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent to a knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*."

Chamberlain v. Pierson, 59 U. S. App. 59, 87 Fed. Rep. 421, 31 C. C. A. 158, in the circuit court of appeals of the fourth circuit, was a case in which an express messenger was injured while traveling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

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"The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his *duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, . . . answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *New York C. R. Co. v. Lockwood*; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

Accordingly, we answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.

Mr. Justice **Harlan** dissenting:

In *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 384, 21 L. ed. 627, 641, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover traveling on a pass, such as was given in this case, . . . is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of *New York C. R. Co. v. Lockwood*, and that the judgment should be affirmed upon the broad ground that the defendant corporation *could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business, whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

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LOUISE M. MATTESON and Charles D. Matteson, *Plffs. in Err.*,
v.

WILLIAM H. DENT, as Receiver of the First National Bank of Decorah, Iowa.

(See S. C. Reporter's ed. 521-532.)

Liability of next of kin for assessments on stock in national bank.

1. The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable, under U. S. Rev. Stat. §§ 5139, 5151, 5152, to assessments on the stock in case the bank subsequently becomes insolvent.
2. Enforcing the whole amount of an assessment on national bank stock, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate, pursuant to Minn. Gen. Stat. 1894, §§ 5918 *et seq.*, does not violate any rights under the Federal statutes.

[No. 124.]

Submitted January 29, 1900. Decided February 26, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming a decision enforcing an assessment on national bank stock. *Affirmed.*

See same case below, 73 Minn. 170, 75 N. W. 1041.

Statement by Mr. Justice **White**:

On October 31, 1864, Sumner W. Matteson became the owner of ten shares of capital stock of the First National Bank of Decorah, established in the city of Decorah, state of Iowa, and the shares were duly registered on the books of the bank in his name. In July, 1895, Matteson, whilst the stock was yet owned by him and still stood registered in his name, died intestate at St. Paul, Minnesota, where he resided, leaving surviving his widow and six children, two of whom were minors. The probate court of Minnesota having jurisdiction over his estate appointed an administrator, who filed an inventory in which was embraced the shares of stock in question. In September, 1896, a final account having been previously filed by the administrator, a decree turning over the estate, including the ten shares of stock was entered. Under this decree the widow and heirs took the ten shares of stock in indivision in proportion to their interest in the estate; that is to say, the widow became the owner of an undivided third interest in the stock and each of the children, there being

six, of a one-ninth interest therein, thus the widow owned three ninths of the ten shares and each of the six children one ninth. No notice of the death of Matteson or of the allotment in question was conveyed to the bank, nor was any transfer of the stock on the books of the bank operated at the time of the allotment or subsequent thereto. Indeed, under the proportions of undivided ownership of the stock in the widow and heirs, it was impossible to have registered on the books of the bank in the name of each owner separately according to their respective ownership in the ten shares without some further partition of the undivided ownership existing between them. It follows that the stock which stood on the books of the bank in the name of Matteson during his life continued to so stand after his death, so remained at the time of the allotment, and was so registered at the time this suit was brought. On November the 10th, 1896, the bank became insolvent and was closed by the comptroller of the currency, who on the 24th of November, 1896, appointed a receiver. In January, 1897, in order to pay the debts of the bank, under the authority conferred on him by law (Rev. Stat. 5151), the comptroller made an assessment upon the shareholders of \$100 upon each share, and proceedings for its enforcement were by him directed to be taken. The assessment not having been paid, although due notice was given to do so, the receiver sued in the state court of Ramsey county, Minnesota, the widow and children of Matteson, as next of kin, asking judgment for the amount* of said assessment. The suit was in conformity to the General Statutes of 1894 of Minnesota, which, in §§ 5918 *et seq.*, permitted an action to be brought against all or one or more of the next of kin of a deceased person, by the creditor of an estate, to recover the distributive shares received out of such estate, or so much thereof as might be necessary to satisfy a debt of the intestate or of his estate. Service was had only upon the widow and one of the children. A general demurrer to the complaint was filed and overruled, and the order so overruling the demurrer was, upon appeal, affirmed by the supreme court of the state. 70 Minn. 519, 73 N. W. 416. Thereafter the demurring defendants answered, setting forth in substance their nonliability to pay said assessment under the statutes of the United States governing the winding up of insolvent national banking associations. A motion for judgment upon the pleadings was thereupon made and granted, and judgment was entered in favor of the receiver against Louise M. Matteson and Charles D. Matteson, and each of them, in the sum of \$1,000 with interest and costs. On appeal to the supreme court of the state of Minnesota, that court affirmed the judgment. 73 Minn. 170, 75 N. W. 1041. A writ of error was allowed, and the judgment of affirmance is now here for review.

NOTE.—As to who are liable as "shareholders" in national banks,—see note to *Beal v. Essex Sav. Bank*, 15 C. C. A. 130.

cause for plaintiff in error. *Mr. Albert R. Moore* was with him on the brief:

After a final decree of distribution there is no estate of a deceased person, and there is no administrator who can hold shares of stock, but the property of the estate has become the individual property of those named in the final decree as distributees.

State ex rel. Dana v. Ramsey County Probate Ct. 40 Minn. 296, 41 N. W. 1033; *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392; *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255.

Although perhaps it has not been directly adjudicated that the liability for an assessment on shares of bank stock rests only upon those who are shareholders at the time the insolvency occurs, all the decisions assume that this is so.

Irons v. Manufacturers' Nat. Bank, 17 Fed. Rep. 316; *Stuart v. Hayden*, 169 U. S. 3, 42 L. ed. 641, 18 Sup. Ct. Rep. 274; *Witters v. Sowles*, 32 Fed. Rep. 130; *Wickham v. Hull*, 60 Fed. Rep. 328; *Blackmore v. Matthews*, 37 U. S. App. 531, 71 Fed. Rep. 321, 18 C. C. A. 57; *Parker v. Robinson*, 33 U. S. App. 368, 71 Fed. Rep. 256, 18 C. C. A. 36; *Brown v. Ellis*, 86 Fed. Rep. 357; *Tourtelot v. Finke*, 87 Fed. Rep. 840.

The absence of the name of the owner of shares from the bank register is no defense to an action to recover from him an assessment on shares of stock owned by him, and the fact of one's name appearing on the bank register as a shareholder does not of itself make him liable for an assessment on stock appearing by the books of the bank to belong to him.

Johnston v. Laflin, 103 U. S. 800, 26 L. ed. 532; *Davis v. Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, sub nom. *Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Pauly v. State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; *Hubbell v. Houghton*, 46 Fed. Rep. 547; *Lucas v. Coe*, 86 Fed. Rep. 372.

The liability of a shareholder to pay an assessment is not strictly, if at all, a contract obligation, but is merely incidental to the ownership of the stock, and is purely statutory.

Witters v. Sowles, 32 Fed. Rep. 137; *Scott v. Latimer*, 60 U. S. App. 720, 89 Fed. Rep. 353, 33 C. C. A. 1; *Declano v. Butler*, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39; *First Nat. Bank v. Hawkins*, 33 U. S. App. 147, 79 Fed. Rep. 53, 24 C. C. A. 444; *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290.

Mr. Frank B. Kellogg submitted the cause for defendant in error. *Messrs. George R. O'Keilly, Dan W. Lawler, and Fitzhugh Burns* were with him on the brief:

While the real owner of shares might be held liable on his statutory liability, the apparent owner may, in every case, be held, unless he has taken every step necessary to have himself released.

National Park Bank v. Harmon, 51 U. S. App. 148, 79 Fed. Rep. 891, 25 C. C. A. 214, Affirmed in 172 U. S. 644, 43 L. ed. 1182, 19 Sup. Ct. Rep. 877; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Horton v. Mercer*, 36 U. S. App. 234, 71 Fed. Rep. 153, 18 C. C. A. 18; *Thomp. Corp.* §§ 3193-3283.

A stockholder's liability is an essential element of the contract by which he becomes a stockholder, and is voluntarily entered into.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Thomp. Corp.* §§ 3018, 3320 et seq.; *Davis v. Weed*, 44 Conn. 569; *Wiles v. Suydam*, 64 N. Y. 173; *Cochran v. Wiechers*, 119 N. Y. 399, 7 L. R. A. 553, 23 N. E. 803; *Bailey v. Hollister*, 26 N. Y. 112; *Lowry v. Inman*, 46 N. Y. 119; *Aultman's Appeal*, 98 Pa. 505.

On the death of a stockholder in a national banking association, this liability passes immediately to his estate, and would do so even were it not for § 5152 of the Revised Statutes. This is not by virtue of any new contract, as the liability rests on the stock and is part of the contingent liability of the estate.

Davis v. Weed, 44 Conn. 569, Fed. Cas. No. 3,658; *Parker v. Robinson*, 33 U. S. App. 368, 71 Fed. Rep. 256, 18 C. C. A. 36.

It is a contingent liability,—one depending upon some future event which may or may not happen; and it is therefore wholly uncertain whether there will ever be a liability.

Davis v. Weed, 44 Conn. 569, Fed. Cas. No. 3,658; *Tourtelot v. Finke*, 87 Fed. Rep. 840; *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Lake Phalen Land & Improv. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

U. S. Rev. Stat. § 5152, does not confine this liability of an estate to such time only as it remains in the hands of the administrator.

Parker v. Robinson, 33 U. S. App. 368, 71 Fed. Rep. 256, 18 C. C. A. 36; *Davis v. Weed*, 44 Conn. 569, Fed. Cas. No. 3,658.

The deceased assumed the liability at the time he took the stock, and was from that time actually liable to the date of his death, though the contingent liability did not become fixed and certain until after his death.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Davis v. Weed*, 44 Conn. 569, Fed. Cas. No. 3,658; *Tourtelot v. Finke*, 87 Fed. Rep. 840.

It cannot be denied that this liability is one that survives against the estate of the deceased.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Cook, Stock and Stockholders*, § 248; *Thomp. Corp.* §§ 3026, 3320 et seq.; *Bailey v. Hollister*, 26 N. Y. 112; *Cochran v. Wiechers*, 119 N. Y. 399, 7 L. R. A. 553, 23 N. E. 803; *Wickham v. Hull*, 60 Fed. Rep. 326.

It is a well-settled doctrine of law that, until a transfer of stock is duly recorded in the transfer books of the corporation, the transferrer is not released from liability, but is still held liable to the creditors of the corporation.

Cook, Stock and Stockholders, §§ 258, 262; Thomp. Corp. §§ 3193, 3283 *et seq.*

This rule is more strictly enforced in reference to transfers of stock in a national banking association, owing to the wording of the statute above quoted.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Bowden v. Farmers' & M. Nat. Bank*, 7 Hughes, 307, Fed. Cas. No. 1,714; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; *Borland v. Haven*, 37 Fed. Rep. 394; *Price v. Whitney*, 28 Fed. Rep. 297; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Robinson v. Southern Nat. Bank*, 94 Fed. Rep. 964, 36 C. C. A. 584; *Davis v. Weed*, 44 Conn. 569, Fed. Cas. No. 3,658.

It was the duty of the personal representative of the intestate to see that proper transfers were made, and this duty having been neglected, the estate is not released from liability.

Price v. Whitney, 28 Fed. Rep. 297; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61.

[523] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The questions arising on this record involve a consideration of §§ 5918 *et seq.* of the General Statutes of the state of Minnesota and of the sections of the Revised Statutes of the United States, which are in the margin.†

[524] *Leaving out of view for the moment the legal effect of the allotment of the ten shares of stock to the next of kin of Matteson, let us consider what, if any, liability rested upon his estate to pay the assessment on the ten shares of stock which stood at his death in

his name, and so remained up to the time of the allotment. Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders to contribute *to pay debts ceases by[525] death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder. The principle controlling the subject was quite clearly stated by Shipman, J., in *Davis v. Weed*, 44 Conn. 569, Fed. Cas. No. 3,658. There, stock of a national bank stood in the name of a person who died in January, 1871. Nearly one year afterwards, on December 12, 1871, the bank became insolvent, and more than five years thereafter several assessments were made by order of the comptroller of the currency, and an action was instituted against the administrator to enforce payment. Two defenses were interposed by the administrator, as follows: 1, that the estate of the decedent had been settled according to law, prior to the assessments, and that as there were no assets in the hands of the administrator at the time of the demand, and he had fully administered the estate and had received no assets since the demand, no judgment could be rendered against him; and,

†Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under state laws, having not less than five millions

of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

2, that inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liability, if any, was against the administrator, who, by § 5152 of the Revised Statutes, was freed from personal liability, and was only liable to the extent of the trust estate and funds in his hands at the time of the demand.

The first contention was held untenable, upon a consideration of the statutes of Connecticut in regard to the settlement of estates, and the presentation, allowance, and payment of claims against the estates of solvent deceased persons. In disposing of the second contention the court said:

[526] **"The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud."*

The question was settled in *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788, where the court said (pp. 55, 56, L. ed. p. 873, Sup. Ct. Rep. p. 801):

"Under that [the national banking] act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Hobart v. Johnson, 19 Blatchf. 359, 8

*Fed. Rep. 493. In Massachusetts it was held, in Grew v. Breed, 10 Met. 569, *that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."* [527]

And a similar determination as to the nature of a responsibility like the one in question has been arrived at by state courts in decisions on kindred statutes, and, indeed, its correctness is not controverted by any authority to which we have been referred or which we have been able to examine. The accepted doctrine finds nowhere a more lucid statement than in the courts of New York. Thus, in *Bailey v. Hollister*, 26 N. Y. 112, judgment having been recovered against a manufacturing company upon indebtedness which arose in the years 1849, 1850, 1851, 1852, and 1853, an action was brought, after return of execution unsatisfied, to recover the same debt from the personal representatives of the estate of one Kirkpatrick, on the ground that when such indebtedness was contracted the estate of Kirkpatrick was a stockholder, and, as such, personally liable under the charter of the company. Kirkpatrick had died intestate in 1832, and the stock stood on the books of the company in his name until 1844, when it was entered in a new stock ledger in the name of the estate, which thereafter received dividends. The facts of this transfer and the payment of dividends were not, however, in the opinion of the court, treated as material factors in the decision. The court, in an opinion delivered by Gould, J., said (p. 116):

*"It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them: and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds, not from any new contract made by or on behalf of the estate, but it is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, *and binding his personal representa-* [528] *tives, as it bound him, as long as the relation of stockholder existed."*

And it may be added, the law presumes, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representatives. *Kernochan v. Murray*, 111 N. Y. 306, 2 L. R. A. 183, 18 N. E. 868.

The doctrine enunciated in *Bailey v. Hollister*, as above stated, was later applied in *Cochran v. Wiechers*, 119 N. Y. 399, 403, *sub nom. Cochran v. Matthiessen*, 7 L. R. A. 553, 23 N. E. 803, where the court held that liability imposed by statute upon stockholders in limited liability companies to respond for the debts of the company, "to an amount equal to the amount of stock held by them

respectively," was in the nature of a contract obligation which survived the death of the stockholder. The court, after approvingly quoting a portion of the opinion of Gould, J., above excerpted, added (p. 404, L. R. A. p. 555, N. E. p. 805):

"The liability of the estate of the deceased stockholder under the statute is so well established, upon principle and authority, that further discussion is unnecessary. *Chase v. Lord*, 77 N. Y. 1; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788."

The debt then being one due by the estate of Matteson, if the allotment of the shares in indivision be not considered, the question then is, Taking the allotment into view, what was its effect? The argument is that the next of kin to whom the allotment was made can only be held responsible to the extent of the interest which they took in the stock, and therefore there was error committed in enforcing the whole amount of assessment against the next of kin who were served, to the extent of the distributive share of the property of the estate received by them. But this contention directly conflicts with the interpretation of the statutes of Minnesota by the court of last resort of that state in this case. It is clear that, by necessary implication, it was decided that by the statutes of Minnesota under which the allotment in indivision was made, the heirs or next of kin remained, by operation of law, to the extent to which they received the property of the estate, subject to be sued and to respond to the debts of the estate existing at the time the allotment took place. But the rights arising from the allotment, under the statutes of Minnesota, cannot be greater than those which the statutes in question conferred. The contention, therefore, amounts to this, that in so far as the statutes of Minnesota operated in favor of the participants in the allotment the statutes are to be respected, but to the extent that they imposed obligations upon the allottees they are not bound thereby. It is argued, however, that as by law of Minnesota the liability to be called upon to pay a debt of the estate, to the extent of the distributive share received, depended solely upon whether there was such debt existing at the time the allotment was made, and as there was no such debt in the present instance, no duty to respond arose. This is predicated upon the assumption that because the insolvency happened after the allotment, therefore there was no debt at the time of the allotment. This assumes that whether there was a debt depended upon the date of the insolvency. In effect, this is but to argue that the estate was never liable at all. Such, clearly, is the essence of the proposition, for if it be that whether there was a debt is to be alone ascertained by the happening of insolvency, and not by referring to the date of the subscription, then where insolvency occurred after the death of the stockholder there would be no responsibility. The unsoundness of this view has been already demonstrated. Moreover, the supreme

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court of Minnesota, in effect, in this case, has held that the statute of that state making the allottees liable, each to the amount of their distributive share, for the debt of the estate, embraced a contract liability to pay an assessment contingent on the happening of insolvency, although that event had not taken place at the time of the allotment.

The contention is next made that conceding there was a debt of the estate, and granting that the statute embraced a pre-existing contract obligation which had not ripened into an actual demand because insolvency had not taken place, nevertheless the court below erred, because by the effect of the allotment the estate had ceased to exist and all its property had passed to the allottees. This but reiterates the misconception already disposed of. Whether the effect of the allotment *was to extinguish the estate was [530] wholly dependent on the Minnesota law. That law, as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract, and liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question.

These considerations would dispose of the case, since they demonstrate that no substantial Federal question was involved but for the fact that it is claimed that as under the statute of the United States each stockholder in a national bank can only be liable to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, therefore the enforcement of the liability for the whole amount against one of the allottees deprives him of the benefit of the Federal statute and involves a misconstruction of its provisions. This contention was considered and adversely decided below. It is conceded that no notice of the allotment was ever given to the bank, and that the stock in question was never registered in the name of the allottees. But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association—that is, the one in whose name stock stands on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; and *Richmond v. Irons*, 121 U. S. 27, 58, 30 L. ed. 864, 874, 7 Sup. Ct. Rep. 788. This principle, thus settled as to the stockholders in national banks is in entire accord with the rule established by state courts in construing statutes contain-

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ing substantially similar provisions. In *Shellington v. Howland*, 53 N. Y. 376, it was said:

[531] "There may have been a transfer by the defendant of his stock to the corporation in 1869, valid as between the parties to the transaction, and sufficient to vest the equitable title in the transferee, but the transfer was not consummated in the form required by statute, so as to affect the rights of strangers or to relieve the defendant from his legal liability to third persons for the debts of the corporation. . . . The transfer of stock, *quoad* the public, is not complete until entered on the book designated by statute. An entry upon the books of registry of stockholders is required for the protection of the company and its creditors, and each may hold the stockholders to their liability as such until they have divested themselves of the title to their shares by a completed transfer, as prescribed by law. No secret transfer will avail to release the stockholder from his obligations, or deprive the creditors of the corporation of the right to look to him as the responsible party liable for the debts of the corporation."

Indeed, this doctrine is so universally settled that it is treated as elementary. See *Thomp. Corp.* §§ 3283, 3284.

True it is that exceptions have been engrafted upon this doctrine as to national bank stockholders by decisions of this court, but none of them are germane to the matter now considered. Cases enunciating certain of the exceptions referred to are cited in the following summary:

1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded and the real owner be held liable. *Germania Nat. Bank v. Case*, 99 U. S. 628, 631, 632, 25 L. ed. 448, 449; *Bowden v. Johnson*, 107 U. S. 251, 261, *sub nom. Adams v. Johnson*, 27 L. ed. 386, 389, 2 Sup. Ct. Rep. 246.

2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books, and extinguish the liability as stockholder of the transferrer. *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61. In the case just cited, in applying the exception, the court very carefully and accurately restated the general rule.

3. Where stock was transferred in pledge, [532] and the pledgee *for the purpose of protecting his contract caused the stock to be put in his name on the books as pledgee, it has been held that such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgee might continue to be so. *Pauly v. State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465.

These and other cases unnecessary to be referred to do not impair, but, on the contrary, serve to prove, the general rule. As in the case now before us the stock remained on the books in the name of Matteson, continued as a liability of the estate, and was

never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the Minnesota statute.

Judgment affirmed.

ROBERT JACKSON, *Plff. in Err.*,

v.
GEORGE E. EMMONS and J. PAUL SMITH.

(See S. C. Reporter's ed. 532-535.)

Dismissal of action for failure to amend declaration or pay costs.

Plaintiff's failure to amend his declaration, for which, in good faith, he has obtained leave, with a continuance of the case by withdrawing a juror, and his failure to pay the term costs imposed on him as a condition of the amendment by an order subsequently made, when he could no longer have any choice as to the acceptance of the leave on those conditions, will not justify the dismissal of his action.

[No. 157.]

Submitted February 2, 1900. Decided February 26, 1900.

IN ERROR to the Court of Appeals of the District of Columbia affirming a decision dismissing an action. *Reversed.*

See same case below, 13 App. D. C. 269.

The facts are stated in the opinion.

Mr. J. J. Waters submitted the cause for plaintiff in error:

To treat the "leave to amend his declaration as advised" as a mandatory order about which Jackson had no discretion or choice and to finally dismiss his suit, was fatal error.

Smith v. Powers, 15 N. H. 546; 1 Encyclop. Plead. & Prac. Amend. p. 640, pt. 14, note 11.

Defendant's failure to demand costs when plaintiff took leave to amend was a waiver of their right to any such condition, and they are estopped by their silence at the time from going back afterwards to the occasion and claiming costs as a proper condition of the leave given.

Smith v. Powers, 15 N. H. 546.

Mr. William F. Mattingly submitted the cause for defendants in error.

*Mr. Justice McKenna delivered the [533] opinion of the court:

This is an action for damages. The ground of it is injuries to the wife of the plaintiff in error, and to his house by blasting rock near the latter.

The allegation is that "by such blasting" the defendant "unlawfully and forcibly, with great and dangerous violence, threw large and heavy pieces of said rocky formation from time to time into the premises . . . and near said ground occupied and held by said plaintiff under a yearly ground rent, with other rights and privileges, and against the house and habitation on said premises,

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which house was and is owned by said plaintiff, and was used and occupied during said period by said plaintiff and his family as a dwelling."

Damages are laid at \$6,000.

The defendant's plea is not guilty; and further, that the cause of action did not accrue within three years.

The case came on to trial before a jury, and the record shows that on December 8, 1897, "after a partial hearing of the case, the plaintiff by leave of the court withdraws a juror, and the remaining jurors are discharged from further consideration of the case, with leave to amend his declaration as advised within twenty days, and the case is continued for the term."

Subsequently, on motion of the attorney for the defendants, and after notice to plaintiff, the order limiting plaintiff's time to amend was rescinded, and he was given twenty days from the 7th of January, 1898, to amend his declaration, and was ordered to pay the costs of the term in which the juror was withdrawn.

On the 27th of January the plaintiff served on the defendants' attorney the following notice:

1225 31st Street, Jan. 27, 1898.

Wm. F. Mattingly, Esq.,

Atty. for Geo. E. Emmons, etc.

[534] We intended in good faith to change or "amend" our declaration in the case of Jackson v. Emmons and Smith, so *as to avoid unnecessary appeals, but the "amendment" since made to the leave given us (at your request), compelling us to pay unexpected costs, induces us to elect not to amend now, especially as on further investigation we are confirmed in the opinion that Jackson is the legal owner of the house he complains of as damaged; so please notice that we stand upon our declaration now as originally filed.

Very respectfully yours,

J. J. Waters,

Atty. for Robt. Jackson.

On March 8, 1898, the defendants gave notice that they would move "the court to dismiss the suit, or to take such other action in the premises as may be lawful and proper."

And on the 25th of March the following order was made:

"The plaintiff, though granted leave to amend his declaration on the 7th day of January, 1898, within twenty days, and that he pay the costs of the October term, 1897, has not so amended or paid said costs, and it appearing upon the records that the plaintiff declines to so amend, therefore the defendants move the court to dismiss this suit, which is granted; therefore it is considered that the plaintiff take nothing by his suit, and that the defendants go thereof without day and recover against the plaintiff their costs of defense, to be taxed by the clerk, and have execution thereof. Penalty of bond on appeal fixed at \$50.00."

On March 26, 1898, the plaintiff moved the court to vacate the order of dismissal, and supported it by an affidavit of what had transpired at the trial inducing his action

of withdrawing a juror and taking the order to amend his declaration. It is also stated that "afterwards, before plaintiff's time to amend had expired, defendants moved to compel him to pay costs of the past term, being \$19.70, as given by the clerk of the court, as a condition of amending, and affiant wished time to see if his client could comply with this when required by the court, so as to avoid controversy, but finding his client could not comply in time, as said client is very poor and a colored laborer, and that it was not necessary to his *case to [535] amend, affiant elected not to do so, and to avoid misunderstanding so informed defendant's counsel by the letter he exhibits with his motion to dismiss."

The motion to vacate the order dismissing the case was denied, and the plaintiff took an appeal to the court of appeals, which affirmed the ruling of the lower court, and this appeal was then taken.

The trial court erred in dismissing the case. If the original order granting leave to amend had been made conditional upon the payment of costs the plaintiff might or might not have accepted it. To decline to amend afterwards upon conditions which were not exacted, or even, as far as the records show, were not contemplated, cannot be charged against him as misconduct. Indeed, there is no question of his good faith, and whatever conditions or rights the defendant was entitled to in consequence of the motion should have been asserted and adjudged when the plaintiff's motion was made. If such rights had been asserted the plaintiff would have had a choice of yielding or not yielding to them, which afterwards could not be exercised.

We think, therefore, the judgment of the Court of Appeals should be reversed with costs, and the cause remanded with directions to reverse the judgment of the Supreme Court, and it is so ordered.

THE PANAMA.

(See S. C. Reporter's ed. 535-550.)

Prize—exemption of mail steamship from capture—exemption of merchant vessel carrying armament.

1. A mail steamship carrying mail of the United States is not for that reason exempt from capture as an enemy vessel.
2. The exemption from capture by the President's proclamation of April 26, 1898, of "Spanish merchant vessels" while completing their voyage then begun, if they do not have on board any prohibited article or contraband of war, does not extend to a Spanish vessel owned by a subject of the enemy, when it has an armament fit for hostile use, and is intended in the event of war to be used as a war vessel, and which is destined to a port of the enemy, although the armament is one that the vessel, as a mail steamship, is required by contract with the Spanish government to carry.

[No. 127.]

Argued November 3, 1899. Decided February 26, 1900.

A PPEAL from a decree of the District Court of the United States for the Southern District of Florida condemning a vessel as a prize. *Affirmed.*

See same case below, 87 Fed. Rep. 927, *sub nom. The Buena Ventura*.

The facts are stated in the opinion.

Mr. J. Parker Kirlin argued the cause and *Messrs. Convers & Kirlin* filed a brief for appellant.

Assistant Attorney General Hoyt argued the cause and, with *Messrs. Joseph K. McCammon* and *James H. Hayden*, filed a brief for the United States and the captors.

Messrs. George A. King and *William B. King* filed a brief for certain captors.

Contentions of counsel sufficiently appear in the opinion.

[536] ***Mr. Justice Gray** delivered the opinion of the court:

This was a libel for the condemnation of the steamship *Panama* as prize of war, and was heard in the district court upon the libel, the claim of the master in behalf of the owner of the vessel, and the depositions *in pre-paratorio* of her master, her supercargo, and her chief engineer, which showed the following state of facts:

The *Panama* was a steamship of 1432 tons register; was owned by the *Compania Transatlantica*, a corporation of Barcelona in Spain; sailed under the Spanish flag; had a commission as a royal mail ship from the government of Spain; carried a crew of 71 men all told, who had been shipped at different times at Havana; and her usual course of voyage included the ports of New York and Havana, and Progreso, Vera Cruz, and other Mexican ports, with general cargoes, passengers, and mails.

[537] *Her last voyage began in Havana, for a round trip by way of New York, and was to have ended in Vera Cruz. She sailed from New York at half past two o'clock in the afternoon of April 20, 1898, with a clearance from the customhouse at that port for Havana, Progreso, and Vera Cruz, having on board the United States mails, twenty-nine passengers (all Spaniards except one Frenchman), and a general cargo, the produce or manufacture of the United States, shipped at New York, and to be delivered, at the risk of the shippers, to consignees at those ports. She pursued the usual course of ships bound southward along the coast until she passed Alligator Reef light on the coast of Florida, and then bore away for Havana, and sighted the Cuban coast on the morning of April 25; and on that day, when about 25 miles from Havana, was captured by the United States ship of war *Mangrove*, and was sent in charge of a prize crew into Key West. She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master.

There were mounted on board the *Panama*, at the time of her capture, five guns: Two

breech-loading Hontoria 9 centimeter guns, one on each side of the ship, with 30 rounds of shot for each; one Maxim rapid-firing gun, on the bridge, with ammunition; and two signal guns, one on each side of the pilot house, with ammunition. She also had on board about twenty Remington rifles, and ten Mauser rifles, with ammunition for each, and about thirty or forty cutlasses. The cannon had been put on board about three years before, and the small arms and ammunition had been on board a year or more. She was so armed in accordance with a contract with the Spanish government, which required all the mail steamships of the company to be armed, and article 26 of which was as follows: "Every ship shall take on board, for her own defense, the following armament: "Two Hontoria 9 centimeter guns, with powder and ammunition for 30 shots for each piece; twenty Remington rifles, with 100 rounds apiece, and bayonet or sword-bayonet; and twenty cutlasses."

The master of the *Panama* moved the court to allow further *proof upon the matters set forth in two test affidavits, filed by leave of the court, in which he testified more distinctly that the mounted guns and small arms which the *Panama* carried had not been shipped for the purpose of war, or in expectation of hostilities between the Spanish government and the United States, but were taken on board pursuant to the requirements of that contract; and also testified that the Spanish government had never taken possession of the *Panama* under the terms of the contract; and that until the capture he and his officers were ignorant of the existence of the war between Spain and the United States, and of any blockade of the port of Havana. And he asked leave to submit to the court the whole contract, as contained in a printed book, which was in the chart room of the *Panama*, and in the custody of the prize master, and which has since been sent up to this court as one of the exhibits in the cause.

By that contract, concluded between the Spanish government and the *Compania Transatlantica* on November 18, 1886, and drawn up and printed in Spanish, the company bound itself to establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York, and other ports of the United States and of Mexico; and the Spanish government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

By article 25. new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into watertight compartments, with all the latest improvements known to the art of naval construction; and "their deck and sides shall have the necessary strength to support the artillery that they are to mount." All the ships of that line must

have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a new ship, shall submit to the minister of the Colonies her plans as prepared for commercial and postal service; "the minister shall cause to be studied the [539] measures *that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of a piece of 14 centimeters." The plans of ships already built shall be submitted to the minister of marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for that end shall be made by the company. But in both old and new ships the changes proposed by the ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments, and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the services that it must render to the state.

By article 60, when by order of the government munitions of war shall be taken on board, the company may require that it shall be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ships, the government may take possession of them with their equipment and supplies, having a valuation of the whole made by a commission composed of two persons selected by the government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also,

[540] for *the time it has the vessels in its service, to pay 5 per cent on the valuation aforesaid. By article 66, at the end of the war the government may relieve the company of the performance of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the government may charter one or more of the company's vessels, and in 176 U. S.

that event shall pay an indemnity estimated by the aforesaid commission.

The district court denied the motion of the master to take further proof; restored parts of the cargo to claimants thereof; gave claimants of other parts of the cargo leave to introduce further proof; and entered a final decree of condemnation and sale of the Panama and the rest of her cargo, upon the ground that she was enemy's property, and was upon the high seas at the time of the President's proclamation exempting certain vessels from arrest. 87 Fed. Rep. 927. The court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the Panama appealed to this court from the decree condemning the vessel.

The recent war with Spain, as declared by the act of Congress of April 25, 1898, chap. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. at L. 364, 1770. This proclamation declared, among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21st, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, that nothing herein contained shall *apply to Spanish vessels hav- [541] ing on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, *sub nom. The Buena Ventura v. United States*, 20 Sup. Ct. Rep. 148, *ante*, 206, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to

be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the Panama, and the contract with the Spanish government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

[542] There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone further than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, *that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. at L. 969; Wheaton, 8th ed. pp. 659-661, Dana's note; Calvo, 5th ed. §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in § 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had

put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the Panama, this proclamation had not been *issued. Without an express order [543] of the government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall. 28, 61, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564, 572.

The mere fact, therefore, that the Panama was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the Panama came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

On the part of the claimant, it was argued that the arms which the Panama carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband," as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the Panama carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she cannot be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The claimant much relied on a case decided in 1800 by the French Council of Prizes, in accordance with the opinion and *report of Portalis, himself a high authority. [544] Wheaton, 8th ed. p. 460; De Boeck, § 81. In the case referred to, an American vessel, carrying ten cannon of various sizes, together with muskets and munitions of war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defense, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for

long voyages. Upon this point, Portalis, acting as commissioner of the French government, reported his conclusion on the question of armament as follows: "For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defense is a natural right, and means of defense are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defense. The pretext of being armed for war therefore appears to me to be unfounded." The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51; s. c. 2 Cranch, 96-98, and note, 2 L. ed. 219.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defense, was liable to capture for want of a commission as a vessel of war or privateer. That [545] the capture took place while there *was no state of war between France and the United States is shown by her being treated, throughout the case, as a neutral vessel; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession, nor bound to a port of the enemy; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Generally speaking, arms and ammunition are contraband of war. In *The Peterhoff*, 5 Wall. 28, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564, Chief Justice Chase, delivering the judgment of this court, said: "The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the 176 U. S.

army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." And it was adjudged that so much of the cargo of the *Peterhoff*, as consisted of artillery harness, artillery boots, and army shoes and blankets, came fairly under the description of goods primarily and ordinarily used for military purposes in time of war; and, being destined directly for the use of the rebel military service, came within the second, if not within the first, class of goods contraband of war. 5 Wall. 58, 18 L. ed. 571.

Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant *vessel [546] as part of her equipment, and solely for her defense against "enemies, pirates, and assailing thieves," according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of War, speaking of the class of "articles which are of direct use in war," says: "With respect to these no questions can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property." But he afterwards adds this qualification: "But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity of them as may be supposed to be necessary for the use or defense of the ship." And again, speaking of "warlike stores," he says: "These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defense; this provision is expressly introduced in many treaties." Pratt, *Contraband of War*, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797, and 1801. See also *Several Dutch Schuyts*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia) 65, 69; Madison, quoted in 3 Whart. Int. Law Dig. § 368, p. 313.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defense is not conclusive as to her character. This is clearly shown by the case of *The Amelia* (1801) reported by the name of *Talbot v. Seeman*, 1 Cranch, 1, 2 L. ed. 15. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron cannon and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with di-

rections to take her into a French port for adjudication as prize; and on her way *thither was recaptured by a United States ship of war. The recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, "the *Amelia* was an armed vessel commanded and manned by Frenchmen," "she was an armed vessel under French authority, and in a condition to annoy the American commerce." 1 Cranch, 32, 2 L. ed. 25. And in *The Charming Betsy* (1804) 2 Cranch, 64, *sub nom. Murray v. The Charming Betsy*, 2 L. ed. 208, that case was expressly approved, as a precedent to be followed under similar circumstances; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121, 2 L. ed. 227. Notwithstanding that the *Amelia* was a neutral vessel, with an armament originally taken on board for defense only, and therefore, while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet, after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the President's proclamation.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based add nothing of importance to the facts disclosed by the testimony in *preparatorio*, and by the mail contract between her owner and the Spanish government, which forms part of the ship's papers.

The *Panama* was a steamship of 1432 tons register, carrying a crew of seventy-one men all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the government of Spain, and plying from and to New York and Havana and various Mexican ports, with *general cargoes, passengers, and mails. At the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Honoria guns of 9 centimeter bore, one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish govern-

ment (made more than eleven years before, and still in force), which specifically required every mail steamship of the company to "take on board, for her own defense," such an armament, with the exception of the Maxim gun and the Mauser rifles.

That contract contains many provisions looking to the use of the company's steamships by the Spanish government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying 5 per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The *Panama* was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms (either as part of her equipment, or as cargo), would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defense. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but *from the action [549] of the district court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other ar-

ticle prohibited or contraband of war, or any despatch of or to the Spanish government."

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

[550] *The result is, that the Panama was lawfully captured and condemned, and that the decree of the District Court must be affirmed.

Mr. Justice **Peckham** dissented.

FREDERICK WEYERHAUESER, F. C. A.
Denkmann, William J. Young, et al., Plffs.
in Err.,

v.

STATE OF MINNESOTA.

(See S. C. Reporter's ed. 550-559.)

Revaluation of undervalued property for taxation—constitutionality—due process of law—Federal question.

1. The failure to provide a hearing before the governor in proceedings for the revaluation of undervalued property, pursuant to Minn. Gen. Laws 1893, chap. 151, does not make the proceeding void for want of due process of law, as the governor only starts the inquiry upon which reassessment may be based, and opportunity to be heard is offered in the course of the subsequent proceedings.
2. A reassessment of grossly undervalued property, so as to make the property bear the same burden it would have borne if the true assessment had been made in the first instance, does not violate the constitutional provision for due process of law, on the ground that the former assessments constituted judicial judgments which could be

NOTE.—As to re-assessment of taxes,—see note to *Chester v. Black* (Pa.) 6 L. R. A. 802.

As to what constitutes due process of law,—see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to notice and hearing required,—see notes to *Kurtz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194, and *Uiman v. Baltimore* (Md.) 11 L. R. A. 225.

As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 834.

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set aside only after notice and opportunity to be heard.

3. No Federal question is involved in the inquiry whether a party has been given or refused the benefit of the law of estoppel.

[No. 128.]

Argued January 30, 1900. Decided February 26, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a decision affirming a judgment which upheld the constitutionality of a statute for reassessment of undervalued property. *Affirmed.*

See same case below, 72 Minn. 519, 75 N. W. 718.

Statement by Mr. Justice **McKenna**:

This writ of error brings up for review a judgment of the Supreme Court of Minnesota affirming the judgment of the district court of Itasca county, assessing certain taxes for the years 1888 to 1893, inclusive, on the lands of the plaintiff in error.

The law upon which the proceedings in taxation were based, omitting parts not material to the pending controversy, is as follows:

"Whenever it shall be made to appear to the governor of this state by a complaint in writing and under oath, or by the finding of any court, the legislature or any committee thereof, that for any reason any considerable amount of property in any county in this state . . . if assessed . . . has been grossly undervalued by the assessor or other county officials, whether such valuation and assessment has or has not been reviewed or acted upon by the county board of equalization *of any such county, he shall forthwith [551] appoint in writing some competent citizen of this state, not a resident of such county, to ascertain the character, location, value, and ownership of the real and personal property of any such county so . . . under-assessed or undervalued, who shall forthwith proceed to examine and report upon the subject, and prepare a list or lists thereof in duplicate, showing therein the character, location, ownership, and valuation of all such property, with the year or years for which the same or any part thereof has been . . . undervalued; said list shall also show therein opposite each tract, piece, or parcel of land or personal property . . . underassessed for any year or years thereupon, in which the same was undervalued or underassessed, with the amount of such assessment, the actual and true value thereof at the time and for which the same was subject to and should have been assessed together with the difference between the assessed and actual value thereof as so found. One of which duplicate reports or lists shall be by him filed with the county auditor of such county on or before the first day of January in the year in which any such assessment is to be made, and the other of said lists shall be by him filed within the same time with the state auditor."

[Gen. Stat. 1894, chap. 11, § 1632.]

It is provided in other sections of the law

that the county auditor shall enter the lists on the assessment books, and that the assessor shall assess the property at its true value corresponding with the lists, and the auditor shall proceed as under the general law.

The taxes which are in controversy were assessed under this law, and proceedings were instituted for their recovery in accordance with the usual practice in collecting taxes against lands in Minnesota.

The plaintiffs in error claimed in their answer that the law of the state and the proceedings under it were repugnant to the Constitution of the United States, in that they impaired the obligation of the contracts made by plaintiffs in error with their grantors, deprived them of their property without due process of law, and denied them the equal protection of the laws.

[552] *The facts were stipulated as follows:

"It is hereby stipulated between the parties to the above-entitled action that the following are, and may be considered by the court as, facts in said matter:

"That the defendants above named are the owners of the lands described in their answer in this proceeding; that the defendants became the owners of such lands on September 18, 1893; that in each of the years 1888, 1889, 1890, 1891, 1892, 1893, and 1894 taxes were assessed upon all said lands by the proper officials pursuant to the provisions of chapter 11, General Statutes of 1878, and the amendments thereto, and that such taxes for each of said years were, before the same became delinquent, paid by the defendants and their predecessors in estate; that the taxes sought to be recovered against said lands in this proceeding are claimed to be due by reason of an assessment made pursuant to the provisions of chapter 151, General Laws 1893, upon the ground that said lands in said prior assessment proceedings had been grossly undervalued.

"That prior to January 1, A. D. 1894, it was made to appear to the governor of this state, by duly verified complaint, that a considerable amount of property in said county of Itasca had been grossly undervalued in the tax proceedings for the years from 1888 to 1893, inclusive; that thereupon and forthwith the said governor did, in writing, appoint a competent citizen of this state, not a resident of said county, to ascertain the character, location, value, and ownership of the real and personal property in said county so omitted, underassessed, or undervalued, to wit, one J. S. Dedon; that thereupon the said Dedon did forthwith proceed to examine and report upon the subject, and did prepare a duplicate list of such lands as he determined had been so underassessed or undervalued, in the manner and form as prescribed in § 1 of said chapter 151, General Laws 1893; that thereafter, and prior to January 1, A. D. 1894, the said duplicate lists were filed with the state auditor and with the county auditor of said Itasca county; that thereafter the county auditor and county assessor of said Itasca county took the proceedings in regard

to said lands described in said lists, which are prescribed in § 2 of said chapter 151.

*"That the said lands so owned by these defendants were returned as undervalued lands for each of said years from 1888 to 1893, inclusive, and were entered by the county auditor upon the real-estate assessment books for the year 1894, and were assessed by the assessor of said Itasca county at the respective values shown by said lists, and were also entered by the county auditor upon the assessment and tax books for each of said years from 1888 to 1893, inclusive, and were assessed by him at the valuation and amounts as shown by said lists to have been omitted or undervalued, and arrearages of taxes by reason of said increased valuation were extended upon said assessment books, and the taxes claimed in this proceeding are the proper amount of taxes claimed in this proceeding, which would be due against said lands on account of said increased valuation if such tax were legal and valid and could be collected in this proceeding.

"That no notice of any of said proceedings by any of said persons in making said reassessment or revaluation of said lands, or in extending said taxes against said lands, was ever given, by publication or otherwise, to these defendants."

The trial court found in accordance with the stipulation, and further found, as a conclusion of law, that the proceedings for levying and assessing the taxes were in accordance with the provisions of chapter 151, General Laws of 1893, but that the said law and the proceedings therein provided were unconstitutional, and the taxes, therefore, not a legal charge against the lands.

The judgment was reversed by the supreme court, and the taxes sustained. 68 Minn. 353, 71 N. W. 265.

The court in its opinion confined its consideration to the validity of the law under the Constitution of the state, and did not pass upon the claim that it was also in violation of the Constitution of the United States. After the judgment was entered in compliance with its mandate by the district court the case was again certified to the supreme court in accordance with the practice of the state.

The certificate recited the facts which have already been set out, and "that the points raised by the defendants [plaintiffs in error] [554] herein are as follows, to wit: 1. Is chapter 151, General Laws of 1893, of the state Minnesota, and the assessment of taxes attempted to be made thereunder in this proceeding, constitutional and legal? 2. In particular, is said chapter 151 and the assessment of taxes attempted to be made in pursuance thereof in this proceeding, in violation of article 14 of the Amendments to the Constitution of the United States, providing that no state shall deprive any person of his property without due process of law, or deny to any person within its jurisdiction equal protection of the laws?"

The supreme court affirmed the judgment. 72 Minn. 519, 75 N. W. 718.

Mr. George Welwood Murray argued the cause and, with **Mr. Moses E. Clapp**, submitted the cause for plaintiffs in error (**Mr. John B. Atwater** was with them on the brief):

The assessments made during 1888 to 1893, inclusive, constituted judicial judgments.

Stanley v. Albany Supers. 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Slaughter v. Louisville*, 89 Ky. 112, 8 S. W. 917; *Burroughs, Taxn.* (1877) § 102; *Otter Tail County v. Batchelder*, 47 Minn. 512, 50 N. W. 536; *Cooley, Taxn.* 2d ed. pp. 365, 46, 47; *Oregon Steam Nav. Co. v. Wasco County*, 2 Or. 206; *Weaver v. State*, 39 Ala. 535; *West Bend Dist. Twp. v. Brown*, 47 Iowa, 25; *Swift v. Poughkeepsie*, 37 N. Y. 511; *Weaver v. Devendorf*, 3 Denio, 117; *New York v. Davenport*, 92 N. Y. 604.

These judgments determined finally the maximum responsibility of the property in question for state taxes during those years. Furthermore they were judgments in rem and therefore their binding effect was especially great.

McQuade v. Jaffray, 47 Minn. 326, 50 N. W. 233; *State v. Central P. R. Co.* 10 Nev. 47; *Gelston v. Hoyt*, 3 Wheat. 319, 4 L. ed. 399; *Bigelow, Estoppel*, 5th ed. p. 224; *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454.

The process which the statute provides for setting aside the judgments of taxable value of the property in question, rendered by the former assessors, is not due process of law, because it commits to the executive branch of the government the power to set aside judgments and grant new trials therein.

Black, Judg. § 298; *State Revenue Agent v. Tonella*, 70 Miss. 701, 22 L. R. A. 346, 14 So. 17; *Ex parte Low*, 24 W. Va. 620; *State ex rel. Flint v. Flint*, 61 Minn. 539, 63 N. W. 1113; *De Chastellux v. Fairchild*, 15 Pa. 18; *Young v. State Bank*, 4 Ind. 301, 58 Am. Dec. 630; *Weaver v. Lapsley*, 43 Ala. 224; *Davis v. Menasha*, 21 Wis. 491; *Lewis v. Webb*, 3 Me. 326.

Such process deprives plaintiff in error of a property right (a judgment fixing immunity from taxation) without due notice and due opportunity to be heard in defense of the right.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111. 292.

The statute deprives plaintiffs in error of the equal protection of the laws in that owners of similar real estate have, under the general laws, an opportunity to contest the absolute assessed valuation of their property, while plaintiffs in error had only an opportunity to contest overvaluation.

Otter Tail County v. Batchelder, 47 Minn. 512, 50 N. W. 536; *State v. Lakeside Land Co.* 71 Minn. 283, 73 N. W. 970; *State v. West Duluth Land Co.* 75 Minn. 456, 78 N. W. 115.

Mr. W. B. Douglas submitted the cause
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for defendant in error (**Mr. C. W. Somerby** was with him on the brief):

The opportunity to appear before the equalizing boards and the published notice of an opportunity to appear and try all questions involved before the district court prior to judgment was sufficient.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 537, 40 L. ed. 251, 16 Sup. Ct. Rep. 83.

A single hearing or opportunity to be heard is all that "due process of law" requires.

Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114.

Where the assessor discovers that property has been omitted from the roll, he may put it on without giving notice.

Wabash, St. L. & P. R. Co. v. Johnson, 108 Ill. 11.

***Mr. Justice McKenna** delivered the [554] opinion of the court:

The procedure under the statute is as follows: A complaint to the governor of the state that a considerable amount of property has been grossly undervalued by the assessor or other county officials.

The appointment by the governor of a competent person to examine and report, and if he find undervalued property to prepare a list in duplicate showing its character, location, ownership, and valuation, one of which lists shall be filed with the county auditor.

The entry of the list on the assessment books by the auditor.

The assessment of the property at its value corresponding to the list.

Proceedings by the county auditor as under the general law.

*This procedure was exactly followed, and [555] it is stipulated that "the taxes claimed in this proceeding are the proper amount of taxes due against said lands on account of said increased valuation. . . ." In other words, the lands have not been made to bear a greater burden than they would and should have borne if they had been originally assessed at their true valuation. It is, however, claimed that the increased taxation is illegal because the law authorizing it offends the Fourteenth Amendment of the Constitution of the United States.

The grounds of the contention are that the former assessments constituted judicial judgments, and hence to commit to the executive the power of setting them aside, or to set them aside without notice or opportunity to be heard, is not due process of law. And further, that the statute deprives the plaintiffs in error of the equal protection of the laws, in that it gives to owners of similar real estate an opportunity to contest the absolute assessed valuation of their property, and to plaintiffs in error only the opportunity to contest the gross overvaluation; and that if the state knew of fraud in the assessments it is estopped to assert it against an innocent party, which plaintiffs in error are claimed to be, and as the statute ignores this doctrine of estoppel, it does not provide due process.

Conceding, *arguendo*, that the former assessments were judicial judgments, the argument based on their immunity from executive power or attack is not supported by the statute. It does not commit to the governor control over them, and it does give opportunity to be heard. The governor only starts the inquiry upon which the reassessment may be based, and the statute directs the proceedings in an orderly course of inquiry, report, entry upon the assessment books, assessment by the assessor, and an action for the collection of the taxes levied in the regular judicial tribunals.

The complaint of plaintiffs in error seems to be that a hearing before the governor was not provided. If the basis of this is that the owner of property must have notice of every step in taxation proceedings, we agree with the supreme court of the state that it is untenable. *Pittsburgh, C. C. & St. L. R.*

[556] *Cc. v. West Virginia Bd. *of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 71, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83. If the basis of the complaint is that the governor acts judicially, and plaintiffs in error were entitled to have notice, and be heard before he rendered judgment, it is also untenable. The governor does not act judicially—he determines nothing but that a complaint has been made in writing and under oath, or that it has been found by a court, or the legislature or any committee thereof, that a considerable amount of property in a county of the state has been grossly undervalued. If the perception of the fact of a complaint or a finding of a court or legislature is a judgment in the sense urged, every act of government is a judgment, and all of its exercises could be stopped, upon the reasoning of plaintiffs in error, by perpetual hearings. But supposing the governor's act is a judgment, it ends with the appointment of an examiner. What is substantial comes afterwards, and if against what may be detrimental in that the landowner can be heard, he is afforded due process within the rule announced by the authorities, *supra*.

That the landowner is provided with an opportunity to be heard is decided by the supreme court of the state. In the opinion in the case at bar the court said, quoting from 40 Minn. 512, 41 N. W. 465, 42 N. W. 473:

"Within twenty days after the last publication of the delinquent list any person may by answer interpose any defense or objection he may have to the tax. He may set up as a defense that the tax is void for want of authority to levy it, or that it was partially, unfairly, or unequally assessed. *St. Louis County Comrs. v. Nettleton*, 22 Minn. 356. He may set up as a defense *pro tanto* that a part of a tax has not been remitted, as required by some statute. *Houston County Comrs. v. Jessup*, 22 Minn. 552. That the land is exempt, or that the tax has been paid. *Chicago County v. St. Paul & D. R.*

*Co. 27 Minn. 109, 6 N. W. 454. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist or any omissions in the proceedings prior to filing the list, resulting to his *prejudice.* [557] *Olmsted County v. Barber*, 31 Minn. 256, 17 N. W. 473, 944. The filing of the list is the institution of an action against each tract of land described in it for the recovery of the taxes appearing in the list against such tract, and tenders an issue on every fact necessary to the validity of such taxes. *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, and 30 N. W. 826. The only limitation or restriction upon the defenses or objections which may be interposed is that contained in § 79, to the effect that if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed. This relates, not to want of authority to levy the tax, but to some omission to do or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid. *St. Louis County Comrs. v. Nettleton*, 22 Minn. 356. And certainly, in justice or reason, a party cannot complain that when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

This court in *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83, quoted the above extract as establishing that the property owner was afforded a hearing by the laws of the state, and declared the rule that the Constitution of the United States was satisfied if an opportunity be given to question the validity or amount of the tax "either before that amount is determined or in subsequent proceedings for its collection." And referring to the difference in the manner of assessment and the successive opportunities for review which were given to the property owner in one case and not in the other, said: "But there is nothing in this difference to affect the constitutional rights of a party. The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114." The later cases of *State v. Lakeside Land Co.* 71 Minn. 283, 73 N. W. 970, and *State v. West *Duluth Land Co.* (Minn.) 78 N. W. 115, cited by the plaintiff in error, do not militate against the rule in any way substantial to the pending controversy.

The special objections of plaintiffs in error therefore cannot be sustained, nor the broader one that the first assessments are

final against any power of review or addition by the legislature. We held in the *Winona Case*, *supra*, that the legislature had power to provide for the assessment of property which had escaped taxation in prior years, and, as we have seen, a special manner of assessment was sustained. We agree with the supreme court of the state that a gross undervaluation of property is within the principle applicable to an entire omission of property. If it were otherwise the power and duty of the legislature to impose taxes and to equalize their burdens would be defeated by the fraud of public officers, perhaps induced by the very property owners who afterwards claim its illegal advantage.

If an officer omits to assess property, or grossly undervalues it, he violates his duty, and the property and its owners escape their just share of the public burdens. In *Stanley v. Albany Supers*. 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234, we held that against an excessive valuation of property its owner had a remedy in equity to prevent the collection of the illegal excess. It would be very strange if the state, against a gross undervaluation of property, could not, in the exercise of its sovereignty, give itself a remedy for the illegal deficiency. And this is the effect of the statute. It "merely sets in motion new proceedings to collect the balance of the state's claim, and there is no constitutional objection in the way of doing this," as the supreme court of the state said in its opinion.

The other objections to the statute do not demand an extended consideration. That it deprives plaintiffs in error of the equal protection of the laws is based on the absence of a provision for notice in the progress of the proceedings, and is answered by the *Winona Case*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

The fourth contention that the state is estopped to assert fraud in the former assessment if we should concede has any basis in law, lacks an essential basis of fact.

[559] *The plaintiffs in error purchased after the enactment of the statute, and the record affords no presumptions of ignorance or innocence. If plaintiffs had been attentive to the assessment of the land its gross undervaluation could not have escaped their notice. Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no Federal question.

Judgment affirmed.

GEORGE L. WHITMAN
v.
NATIONAL BANK OF OXFORD.

(See S. C. Reporter's ed. 559-568.)

Self-executing constitutional provision—contractual liability of stockholder under

NOTE.—As to self-executing constitutional provision,—see *Willis v. St. Paul Sanitation Co.* (Minn.) 16 L. R. A. 281, and note.

As to right to enforce stockholder's liability
176 U. S.

statutes—place where liability can be enforced by action.

1. The words "shall be secured," in Kan. Const. art. 12, § 2, declaring the liability of stockholders in corporations, are not merely directory to the legislature to make provision for such liability, but of themselves declare it; and to this extent the Constitution is self-executing.
2. The liability of a stockholder to an additional amount equal to his stock, though created by statute, is contractual in its nature, where the parties voluntarily form a corporation under such statute.
3. An action to enforce the liability of a stockholder under the state Constitution and statutes, which make him liable to an additional amount equal to his stock, can be maintained in any court of competent jurisdiction, because the liability is contractual in its nature.

[No. 27.]

Argued March 8, 9, 1899. Decided March 5, 1900.

ON WRIT OF ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming a judgment for plaintiff in an action to enforce the liability of a stockholder in a corporation of another state. *Affirmed.*

See same case below, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404.

Statement by Mr. Justice **Brewer**:

This was an action brought in the circuit court of the United States for the southern district of New York, by the National Bank of Oxford, a national banking association, incorporated and established under the laws of the United States, and doing business at Oxford in the state of Pennsylvania, against George L. Whitman, a citizen of the state of New York, asserting his liability, under the provisions of the Constitution and laws of the state of Kansas, for a debt of more than \$2,000 due to the plaintiff from the Arkansas City Investment Company, a corporation of the state of Kansas, in which the defendant was a stockholder.

*The Constitution of the state of Kansas of [560] 1859 provided, in article 12, § 2, as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The General Statutes of 1868 of that state, chapter 23, contained the following provisions:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot

outside of the state of incorporation,—see *Cushing v. Perot* (Pa.) 34 L. R. A. 737, and note. For later case, see *Stoddard v. Lum* (N. Y.) 45 L. R. A. 551.

be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 40 (as amended in 1883). Laws 1883, chap. 46, p. 88. A corporation is dissolved—first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation

shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"Sec. 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious *corporations, be dissolved, leaving debts un- [561] paid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution

Self-executing nature of constitutional provisions declaring the liability of stockholders in corporations.

The question whether or not the provision of the Kansas Constitution declaring that "dues from corporations shall be secured by individual liability of the stockholders and an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," is self-executing, has been considered in a number of cases. In *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, the court said the decisions of the supreme court of Kansas must be first looked to, and their ruling would be adopted if they had made any upon the subject, and afterwards said: "While it is, perhaps, true that the supreme court of Kansas has not decided, in terms, that said constitutional provision is self-executing, it has fully recognized, and in effect held, that stockholders of corporations organized under the Constitution and foregoing statutes of that state are individually liable to creditors of such corporation to an additional amount equal to the stock owned by each of them."

But that the Kansas Constitution is not self-executing in this matter is directly decided in *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; and *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419. And in a recent case the Kansas supreme court has adopted the same view. *Woodworth v. Bowles* (Kan.) 60 Pac. 331.

A constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," is not operative without the aid of legislation, and statutes passed in fulfillment of it furnish the only basis of judicial action. *Morley v. Thayer*, 3 Fed. Rep. 737.

So, in *Jerman v. Benton*, 79 Mo. 148, it was held that the double liability clause of the Missouri Constitution of 1866 did not take effect until the enactment of appropriate legislation.

A constitutional provision that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law," and another, that "each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities," must be construed together,

and the latter cannot be held self-executing, as in that case the former would have no meaning. *French v. Teschemaker*, 24 Cal. 518.

The provision of the Ohio Constitution, that "dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law, but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock," is not self-executing so as to create a right of action in another state against a stockholder in an Ohio corporation. *Barnes v. Wheaton*, 80 Hun, S. 29 N. Y. Supp. 830.

A provision of the Michigan Constitution, that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association," being held by the courts of that state to create a collateral, and not a primary, liability, which cannot be enforced without the aid of statutes, will not create a right of action in another state against a stockholder of a Michigan corporation. *May v. Black*, 77 Wis. 101, 45 N. W. 949.

But the "double liability clause" of the Minnesota Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," *ex proprio vigore* creates an individual liability on the part of the stockholders. *Willis v. Mabon*, 48 Minn. 140, *sub nom. Willis v. St. Paul Sanitation Co.* 16 L. R. A. 281, 50 N. W. 1110.

And no supplementary statutory legislation is needed to render effective the provision of the Nebraska Constitution declaring that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." *Farmers' Loan & T. Co. v. Funk*, 49 Neb. 353, 68 N. W. 520.

And there is no necessity for legislation providing special means for the enforcement of the provision of the Washington Constitution making any bank officer receiving deposits, with knowledge of the bank's insolvency, individually liable for such deposits. *Mallon v. Hyde*, 76 Fed. Rep. 388.

upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The complaint alleged, and the plaintiff at the trial introduced evidence of, the following facts: The Kansas corporation was duly formed under the general laws of the state of Kansas in 1886, for the purpose of a general banking and real-estate business; had its only place of business at Arkansas City in that state; was not a railway, religious, or charitable corporation; and had a capital of \$200,000, divided into 2,000 shares of \$100 each, of which the defendant, from the time of the formation of the corporation, and ever after, owned one half. In December, 1890, that corporation made a general assignment for the benefit of its creditors, and from that time wholly suspended business. About four months before its failure, it indorsed and guaranteed for value two promissory notes, together amounting to \$4,875, which were discounted by the plaintiff. In 1895 the plaintiff brought an action to recover the unpaid balance of those notes, in a district court of the county of Cowley and state of Kansas, against the corporation, and, after its general appearance and subsequent default, recovered judgment against it for the sum of \$3,449; an execution thereon against the corporation was issued to the sheriff of the county, who returned it wholly unsatisfied, because he could not find any property [562] on which to make a *levy; and the corporation had in fact no assets of any kind.

The defendant moved the circuit court of the United States to direct a verdict in his favor, upon the ground that it had no jurisdiction to enforce a statutory remedy of the state of Kansas. The court denied the motion, directed a verdict for the plaintiff, overruled a motion for a new trial, and entered a final judgment for the plaintiff. 76 Fed. Rep. 697. That judgment was affirmed by the circuit court of appeals. 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404. The defendant thereupon applied for and obtained this writ of certiorari. 168 U. S. 710, 18 Sup. Ct. Rep. 950.

Mr. William G. Choate argued the cause, and **Messrs. Joseph H. Choate** and **William G. Wilson** filed a brief, for Whitman:

Defendant's liability, if any, is purely statutory.

Morley v. Thayer, 3 Fed. Rep. 739; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830; *State ex rel. Atty. Gen. v. Sherman*, 22 Ohio St. 411; *French v. Teschemaker*, 24 Cal. 518; *Fusz v. Spaunhorst*, 67 Mo. 256; *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 176 U. S.

757, 42 N. E. 419; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148.

The Kansas statute does not create or impose a general liability or a liability as upon contract.

Ball v. Reese, 58 Kan. 614, 50 Pac. 875; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864.

The remedy is not available without the state of Kansas.

Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Story*, Conf. Laws, § 572; 2 Kent, Com. 462; *Wharton*, Conf. Laws, § 721.

The whole fabric of supposed authority has been built upon an unsupported dictum of the Kansas supreme court in *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759. It is well settled that such a dictum is not to be regarded as an authority.

Carroll v. Carroll, 16 How. 286, 14 L. ed. 941.

The weight of considered authority is wholly opposed to the series of decisions, which are mere successive echoes of the dictum in *Howell v. Manglesdorf*.

Lowry v. Inman, 46 N. Y. 119; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341; *Rice v. Merrimack Hosiery Co.* 56 N. H. 114.

If the liability of a stockholder in a Kansas corporation is upon contract, then the statute of frauds forbids the enforcement of such contract.

Moses v. Lawrence County Bank, 149 U. S. 303, 37 L. ed. 745, 13 Sup. Ct. Rep. 900.

Messrs. Howard A. Taylor and **William B. Hornblower** argued the cause and filed a brief for the bank:

The provision of the Kansas Constitution is, if not self-executing, at least declaratory of a legal relation involving rights and liabilities.

Willis v. Mabon, 48 Minn. 140, *sub nom.* *Willis v. St. Paul Sanitation Co.* 16 L. R. A. 281, 50 N. W. 1110; *People ex rel. McClelland v. Roberts*, 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082.

Having in mind the constitutional provision as a declaration, even if not self-executing, the special remedies of the statute become merely additional remedies to the ordinary one by action in any court of record.

Cook, Stock & Stockholders, 3d ed. §§ 218, 219.

The liability can be enforced in any Federal circuit court of the United States which has jurisdiction of the parties.

Huntington v. Attrill, 146 U. S. 657, 36 L.

ed. 1123, 13 Sup. Ct. Rep. 224; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978.

For instances of the enforcement of similar liabilities outside of the territorial limits of the state enacting the statute, see—

Auer v. Lombard, 33 U. S. App. 438, 72 Fed. Rep. 209, 19 C. C. A. 72; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 329, 6 L. R. A. 676, 44 N. W. 198; *Paine v. Stewart*, 33 Conn. 516; *Aldrich v. Anchor Coal Co.* 24 Or. 32, 32 Pac. 756; *Aultman's Appeal*, 98 Pa. 505; *Ex parte Van Riper*, 20 Wend. 614; *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764.

The current of authority in the Federal circuit court and the circuit court of appeals in favor of enforcing the liability in the courts outside the territorial limits of Kansas is overwhelming.

Rhodes v. United States Nat. Bank, 24 U. S. App. 607, 66 Fed. Rep. 512, 13 C. C. A. 612, 34 L. R. A. 742; *McVickar v. Jones*, 70 Fed. Rep. 754; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Brown v. Trail*, 89 Fed. Rep. 641; *Mechanics' Sav. Bank v. Fidelity Ins. Trust & S. D. Co.* 87 Fed. Rep. 113; *Schiffer v. Columbia College*, 87 Fed. Rep. 166; *American Freehold Land Mortg. Co. v. Woodworth*, 82 Fed. Rep. 269.

The authorities in the state courts are mostly in support of respondent's position.

Hancock Nat. Bank v. Ellis, 166 Mass. 414, 44 N. E. 349, 51 N. E. 207; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Tuttle v. National Bank of the Republic*, 48 Ill. App. 481; *National Bank v. Zinser*, 55 Ill. App. 510; *Marshall v. Sherman*, 84 Hun, 186, 32 N. Y. Supp. 193; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346.

[562] *Mr. Justice **Brewer** delivered the opinion of the court:

By § 2 of article 12 of the Constitution of Kansas a certain definite liability is cast upon each stockholder in other than railway, religious, and charitable corporations. This liability is for the dues of the corporation and to an amount equal to the stock owned by him. The word "dues" is one of general significance, and includes all contractual obligations. Whether broad enough to include liabilities for torts, either before or after judgment, is not a question before us, and upon it we express no opinion. The words, "shall be secured," are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the Constitution is self-executing. *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 50 N. W. 1110. The discretion of the legislature extends beyond this, as indicated by the clause "and such other means as shall be provided by law." A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make in-

effective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature *prescribing[563] the mode of its enforcement. This is the obvious meaning of the constitutional provision. "The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." Lamar, Justice, in *Lake County v. Rollins*, 130 U. S. 662, 671, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651, 652.

But this constitutional provision does not stand alone. The legislature of Kansas has acted on the subject-matter, and the Constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have, or what liabilities would rest upon a stockholder, if either Constitution or statutes stood alone and unaided by the other.

In § 32 of chapter 23 of the General Statutes of that state, passed before the organization of the corporation referred to, the legislature prescribed the mode of enforcing this constitutional liability, and if such were needed declared to what extent it could be enforced. It may be either by motion in a case in which judgment has been rendered against the corporation and execution thereon returned unsatisfied, or by a direct action by the plaintiff in such judgment. Neither remedy can be made effectual in the courts of Kansas against a stockholder unless by due service of process he is brought within the jurisdiction of such courts. *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Howell v. Manglesdorf*, 33 Kan. 194, 199, 5 Pac. 759.

Whatever else may be said about the remedy, it is direct, certain, and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations. In view of the present tendency to carry on business through corporate instrumentalities and the freedom from personal liability which attends ordinary corporate action, it cannot be said that this limited additional remedy is open to judicial condemnation.

The liability which by the Constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, *the obligations of each partner to the others[564] and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders

organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumes to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute.

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263, is much in point. In that case a corporation was organized in the state of New York, under an act of the legislature, which contained this provision:

"Sec. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

An action was brought in Florida against one of the stockholders, and on error to this court it was held that the stockholder was liable, the court saying (377, L. ed. 969, Sup. Ct. Rep. 267):

"We think the liability imposed by § 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Everyone who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published, and recorded."

[565] *And again, after noticing the rulings of the court of appeals of the state of New York (379, L. ed. 969, Sup. Ct. Rep. 268):

"If this were a case arising in the state of New York we should therefore follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty."

"The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is therefore clear. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439."

And finally, in reference to the objection that the action was one at law against a single stockholder instead of in equity against all (380, L. ed. 970, Sup. Ct. Rep. 269):

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed

and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York, under § 10 of the statute relied on in this case. *Shellington v. Howland*, 53 N. Y. 371; *Wiles v. Suydam*, 64 N. Y. 173; *Handy v. Draper*, 89 N. Y. 334; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338."

In *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788, in which the question presented was whether the individual liability of a stockholder in a national bank survived as against an administrator, it was said (p. 55, L. ed. p. 873, Sup. Ct. Rep. p. 801):

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily *entered into by subscribing for[566] and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

In *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. ed. 1007, 1011, 19 Sup. Ct. Rep. 739, 742, in which one national bank was sought to be charged as stockholder in another national bank, was this declaration:

"In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory."

"Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Similar are the views entertained by the supreme court of Kansas.

In *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415, 418, 24 Pac. 426, 427, we find this statement:

"The nature of this liability is peculiar; it seems to have been created for the exclusive benefit of corporate creditors; the liability rests upon the stockholders of a corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves, in their own right and for their own benefit."

And again, in *Plumb v. Bank of Enterprise*, 48 Kan. 484, 486, 29 Pac. 699, 700: "Under our Constitution and statutes, the individual liability stands as a sort of surety for the corporate liability, and creditors of the corporation are supposed to contract with reference to the individual responsibility of the stockholders."

[567] *In *Achenbach v. Pomeroy Coal Co.* 2 Kan. App. 357, 359, 42 Pac. 734, 735, is this language:

"The liability of a stockholder in an insolvent corporation is of the nature of a liability on contract, and survives against the legal representatives of a deceased stockholder."

And while the word "statutory" is sometimes found in the opinions of that court as descriptive of the stockholder's liability, evidently the word is so used to indicate the origin rather than the nature of the liability. Thus, in *Howell v. Manglesdorf*, 33 Kan. 194, 199, 5 Pac. 759, 762, it was said:

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

Obviously this recognizes the contractual nature of the obligation as well as its statutory origin. Again, in *Pierce v. Topeka Commercial Security Co.* 60 Kan. 164, 55 Pac. 853, it was held that a stockholder, sued by a judgment creditor of the corporation, might set off against that claim the indebtedness of the corporation to him, accruing before he became liable as stockholder, the court saying (60 Kan. 166, 55 Pac. 854):

"Where the statute creates a liability against stockholders which is personal and several, and actionable by any creditor against any stockholder, it is generally held that a stockholder may in such a proceeding brought against himself set off debts due to him from the company."

Thus, while the statutory origin of the obligation is asserted, its contractual nature is recognized in that the right of set-off is affirmed.

That an action upon this liability is not one to enforce a penal statute of Kansas, but only to secure a private remedy, is not open to question since the decision in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

And as this liability is one which is contractual in its nature, it is also clear that an action therefor can be maintained in any court of competent jurisdiction. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

[568] *Similar views have been expressed by the highest courts of several states in like actions based upon the same Kansas constitutional and statutory provisions. *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 592

51 N. E. 207; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132. See also *Paine v. Stewart*, 33 Conn. 516; *Cushing v. Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 66 Fed. Rep. 512, 13 C. C. A. 612, 34 L. R. A. 742; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *McVickar v. Jones*, 70 Fed. Rep. 754; *Mechanics' Sav. Bank v. Fidelity Ins. Trust & S. D. Co.* 87 Fed. Rep. 113; *Dexter v. Edmonds*, 89 Fed. Rep. 467; *Brown v. Trail*, 89 Fed. Rep. 641.

We see no error in the judgment of the Circuit Court of Appeals, and it is therefore affirmed.

Mr. Justice Peckham dissents.

THE BENITO ESTENGER.

(See S. C. Reporter's ed. 568-581.)

Prize—vessel trading in provisions—friendly acts—license or exemption by consul.

1. The trading to a stronghold of the enemy, of an enemy vessel carrying provisions, constitutes, under the laws of war, illicit intercourse with the enemy, subjecting the property to capture as a prize.
2. The individual acts of friendship of a subject of one nation at war, toward the other nation, will not affect his status as an enemy.
3. A United States consul has no authority by virtue of his official station to grant any license or permit to exempt a vessel of the enemy from capture and confiscation.
4. A colorable transfer of a ship from a belligerent to a neutral is in itself ground for condemnation as prize.
5. The burden of proving neutral ownership of a vessel in a prize case is on the claimants.

[No. 192.]

Argued January 11, 12, 1900. Decided March 5, 1900.

APPEAL from a decree of the District Court of the United States for the Southern District of Florida condemning a vessel as a prize. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

*The Benito Estenger was captured by the [569] U. S. S. Hornet on June 27, 1898, off Cape Cruz on the south side of the island of Cuba, and was brought into the port of Key West and duly libelled on July 2. The depositions in *preparatorio* of Badamero Perez, Edwin Cole, and Enrique de Messa were taken, and thereafter and on July 27 a claim was interposed by Perez as master of the steamer on behalf of Arthur Elliott Beattie, a British subject, as owner, supported by test affidavits of himself and de Messa. The cause was preliminarily heard on the libel, the deposi-

NOTE.—As to jurisdiction and powers of consuls,—see *Telefsen v. Fee* (Mass.) 45 L. R. A. 481, and note.

tions in *preparatorio* and the test affidavits, and sixty days given for further proofs. Accordingly the depositions of the claimant and sundry others were taken on behalf of the claimant, and the testimony of the consul of the United States at Kingston on behalf of the captor. The cause coming on for final hearing, the court entered a decree December 7, 1898, condemning the vessel as lawful prize as enemy property, and ordering her to be sold in accordance with law. Claimant thereupon appealed, and assigned errors to the effect, in substance, that the court erred in failing to hold that the Benito Estenger was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain; and also in holding that the Benito Estenger was lawful prize of war, inasmuch as she was engaged on a voyage in *behalf of the local Cuban junta in Kingston, allies of the United States, and when captured was in the service of the United States, and employed in friendly offices to the forces of the United States.

[570]

The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa & Company, subjects of Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and, on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, cornmeal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock A. M., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect of the alleged Cuban sympathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which preceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all the circumstances of the case.

Mr. Harrington Putnam argued the cause and filed a brief for appellant.

Assistant Attorney General Hoyt argued the cause and, with **Messrs. Joseph K. Mc-**
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Cammon and James H. Hayden, filed a brief for the United States and the captors.

Messrs. George A. King and William B. King also filed a brief for the captors.

The contentions of counsel sufficiently appear in the opinion.

***Mr. Chief Justice Fuller** delivered the [571] opinion of the court:

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the district court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from domestic law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. *Prize Cases*, 2 Black, 635, 674, *sub nom. Preciat v. United States*, 17 L. ed. 459, 478; *The Sally*, 8 Cranch, 382, 384, 3 L. ed. 597, 598; *Jecker v. Montgomery*, 18 How. 110, 15 L. ed. 311; *The Peterhoff*, 5 Wall. 28, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564; *The Flying Scud*, 6 Wall. 263, *sub nom. The Flying Scud v. United States*, 18 L. ed. 755.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo. She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of 1,100 barrels of flour.

Manzanillo was a city of several thousand inhabitants, and the first important place on the south Cuban coast between *Santiago and [572] Cienfuegos, lying inside the bay formed by the promontory which Cape Cruz terminates, and about 60 miles northeast of the cape. Cape Cruz is about due north from Montego bay on the northwestern shore of Jamaica, and about 75 miles distant, while Kingston is on the southeastern coast of Jamaica. The record lacks evidence of the condition of affairs there at that time, but official reports leave no doubt that it was defended by several vessels of war and by shore batteries, and was occupied by some thousands of Spanish soldiers. On the 6th of April, 1898, the Secretary of the Navy had instructed Admiral Sampson, among other things, that the department desired "that, in case of war, you

will maintain a strict blockade of Cuba, particularly the ports of Havana, Matanzas, and, if possible, Santiago de Cuba, Manzanillo, and Cienfuegos." Manzanillo was the terminus of a cable which connected with Santa Cruz, Trinidad, Cienfuegos, and Havana, and was subsequently cut by the forces of the United States, in order to check the inland traffic with Manzanillo, and to prevent the calling of reinforcements to resist the capture of that place. And it appeared that Admiral Sampson had been for some weeks endeavoring to stop blockade running on the south coast of Cuba, and that a large vessel with a heavy battery was stationed at Cape Cruz. Manzanillo was not declared blockaded, however, until the proclamation of June 27, 1898; but the consul of the United States at Kingston had warned Messa and Beattie that a blockade in fact existed. The claimant testified that the vessel was chartered by Flouriache, a Cuban merchant, and that the cargo was consigned to Bauriedel & Company, at Manzanillo. The deposition of neither of these was taken. According to the explicit testimony of the consul, he was informed by both the claimant and his brother that the flour was transferred by Bauriedel & Company, through a communicating way from their warehouse to the Spanish government warehouse, immediately upon its delivery; and no evidence to contradict this was introduced.

[573] The instructions of the Navy Department to "Blockading Vessels and Cruisers," in the late war, included among articles *conditionally contraband, "provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

In *The Commercen*, 1 Wheat. 382, 4 L. ed. 116, Mr. Justice Story said: "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.

. . . If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

In *The Jonge Margaretha*, 1 C. Rob. 189, 193, Sir William Scott discussed this question, and, after referring to many instances, concluded: "And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it."

But, while alluding to this subject by way of illustration, we do not feel called on to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that in dealing with a vessel adjudicated to have been an enemy vessel, the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well nigh decisive importance.

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In reply it is suggested that this cargo was intended for the Cuban insurgents, and a quotation is made from a letter of the consul to the effect that he had been "told privately by the president of the local junta, who has performed valuable services for me, that the proceeds of this cargo are to be forwarded to the Cuban government and troops through the Cuban agent at Manzanillo." The suggestion derives no support from the record, and the facts remain that the provisions were delivered to the Spanish government, and that the trade to this Spanish stronghold constituted under the laws of war illicit intercourse with the enemy.

This brings us to consider the contention that Messa had *rendered important services [574] to the United States; that he was the friend, and not the enemy, of this government, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. But Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war. The legal conclusion was not affected by the fact that Messa had, in cultivating friendly relations with the consul, given the latter an old government plan of the province of Santiago and an especially prepared chart of the harbor. Thus displaying his amicable inclinations, he endeavored to obtain from the consul a letter of protection for the voyage he was about to undertake, but this the consul declined to furnish, and informed him at the same time that Manzanillo was blockaded, and that the contemplated venture would be at his own risk.

Nevertheless, the consul agreed to write the admiral, and did write him June 23, that Messa offered to give certain information that might be valuable, and that he proposed to be off Cape Cruz on June 30, when he could be picked up there and taken to the admiral if desired; but the consul said: "You quite understand that in dealing with those people one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." There was nothing to show that the voyage was undertaken on the strength of this letter, or that it in any way contributed to the capture, nor that the admiral intended to avail himself of the suggestion in regard to Messa.

The claimant asserted, and the consul denied, that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and, so far as appears, the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States *consul has no authority, by [575] virtue of his official station, to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation.

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This was so held by Judge McCaleb in *Rogers v. The Amado*, Newberry, Adm. 400; Fed. Cas. No. 12,005, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dod. Adm. 226, 229: "To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed "mandatories," or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Bi rei non præponitur*; and therefore his acts relating to it are not binding.

In *The Joseph*, 8 Cranch, 451, 3 L. ed. 621, the vessel was condemned for trading with the enemy, and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, "if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

This is equally true of the case before us, for, even if the circumstances may have justified liberal treatment, that cannot be permitted to influence our decision. It belongs to another department of the government to extend such amelioration as appears to be demanded in particular instances.

Neither the case of *Les Cinq Frères*, 4 Lebau's Nouveau Code de Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is in point. In the former, the Committee of Public Safety in the year three of the French Calendar of the Revolution decreed the condemnation of *Les Cinq Frères* as an enemy's vessel, and of her cargo, although belonging to Frenchmen, but further decreed [576] restitution of the cargo or its value, as matter of grace, in consideration of services rendered by the claimants in furnishing provisions to the Republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British government.

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa, & Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for \$40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to

Beattie & Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

It appeared that Beattie applied to the customs and shipping office in Jamaica for a British register, lodged with him the bill of sale, and made a declaration of ownership before him as registrar of shipping, which documents were filed on June 9 and 14 respectively, and were in conformity with the requirements of British law. The depositions of the shipbroker and his employees put the price at £9,000, and showed their belief that the sale was bona fide, founded on what passed between Messa and Beattie. They did not know what arrangements were made for the payment of the price, or how or in what shape the purchase money was paid. The accountant stated that after the sale Beattie went on board and took possession of the vessel, and informed the officers in charge that he had become the owner, gave orders regarding her, and informed witness that he had given Messa the position as supercargo.

There was considerable confusion on the point as to who was master of the vessel after the transfer. Perez testified that he was, and as master he interposed the claim on behalf of Beattie. He also swore that Mr. Beattie "informed him *that he could remain [577] as master, but it would be necessary for him to put an English subject on board as first officer or second captain, in conformity with the British law." Cole, a British subject, asserted that he was master, and Beattie stated that he appointed him such with Perez as mate and pilot, while Messa said that Perez was master and that he, Messa, was supercargo. Perez had been the captain of the ship and remained on her and, conceding that Cole was placed on board in the capacity of captain, the inference is not unreasonable that this was for appearances only.

Beattie testified that he was a member of the firm of Beattie & Company, composed of himself and his brothers, all British subjects, and interested in lands, sugar estates, mines, and forests in the district of Manzanillo; that he had resided there for some years returning to his parent's home in England for several months at a time; that he concluded the purchase of the Benito Estenger from Messa on June 9, 1898; that she left Jamaica on her last voyage on June 23, bound for Manzanillo, and chartered by Flouriache, a Cuban merchant, carrying a cargo of food stuffs sent for the purpose of trade; that he bought the vessel for £9,000; but he declined to state of what the payment or payments of the purchase money consisted, although saying that the sale was bona fide.

The consul testified that claimant, in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel.

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that

he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr. *Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

[578] The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war," says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law, 4th ed. 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts (Pratt's ed.) 63, 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral *claim . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

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The Sechs Geschwistern, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be bona fide and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether."

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of the former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises that it is merely a covered and pretended transfer. The presumption is so strong that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the eastern *district of Pennsylvania thus: [580] "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 5 Phila. 501, Fed. Cas. No. 7,107.

So in *The Baltica*, Spinks Prize Cases, 264, several vessels had been sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of the future earnings thereof, and the *Baltica*, which was one of them, was condemned on the ground of a continuance of the enemy's interest.

In *The Soglasie*, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not

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follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is that testimony which bears less the appearance of formality, —evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends a transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In *The Ernst Merck*, Spinks Prize Cases, 87, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington [581] saying: "We*all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant, see also *The Jenny*, 5 Wall. 183, *sub nom. United States v. The Jenny*, 18 L. ed. 693; *The Amiable Isabella*, 6 Wheat. 1, 5 L. ed. 191; *United States v. The Lilla*, 2 Cliff. 169, Fed. Cas. No. 15,600; *Story's Prize Courts*, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

Mr. Justice **Shiras**, Mr. Justice **White**, and Mr. Justice **Peckham** dissented.

CHARLES L. MAXWELL, *Plff. in Err.*,

vs.

GEORGE N. DOW, as Warden of the Utah State Prison.

(See S. C. Reporter's ed. 581-617.)

Due process of law—sufficiency of information without indictment—privileges and immunities of citizens of United States in respect to criminal prosecutions—validity of trial by eight jurors.

1. A proceeding by information, instead of by an indictment by a grand jury, is not insufficient to constitute due process of law.

2. The privileges and immunities of a citizen

NOTE.—As to number and agreement of jurors necessary to constitute a valid verdict,—see *State v. Bates* (Utah) 43 L. R. A. 33, and note.

As to what constitutes due process of law,—see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.
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of the United States do not include the right of trial by jury in a state court for a state offense, or the right to be exempt from any trial in such case for an infamous crime, unless upon presentment by a grand jury.

3. The adoption of the Fourteenth Amendment to the Federal Constitution has not had the effect of making all the provisions contained in the first ten amendments operative in state courts, on the ground that the fundamental rights protected by those amendments are, by virtue of the Fourteenth Amendment, to be regarded as privileges or immunities of citizens of the United States.

4. The language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.

5. A state statute providing for a jury of eight, instead of twelve, persons in any criminal case not capital, does not deny the right of the defendant to due process of law, if all persons within the state are made liable to be proceeded against in the same way.

[No. 384.]

Argued December 4, 1899. Decided February 26, 1900.

IN ERROR to the Supreme Court of the State of Utah to review a decision denying a writ of habeas corpus on the ground of the unconstitutionality of a statute. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. W. N. Whitecotton** argued the cause and filed a brief for plaintiff in error.

Mr. **Alexander C. Bishop** argued the cause and, with Mr. **William A. Lee**, filed a brief for defendant in error.

The contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Peckham** delivered the opinion [582] of the court:

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the state of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the supreme court of the state for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight, instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the

United States, under Article 5 of the Amendments to the Constitution of the United States, and also violated section 1 of Article 14 of those Amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under Article 6, and also violated section 1 of Article 14 of such Amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, in violation of section 1 of Article 14, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

[583] *The supreme court of the state, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison to undergo the remainder of his sentence; and he then sued out a writ of error and brought the case here.

The questions to be determined in this court are (1) as to the validity, with reference to the Federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors.

We think the various questions raised by the plaintiff in error have in substance, though not all in terms, been decided by this court in the cases to which attention will be called. The principles which have been announced in those cases clearly prove the validity of the clauses in the Constitution of Utah which are herein attacked as in violation of the Constitution of the United States. It will therefore be necessary in this case to do but little else than call attention to the former decisions of this court, and thereby furnish a conclusive answer to the contentions of plaintiff in error.

The proceeding by information, and also the trial by a jury composed of eight jurors, were both provided for by the state Constitution.

Section 13, Article 1, of the Constitution of Utah provides:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it."

Section 10, article 1, of that Constitution is as follows:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of

[584] inferior *jurisdiction a jury shall consist of four jurors. In criminal cases the verdict

shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292. The case has since been frequently approved. *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. ed. 986, 991, 13 Sup. Ct. Rep. 105; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Hodgson v. Vermont*, 168 U. S. 262, 272, 42 L. ed. 461, 464, 18 Sup. Ct. Rep. 80; *Holden v. Hardy*, 169 U. S. 366, 384, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 176, ante, 119, 20 Sup. Ct. Rep. 77; *Bolln v. Nebraska*, 176 U. S. 83, ante, 382, 20 Sup. Ct. Rep. 287.

But the plaintiff in error contends that the *Hurtado Case* did not decide the question whether the state law violated that clause in the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Although the opinion is mainly devoted to an inquiry whether the California law was a violation of the "due process clause" of the above-mentioned amendment, yet the matter in issue in the case was as to the validity of the state law, and the court held it valid. It was alleged by the counsel for the plaintiff in error, before the court which passed sentence, that the proceeding was in conflict with the Fifth and the Fourteenth Amendments, and those grounds were before this court. The Fifth Amendment was referred to in the opinion delivered in this court, and it was held not to have been violated by the state law, although that amendment provides for an indictment by a grand jury. This decision could not have been arrived at if a citizen of the United States were entitled, by virtue of that clause of the Fourteenth Amendment relating to the privileges and immunities of citizens of the United States, to claim in a state court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the *Fifth[585] Amendment. Yet this amendment was held in the *Hurtado Case* not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the states themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the Federal government. By holding that the conviction upon an information was valid, the court necessarily held that an indictment was not necessary; that exemption from trial for an

infamous crime, excepting under an indictment, was not one of those privileges or immunities of a citizen of the United States which a state was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case.

Under these circumstances it may not be improper to inquire as to the validity of a conviction in a state court, for an infamous crime, upon an information filed by the proper officer under the authority of the Constitution and laws of the state wherein the crime was committed and the conviction took place; confining the inquiry to the question of the effect of the provision in the Fourteenth Amendment prohibiting the states from making or enforcing any law which abridges the privileges or immunities of citizens of the United States. To the other objection, that a conviction upon an information deprives a person of his liberty without due process of law, the *Hurtado Case* is, as we have said, a complete and conclusive answer.

The inquiry may be pursued in connection with that in regard to the validity of the provision in the state Constitution for a trial before a jury to be composed of but eight jurors in criminal cases which are not capital. One of the objections to this provision is that its enforcement has abridged the privileges and immunities of the plaintiff in error as a citizen of the United States; the [586] other objection being that a *conviction thus obtained has resulted in depriving the plaintiff in error of his liberty without due process of law. Postponing an inquiry in regard to this last objection until we have examined the other, we proceed to inquire, What are the privileges and immunities of a citizen of the United States which no state can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson v. Utah*, 170 U. S. 343, 349, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 816.

It would seem to be quite plain that the provision in the Utah Constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that

amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the states. In order to limit the powers which it was feared might be claimed or exercised by the Federal government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several states by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states. This has *been many times [587] decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. *Spies v. Illinois*, 123 U. S. 131, 166, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 174, ante, 119, 20 Sup. Ct. Rep. 77.

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the *Spies Case*, 123 U. S. 151, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular state, was treated by Mr. Justice Miller in delivering the opinion of the court. He stated that the argument in favor of the plaintiffs, claiming that the ordinance of the city of New Orleans was invalid, rested wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the Fourteenth Amendment are the same as to citizens of the United States and citizens of the several states. This he showed to be not well founded; that there was a citizenship of the United States and a citizenship of the states, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of the citi-

zen of the United States that were placed by the amendment under the protection of the Federal Constitution, and that the privileges and immunities of a citizen of a state, [588] whatever they might be, were not *intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested.

He then proceeded to inquire as to the meaning of the words "privileges and immunities" as used in the amendment, and said that the first occurrence of the phrase in our constitutional history is found to be in the fourth article of the old confederation, in which it was declared "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively." A provision corresponding to this he found in the Constitution of the United States in section 2 of the Fourth Article, wherein it is provided that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." What these privileges were is not defined in the Constitution, but the justice said there could be but little question that the purpose of both those provisions was the same, and that the privileges and immunities intended were the same in each. He then referred to the case of *Corfield v. Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania, in 1823 (4 Wash. C. C. 371, Fed. Cas. No. 3,230), where the question of the meaning of this clause in the Constitution was raised. Answering the question, what were the privileges and immunities of citizens of the several states, Mr. Justice Washington said in that case:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. *What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Having shown that prior to the Four-

teenth Amendment the legislation under review would have been regarded as relating to the privileges or immunities of citizens of the state, with which the United States had no concern, Justice Miller continued:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?"

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any *of them are supposed to be [590] beabridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And, still further, such a construction, followed by the reversal of the judgments of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and Federal governments to each other, and

of both these governments to the people,—the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.”

[591] If the rights granted by the Louisiana legislature did not infringe upon the privileges or immunities of citizens of the United States, the question arose as to what such privileges were, and in enumerating some of them, without assuming to state them all, it was said that a citizen of the United States, as such, had the right to come to the seat of government to assert claims or transact business, to seek the protection of the government or to share its offices; he had the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several states; to demand *the care and protection of the general government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; the right, with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of habeas corpus, and to use the navigable waters of the United States, however they may penetrate the territory of the several states; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any state in the Union by a bona fide residence therein, with the same rights as other citizens of that state; and the rights secured to him by the Thirteenth and Fifteenth Amendments to the Constitution. A right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the state, and not covered by the amendment.

Other objections to the judgment were fully examined, and the result was reached that the legislation of the state of Louisiana complained of violated no provision of the Constitution of the United States.

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a state against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the Fourteenth Amendment of which it treats.

The definition of the words “privileges and immunities,” as given by Mr. Justice Washington, was adopted in substance in *Paul v. 176 U. S.*

Virginia, 8 Wall. 180, 19 L. ed. 360, and in *Ward v. Maryland*, 12 Wall. 430, 20 L. ed. 453. These rights, it is said in the *Slaughter-House Cases*, have always been held to be the class of *rights which the state govern- [592] ments were created to establish and secure.

In the same volume as the *Slaughter-House Cases* is that of *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442, where it is held that the right to practise law in the courts of a state is not a privilege or immunity of a citizen of the United States, within the meaning of the Fourteenth Amendment. And in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, it was held that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and although a woman was in one sense a citizen of the United States yet she did not obtain the right of suffrage by the adoption of that amendment. The right to vote is a most important one in our form of government, yet it is not given by the amendment.

In speaking of the meaning of the phrase “privileges and immunities of citizens of the several states,” under section 2d, Article Fourth, of the Constitution, it was said by the present Chief Justice, in *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, that the intention was “to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions.”

And in *Blake v. McClung*, 172 U. S. 239, 248, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, various cases are cited regarding the meaning of the words “privileges and immunities,” under the Fourth Article of the Constitution, in not one of which is there any mention made of the right claimed in this case as one of the privileges or immunities of citizens in the several states.

These cases show the meaning which the courts have attached to the expression, as used in the Fourth Article of the Constitution, and the argument is not labored which gives the same meaning to it when used in the Fourteenth Amendment.

That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, *white or black, that [593] comes within its provisions. But, as said in the *Slaughter-House Cases*, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, wherein it is said that sovereignty, for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase “privileges and immunities” of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in

any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the *Slaughter-House Cases* and *United States v. Cruikshank* are all wrong, and should be overruled.

It was said in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, it was stated by the present Chief Justice that—

“The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.”

In Cooley's Constitutional Limitations, 4th ed. p. 497, marg. page 397, the author says:

[594] “Although the precise meaning of ‘privileges and immunities’ is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each state to the citizens of all other states the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same state are not subject to.”

There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a state court for a state offense, and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury. And yet if these were such privileges and immunities, they would be among the first that would occur to anyone when enumerating or defining them. Nor would these rights come under the description given by the Chief Justice in the *Kemmler Case*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930. Such privileges or immunities do not arise out of the nature

or essential character of the national government.

In *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. The action was tried without a jury by virtue of an act of the legislature of the state of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

“By article 7 of the Amendments it is provided that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott*, 21 Wall. 557, 22 L. ed. 492. *The states, so[595] far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not therefore a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. (*Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 280, 15 L. ed. 372.) Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States.”

This case shows that the Fourteenth Amendment in forbidding a state to abridge the privileges or immunities of citizens of the United States does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a

privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to [596]*certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.

So it was held in the oyster planting case (*McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248), that the right which the people of that state acquired to appropriate its tide waters and the beds therein for taking and cultivating fish was but a regulation of the use, by the people, of their common property, and the right thus acquired did not come from their citizenship alone, but from their citizenship and property combined. It was therefore a property right, and not a mere privilege or immunity of citizenship, and for that reason the citizen of one state was not invested by the Constitution of the United States with any interest in the common property of the citizen of another state.

This was a decision under another section of the Constitution (section 2d of Article Fourth) from the one under discussion, and it gives to the citizens of each state all privileges and immunities of citizens of the several states; but it is cited for the purpose of showing that where the privilege or immunity does not rest alone upon citizenship a citizen of another state does not participate therein.

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the Federal government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The *Sauvinet Case* is an authority in favor of the contention that the [597] amendment *does not preclude the states by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478, although that case was decided with special reference to the "due process of law" clause.

In *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, it was 176 U. S.

stated that it was not contended and could not be that the Eighth Amendment to the Federal Constitution was intended to apply to the states. This was said long after the adoption of the Fourteenth Amendment, and also subsequent to the making of the claim that by its adoption the limitations of the preceding amendments had been altered and enlarged so as in effect to make them applicable to proceedings in the state courts.

In *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the national government the states could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

In *O'Neil v. Vermont*, 144 U. S. 323, 332, 36 L. ed. 450, 456, 12 Sup. Ct. Rep. 693, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the states.

In *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of Federal power, and has no application to the states.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the *powers of the [598] Federal government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

It has been held that the last clause of the Seventh Amendment, which provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, is not confined to trials by jury in Federal courts, but applies equally to a cause tried before a jury in a state court and brought thence before a Federal court. *The Justices v. Murray*, 9 Wall. 274, *sub nom. New York Supreme Court Justices v. United States ex rel. Murray*, 19 L. ed. 658; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580. But these decisions only carry out the idea that the amendment is a restraint upon Federal power, and not upon the power of the state, inasmuch as they declare that the clause re-

stricts the right of the Federal courts to re-examine the facts found by a jury in a state court, as well as in a Federal one.

In *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989, it was held that the clause of the Fourteenth Amendment, which prohibits a state from denying to any person the equal protection of the laws, did not thereby prohibit the state from prescribing the jurisdiction of its several courts either as to their territorial limits or the subject-matter, or amount or finality of their respective judgments or decrees; that a state might establish one system of law in one portion of its territory and another system in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws in the same district, nor deprive him of his rights without due process of law. In the course of the opinion, which was delivered by Mr. Justice Bradley, he said:

[599] "We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for *all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are

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allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its *discretion, [600] provide for these various exigencies. If a Mexican state should be acquired by treaty and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard for the welfare of all classes within the particular territory or jurisdiction."

Although this case was principally discussed under that clause of the Fourteenth Amendment which prohibits a state from denying to any person within its jurisdiction the equal protection of the laws, yet the application of the amendment with regard to the privileges or immunities of citizens of the United States was also referred to, and if it had been supposed that it secured to a citizen of the United States, when proceeded against under state authority, all the privileges and immunities set forth in the first eight amendments to the Federal Constitution, Mr. Justice Bradley could not, in the course of his opinion in the case, have said that a trial by jury might exist as a right in one state and not exist in another. Trial by jury would in such case have been protected under the Fourteenth Amendment, because it was granted to all persons by Article Six in all criminal prosecutions in the Federal courts, and by Article Seven in civil actions at common law, where the value in controversy should exceed \$20. On the contrary, it was stated that great diversity in these respects might exist in two states separated only by an imaginary line, on one side of which there might be a right of trial by jury, and on the other side no such right. Each state, it was said, prescribes its own modes of judicial procedure. The decision of this case was by an unanimous court, and the remarks of the justice are wholly irreconcilable with the existence of a right of trial by jury in a state court, which was guaranteed and protected by the Fourteenth Amendment, notwithstanding the *denial of [601] such right by and under the Constitution and laws of the state.

The principle to be deduced from these various cases is that the rights claimed by the plaintiff in error rest with the state governments, and are not protected by the particular clause of the amendment under dis-

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cussion. What protection may be afforded the individual against state legislation or the procedure in state courts or tribunals, under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of,—the privileges or immunities of citizens of the United States.

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by the states were included those set forth in the first eight amendments to the Constitution; and counsel has argued that this court should therefore give that construction to the amendment which was contended for by the Senator in his speech.

What speeches were made by other Senators and by Representatives in the House upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used, and not by the speeches made regarding it.

[602] What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important* as explanatory of the grounds upon which the members voted in adopting it. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540; *Dunlap v. United States*, 173 U. S. 65, 75, 43 L. ed. 616, 19 Sup. Ct. Rep. 319.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language

used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah Constitution and legislation.

The remaining question is whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the state deprives him of life, liberty, or property without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado Case*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state Constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by the common law. If the state have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning *which establishes [603] that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado Case* was decided are to be found gathered in *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; *Holden v. Hardy*, 169 U. S. 366, 384, 42 L. ed. 780, 788, 13 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77; *Bolln v. Nebraska*, 176 U. S. 83, ante, 382, 20 Sup. Ct. Rep. 287.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado Case* is a trial by jury mentioned as a necessary part of such process.

In *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, it was stated that the Fourteenth Amendment was not designed to interfere with the power of a state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering process provided by the law of the state.

In *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224, it was held that no state can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

In *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 577, it was

said "that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Hurtado v. California*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292, and cases cited." See also, for [604] statement *as to due process of law, the cases of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 707, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The clause has been held to extend to a proceeding conducted to judgment in a state court under a valid statute of the state, if such judgment resulted in the taking of private property for public use, without compensation made or secured to the owner, under the conditions mentioned in the cases herewith cited. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 985, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

It has also been held not to impair the police power of a state. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 375.

It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each state for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 18 Sup. Ct. Rep. 383. It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado Case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several

states have the same right to provide by their organic law for the change of both or either. Under this construction of the *amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

Judged by the various cases in this court, we think there is no error in this record, and the judgment of the Supreme Court of Utah must therefore be affirmed.

Dissenting opinion by Mr. Justice Harlan:

Under an information filed against him in one of the courts of the state of Utah, Maxwell, the plaintiff in error, a citizen of the United States, was convicted of the crime of robbery, and having been tried by a jury consisting of eight persons was found guilty and sentenced to confinement in the penitentiary for the term of eighteen years.

He insists that his imprisonment is in violation of the Constitution of the United States in that he was proceeded against by information,—not by indictment or presentment of grand *jury,—and was tried for an [606] infamous crime by a jury composed of less than twelve persons.

By its opinion and judgment just rendered this court holds that neither the prosecution by information nor the trial by eight jurors was in violation of the Constitution of the United States.

Upon the first point I do not care to say anything. For, in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292, this court held that a state enactment authorizing the prosecution by information for the crime of murder in the first degree—the penalty for such crime being death—was not in violation of the Constitution of the United States. The principles there announced have been reaffirmed in

later cases. In the *Hurtado Case* I dissented from the opinion and judgment of the court and stated fully the reasons why, in my judgment, no civil tribunal or court, Federal or state, could legally try a citizen of the United States for an infamous crime otherwise than on the indictment or presentment of a grand jury. I adhere to the views then expressed, but further discussion of the question decided seems unnecessary.

The remaining question in the present case is whether the trial of the accused by eight jurors is forbidden by the Constitution of the United States.

The Fourteenth Amendment, after declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside, provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law."

What are the privileges and immunities of "citizens of the United States?" Without attempting to enumerate them, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair.

[607] When the Constitution was adopted by the convention of 1787* and placed before the people for their acceptance or rejection, many wise statesmen whose patriotism no one then questioned or now questions earnestly objected to its acceptance upon the ground that it did not contain a bill of rights guarding the fundamental guaranties of life, liberty, and property against the unwarranted exercise of power by the national government. But the friends of the Constitution, believing that the failure to accept it would destroy all hope for permanent union among the people of the original states, and following the advice of Washington, who was the leader of the constitutional forces, met this objection by showing that when the Constitution had been accepted by the requisite number of states and thereby became the supreme law of the land, such amendments could be adopted as would relieve the apprehensions of those who deemed it necessary, by express provisions, to guard against the infringement by the agencies of the general government of any of the essential rights of American freemen. This view prevailed, and the implied pledge thus given was carried out by the first Congress, which promptly adopted and submitted to the people of the several states the first ten Amendments. These Amendments have ever since been regarded as the national Bill of Rights.

Let us look at some of those Amendments. It is declared by the First, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the

government for a redress of grievances;" by the Third, "no soldiers shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law;" by the Fourth, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;" by the Fifth, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled *in any [608] criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation;" by the Sixth, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense;" and by the Eighth, "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It seems to me that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, the political community known as the people of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten Amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified—the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty—could never be impaired or destroyed by the national government.

Now, the original Constitution declared that "the trial of all crimes, except in cases of impeachment, shall be by jury." This was supplemented by the Sixth Amendment, declaring that in all criminal prosecutions the accused should enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime was committed. And *we have held that the [609] jury here referred to was a common-law jury consisting of neither more nor less than twelve persons, whose unanimous verdict was necessary to acquit or convict the ac-

cused; that a jury of less number was not admissible in any criminal trial in the District of Columbia or in a territory of the United States, or in any prosecution of a criminal character in a court of the United States, or in any court organized under the authority of the United States. *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. We have often adjudged that the declaration in Magna Charta that the King would not pass upon any freeman, nor condemn him, "but by the lawful judgment of his peers," referred to a jury of twelve persons.

It is not difficult to understand why the fathers entrenched the right of trial by jury in the supreme law of the land. They regarded the recognition and exercise of that right as vital to the protection of liberty against arbitrary power. Mr. Hallam in his *Constitutional History of England*, after observing that liberty had been the slow fruit of ages, said that as early as the reign of Henry VII. one of the essential checks upon royal power was that "the fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made." And it is an interesting fact that the first ordinance adopted by the Plymouth colony in 1623 was one declaring, among other things, that "all criminal facts" should be tried "by the verdict of twelve honest men to be impaneled by authority, in form of a jury upon their oaths." The value of that institution was recognized by the patriotic men of the revolutionary period when in the Declaration of Independence they complained that the King of Great Britain had deprived the people of the colonies in many cases of the benefits of trial by jury. Referring to the provisions of the Federal Constitution relating to the personal security of citizens of the United States, Kent says they "must be regarded as fundamental in every state, for the colonies were parties to the national declaration of

[610]rights in 1774, in which the trial by *jury, and the other rights and liberties of English subjects, were peremptorily claimed as their undoubted inheritance and birthright." Upon this general subject Mr. Justice Story in his *Commentaries on the Constitution* has said: "It was under the consciousness of the full possession of the rights, liberties, and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them. And for the most part they thus succeeded in obtaining a real and effective Magna Charta of their liberties. The trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country." 1 Story, Const. § 165. Again, the same eminent jurist says: "It seems hardly necessary in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early

times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta, in which it is declared, '*nullus homo capiatur, nec imprisonetur, aut exuletur, aut aliquo modo destruat, etc.; nisi per legale iudicium parium suorum, vel per legem terræ*,' no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, etc., but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the state. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state Constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms. The great object of a trial by jury *in criminal cases is to guard [611] against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former." 2 Story, Const. §§ 1779, 1780. Blackstone has said: "A celebrated French writer, who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury." 2 Bl. Com. 379. In a recent American work on trial by jury the author well says: "The English colonists settled here with a deep-rooted regard for this right. It had been, no doubt, to them in the mother country a valuable protection. They brought it with them and established and cherished it as one of their dearest privileges, and in every enumeration of their rights and immunities it takes a conspicuous place." Again, the same author: "Ever since Magna Charta, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race; and whether in a strictly historical view the right was defined or secured by that instrument or not, it was nevertheless invariably appealed to and implicitly relied on as unalterably and inviolably securing the right among other valuable privileges guaranteed therein. During long centuries, when popular rights were overborne by prerogative or despotism, those who claimed and were denied the right to such a trial founded their demand on the guaranty of the Great Charter, and solemnly protested against its violation when the

privilege was denied them; and whenever an invasion or violation of individual rights was threatened, the security afforded by this guaranty was relied on as an effectual safeguard, either to repel the attack or nullify its effect." Proffatt, Jury Trial, §§ 81, 82. And this court has declared that "the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford*, 3 Pet. 433, 446, 7 L. ed. 732, 736.

[612] Notwithstanding this history of the incorporation into the Constitution of the United States of the provision relating to trial by jury, it is now adjudged that immunity from trial for crime except by a jury of twelve jurors is not an immunity belonging to citizens of the United States within the meaning of the Fourteenth Amendment.

It does not solve the question before us to say that the first ten Amendments had reference only to the powers of the national government, and not to the powers of the states. For, if, prior to the adoption of the Fourteenth Amendment, it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime in any court organized or existing under national authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime, particularly for an infamous crime, by eight jurors, when that Amendment expressly declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?" It does not meet the case to say that a trial by eight jurors is as much a trial by jury as if there were twelve jurors; for if a citizen charged with crime can be subjected to trial by a less number of jurors than that prescribed by the Constitution, the number may be reduced to three. Indeed, under the interpretation now given to the amendment, it will, I think, be impossible to escape the conclusion that a state may abolish trial by jury altogether in a criminal case, however grave the offense charged, and authorize the trial of a case of felony before a single judge. I cannot assent to this interpretation, because it is opposed to the plain words of the Constitution, and defeats the manifest object of the Fourteenth Amendment.

I am of opinion that under the original Constitution and the Sixth Amendment, it is one of the privileges and immunities of citizens of the United States that when charged with crime they shall be tried only by a jury composed of twelve persons; consequently, a state statute authorizing the trial by a jury of eight persons of a citizen of the United States, charged with crime, is void under the Fourteenth Amendment, declaring that no state shall make or enforce [613] any law that "shall abridge the privileges or immunities of citizens of the United States."

I am also of opinion that the trial of the

accused for the crime charged against him by a jury of eight persons was not consistent with the "due process of law" prescribed by the Fourteenth Amendment. Referring to the words in the Fifth Amendment, that "no person shall be deprived of life, liberty, or property without due process of law," this court said in *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 276, 277, 15 L. ed. 372, 374: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It was manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

No one, I think, can produce any authority to show that according to the "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors," the trial of one accused of felony otherwise than by a jury of twelve, or wholly without a jury, was consistent with "due process of law." If the original Constitution had not contained a specific prohibition of trials for crime otherwise than by a jury, the requirement of due process of law in the Fifth Amendment would have stood in the way of any act of Congress authorizing criminal trials in the Federal courts in any mode except by a com-[614] mon-law jury. When, therefore, the Fourteenth Amendment forbade the deprivation by any state of life, liberty, or property without due process of law, the intention was to prevent any state from infringing the guaranties for the protection of life and liberty that had already been guarded against infringement by the national government.

This interpretation of the Fourteenth Amendment finds support in some of the decisions of this court. In addition to the clause forbidding the deprivation of property "without due process of law," there is in the Fifth Amendment a clause specifically declaring, "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment does not in terms refer to the taking of private property for public use, yet we have held that the requirement of "due process of law" in that Amendment forbids the taking of private

property for public use without making or securing just compensation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 233, 241, 41 L. ed. 979, 983, 986, 17 Sup. Ct. Rep. 581; *Norwood v. Baker*, 172 U. S. 269, 277, 43 L. ed. 443, 446, 19 Sup. Ct. Rep. 187.

If, then, the "due process of law" required by the Fourteenth Amendment does not allow a state to take private property without just compensation, but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the settled usages and the modes of proceeding authorized at the time the Constitution was adopted and which was expressly forbidden in the national Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.

If the court had not ruled otherwise, I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no state should make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, the People of the United States put upon the states the same restrictions that had been imposed upon the national government in respect, as well of the privileges, and immunities of citizens of the United States, as [615] of the protection of the fundamental rights of life, liberty, and property.

The decision to-day rendered is very far-reaching in its consequences. I take it no one doubts that the great men who laid the foundations of our government regarded the preservation of the privileges and immunities specified in the first ten Amendments as vital to the personal security of American citizens. To say of any people that they do not enjoy those privileges and immunities is to say that they do not enjoy real freedom. But suppose a state should prohibit the free exercise of religion; or abridge the freedom of speech or of the press; or forbid its people from peaceably assembling to petition the government for a redress of grievances; or authorize soldiers in time of peace to be quartered in any house without the consent of the owner; or permit the persons, houses, papers, and effects of the citizens to be subjected to unreasonable searches and seizures under warrants not issued upon probable cause nor supported by oath or affirmation, nor describing the place to be searched and the persons or things to be seized; or allow a person to be twice put in jeopardy of life or limb; or compel the accused to be a witness against himself; or deny to the accused the right to be informed of the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel; or require excessive bail; or inflict cruel and unusual punishment. These or any of these things being done by a state, this court, according to the reasoning and legal effect of the opinion just delivered, would be bound to say that the privileges

and immunities specified were not privileges and immunities of citizens of the United States within the meaning of the Fourteenth Amendment, and that citizens of the United States affected by the action of the state could not invoke the protection of that Amendment or of any other provision of the national Constitution. Suppose the state of Utah should amend its Constitution and make the Mormon religion the established religion of the state, to be supported by taxation on all the people of Utah. Could its right to do *so, as far as the [616] Constitution of the United States is concerned, be gainsaid under the principles of the opinion just delivered? If such an amendment were alleged to be invalid under the national Constitution, could not the opinion herein be cited as showing that the right to the free exercise of religion was not a privilege of a "citizen of the United States" within the meaning of the Fourteenth Amendment? Suppose, again, a state should prescribe as a punishment for crime burning at the stake or putting out the eyes of the accused. Would this court have any alternative under the decision just rendered but to say that the immunity from cruel and unusual punishments recognized in the Eighth Amendment as belonging to every citizen of the United States was not an immunity of a citizen within the meaning of the Fourteenth Amendment, and was not protected by that Amendment against impairment by the state? The privileges and immunities specified in the first ten Amendments as belonging to the people of the United States are equally protected by the Constitution. No judicial tribunal has authority to say that some of them may be abridged by the states while others may not be abridged. If a state can take from the citizen charged with crime the right to be tried by a jury of twelve persons, it can, so far as the Constitution of the United States is concerned, take away the remaining privileges and immunities specified in the national Bill of Rights. There is no middle position, unless it be assumed to be one of the functions of the judiciary by an interpretation of the Constitution to mitigate or defeat what its members may deem the erroneous or unwise action of the people in adopting the Fourteenth Amendment. The court cannot properly say that the Constitution of the United States does not protect the citizen when charged with crime in a state court against trial otherwise than by a jury of twelve persons, but does protect him against cruel and unusual punishment, or against being put twice in jeopardy of life or limb for the same offense, or against being compelled to testify against himself in a criminal prosecution, or in freedom of speech or in the free exercise of religion. The right to be tried when charged with crime by a jury of twelve persons *is placed [617] by the Constitution upon the same basis as the other rights specified in the first ten Amendments. And while those Amendments originally limited only the powers of the national government in respect of the priv-

ileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the states.

If it be said that there need be no apprehension that any state will strike down the guaranties of life and liberty which are found in the national Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved, nor even now, and would have caused the rejection of the Constitution by every one of the original states if it had been sanctioned by any provision in that instrument when it was laid before the people for acceptance or rejection. Liberty, it has been well said, depends, not so much upon the absence of actual oppression, as on the existence of constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decisions. On the contrary, speaking by Mr. Justice Bradley, we have declared in *Boyd v. United States*, 116 U. S. 616, 636, 29 L. ed. 746, 753, 6 Sup. Ct. Rep. 524, 535, that "it is the duty of courts to be watchful for the constitutional rights of the citizen." If some of the guaranties of life, liberty, and property which at the time of the adoption of the national Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any state striking down guaranties of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the revolutionary period universally claimed as the birthright of freemen.

I dissent from the opinion and judgment of the court.

[618]*J. FRANK ALDRICH, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Appt.,

v.

CHEMICAL NATIONAL BANK of New York.

(See S. C. Reporter's ed. 618-639.)

Liability of national bank for loan fraudulently obtained by officers—deducting collections from collateral in proving claim against insolvent bank.

1. A national bank which uses in its business money obtained by its vice president as a loan to it from another national bank cannot

NOTE.—As to estoppel and ratification of transactions *ultra vires*,—see note to *Central Transp. Co. v. Pullman's Palace Car Co.* 35 L. ed. U. S. 55.

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escape liability to account therefor upon the ground that the loan was not negotiated by it or by its direction, or that it could not itself have legally borrowed the money.

2. Collections from collateral securities made by a creditor of a national bank after the declared insolvency of the bank need not be deducted from the amount on which dividends are to be computed by the receiver of the bank, as the secured creditor is a creditor to the full amount due him when the insolvency is declared, and his right to dividends is unaffected by his collateral.

[No. 58.]

Argued October 20, 1899. Decided March 5, 1900.

APPEAL from a decree of the United States Circuit Court of Appeals for the Sixth Circuit affirming a decree of the Circuit Court against the receiver of a national bank. *Affirmed.*

See same case below, *sub nom. Armstrong v. Chemical Nat. Bank*, 54 U. S. App. 462, 83 Fed. Rep. 556, 27 C. C. A. 601.

The facts are stated in the opinion.

Messrs. **Francis F. Oldham** and **John W. Herron** argued the cause and filed a brief for appellant.

Messrs. **George H. Yeaman** and **William Worthington** argued the cause and, with **Mr. George C. Kobbé**, filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Harlan** delivered the opinion—[619] ion of the court:

This litigation has extended over many years, and the case as now presented will be best understood if a statement be made showing the proceedings in the circuit court and circuit court of appeals.

In its bill in this case the Chemical National Bank alleged that on the 2d day of March, 1887, it loaned to the Fidelity National Bank the sum of \$300,000 which the latter bank promised to repay on demand with interest from the date of the loan, and at the same time delivered as collateral security therefor a certificate of deposit for the above amount together with sundry promissory notes.

The certificate referred to was in the following form:

Certificate of Deposit.

This certificate is not subject to check, but must be presented to draw the money. No. 345.

The Fidelity National Bank.

Cincinnati, Feb. 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars (\$300,000), payable to the order of himself on return of this certificate in current funds. \$300,000.

Ammi Baldwin,

Cashier.

Indorsed: "E. L. Harper."

It was alleged that the signature of Baldwin as cashier was used as the signature of the bank by its authority.

The bill then stated that on May 21st, 1887, the Chemical Bank at the request of the Fidelity Bank returned some of the notes delivered as collateral security, and received in substitution therefor other notes. The latter notes were described in a schedule attached to the bill, and it was alleged that the bank was still the owner and holder of them, except three executed by J. W. Wilshire for \$25,000 each, which had been paid at maturity by John V. Lewis, the indorser thereof, the money so paid being held in lieu of the notes delivered as collateral security for the loan.

After setting forth the appointment on the 21st day of June, 1887, of Armstrong as receiver of the Fidelity Bank, as well as the subsequent proceedings by which on the 12th day of July, 1887, that corporation was dissolved, the bill alleged that the Fidelity Bank never repaid the loan nor any *part thereof; that the Chemical Bank presented to the receiver proof of its claim, and requested him to submit it to the Comptroller of the Currency in order that a dividend might be paid to it from the assets of the bank equal in ratio to the dividends paid to other creditors, and that it might thereafter receive further dividends until its claim was paid; but that the Comptroller and the receiver had refused to allow it to be enrolled as a creditor.

The receiver, without explicitly responding to the allegations of the bill as to the making of the loan, said that he was unable to state whether or not the plaintiff loaned to the Fidelity Bank the sum of \$300,000. In an amended answer he specifically denied that the Chemical Bank loaned to the Fidelity Bank the sum named, or that any such loan was made by the former to the latter on the faith and credit of the alleged certificate of deposit, or that such certificate was executed and delivered by the cashier of the Fidelity Bank as its act and by its authority.

The answer averred that on the 2d day of March, 1887, and prior thereto, Harper was the vice president of the Fidelity Bank, and engaged in speculations in which he used its funds; that in the use of those funds he was assisted by Baldwin, but that such use was not known to the other directors of the bank, was not authorized by it, and was a fraudulent and illegal appropriation of its funds for the personal use of Harper; that a paper was signed by Baldwin, as cashier of the Fidelity Bank, which was believed to be the same paper alleged to be a certificate of deposit of the Fidelity Bank; that such certificate was not entered upon the books of the bank, nor taken from the book from which, if regular, it should have been taken; that its execution was unknown to the other officers of the bank, and was unauthorized by it; and that no consideration was received for it by the Fidelity Bank from Harper, or from any other person, nor was money deposited in the bank as the basis of the certificate.

Continuing, the defendant averred that the certificate of deposit and the promissory

notes described in the bill were forwarded to the Chemical Bank by Harper, and the sum of \$300,000 *was received by him from that bank; that he represented to the officers of the Fidelity Bank that the money was received from a loan made to him, and by his direction was credited, on his personal account, and was thereupon drawn out and used for his individual purposes, and that the other officers of the bank had no knowledge that the facts were otherwise than as represented by him. It was also averred that a large portion of the promissory notes delivered as collateral security for the loan was the personal property of Harper in which the Fidelity Bank had no interest.

The answer, after reciting the fact of the payment by the indorser Lewis of the three notes made by Wilshire for \$25,000 each, alleged that the fourth note of Wilshire for the same amount, also indorsed by Lewis, was not presented for payment by plaintiff at maturity, in consequence whereof that note was not paid and the indorser was discharged. It was also averred that the Chemical Bank credited the payment of the above three sums of \$25,000 upon the alleged loan of \$300,000, reporting the same to the defendant as payments on that account, and treated them in all respects as proper credits on such loan. Payment of certain other notes since the bringing of the action was also alleged to have been made to the Chemical Bank.

The defendant therefore claimed that the Fidelity Bank was not liable to the Chemical Bank for the amount of the loan, but if it were otherwise adjudged, the defendant asked that all payments made to the plaintiff upon the collateral paper forwarded by Harper as security for the loan should be credited thereon; that the above note of Wilshire, indorsed by Lewis, not having been paid in consequence of plaintiff's neglect to present the same for payment, should be also credited; that the balance of the collateral paper should first be exhausted and the proceeds credited; and that the plaintiff should be permitted to prove only the amount found due after such credits had been made.

To the answer as amended the plaintiff filed a general replication.

In deciding the case the circuit court, among other things, *said: "Conceding that the transaction of \$300,000 loan was fraudulent as between E. L. Harper and the Fidelity Bank, and that he appropriated the entire proceeds to his individual use, the claim of the Chemical Bank, which dealt in good faith in the transaction, and was innocent of any knowledge or participation in the fraud, is not affected thereby. The negotiation of the loan was within the authority of Harper as vice president of the Fidelity Bank, and if he used that authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer from the consequences, and not the bank that made the loan and advanced the money, under the representation and in the belief that it was conducting a fair, legiti-

mate business transaction with the Fidelity Bank." But the court held that all collections made prior to the filing of the claim upon the collaterals held by the Chemical Bank as security for the loan should be deducted therefrom. 50 Fed. Rep. 798, 802.

From this decision both parties appealed to the circuit court of appeals. That court reversed the decree, holding upon an extended review by Judge Taft of the adjudged cases that creditors of an insolvent national bank could not be required in proving their claims, to allow credit for any collections made after the declared insolvency of the bank from collateral securities held by them. 16 U. S. App. 465, 59 Fed. Rep. 372, 8 C. C. A. 155, 28 L. R. A. 231.

The Chemical Bank filed a petition for rehearing upon the ground that the court had erred in fixing the amount of interest to be allowed the bank on the dividends declared.

While that petition was under consideration by the circuit court of appeals, this court decided the case of *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572, which related to a transaction between that bank and Harper. Thereupon the receiver filed a petition for rehearing, upon the question as to the validity of the loan involved in the present suit.

[623] The above petitions for rehearing having been granted, the cause was again heard in the circuit court of appeals, and it was there decided that under the special facts disclosed by the evidence, and in view of the decision in *Western Nat. Bank v. Armstrong*, the parties should be allowed an opportunity* to introduce further evidence "upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the loan." The former order of the court was therefore modified, and the decree of the circuit court was reversed and the cause remanded, with leave to the parties to adduce such additional evidence. 31 U. S. App. 75, 83, 65 Fed. Rep. 573, 577, 13 C. C. A. 47, 28 L. R. A. 239.

The cause was again heard in the circuit court, which said: "Upon the evidence, the finding of this court is that the power of the Fidelity to borrow money by conducting such a transaction as is involved in this case is established, and that the same is legitimately within the business of banking under the national bank act." It found for the Chemical Bank on the issue defined in the mandate of the appellate court. 76 Fed. Rep. 339, 345, 347. The decree was in these words: "And the court being now fully advised, finds that the Fidelity National Bank upon the second day of March, 1887, borrowed from the complainant the sum of \$300,000, and that on the 21st day of June, 1887, when the Fidelity National Bank was declared insolvent, there was due from the Fidelity National Bank to the complainant the said sum of \$305,450; that dividends have been declared from the assets of the Fidelity National Bank to the creditors thereof at the dates and for the rates per centum, as follows, that is to say: October 31st, 1887, the first dividend of 25 per centum; 176 U. S.

June 15th, 1889, the second dividend of 10 per centum; June 30th, 1890, the third dividend of 10 per centum; August 5th, 1891, the fourth dividend of 5 per centum; August 15th, 1894, the fifth dividend of 8 per centum. The court further finds that upon the 25th day of April, 1890, the defendant rejected the claim aforesaid of the complainant, which had been theretofore presented to him; and that after the previous decree of this court upon, to wit, the 25th day of July, 1892, said defendant paid to said complainant the sum of \$100,000 upon account of the sum which might be due to the complainant pursuant to the provisions for that purpose made in the decree of this court, entered in this cause on the 8th day of July, 1892. The court finds that there is now due this 21st day of October, 1896, to the complainant *from the defendant the sum of \$117,749.78, being the dividends aggregating 58 per centum heretofore declared from the assets of the Fidelity National Bank, computed upon the amount of the complainant's claim as herein allowed, with interest on those of said dividends which were declared prior to April 25th, 1890, from said last-named day, and with interest upon those thereafter declared from the dates of their declaration, respectively, after crediting the said payment of \$100,000, upon the 25th day of July, 1892, the computation being made upon the principle ordinarily applied in partial payments. It is therefore ordered, adjudged, and decreed that the defendant pay to the complainant the said sum of \$117,749.78, with interest thereon from said 21st day of October, 1896, and that hereafter, while any balance remains due the complainant upon said loan, said defendant pay to complainant dividends, calculated upon said sum of \$305,450, like to those paid to other creditors of the Fidelity National Bank."

The receiver appealed from this decree, and the circuit court of appeals affirmed the decree of the court below. The opinion of that court states fully the grounds upon which it held the case not to come within the rule announced in *Western National Bank v. Armstrong*, 54 U. S. App. 462, 83 Fed. Rep. 556, 27 C. C. A. 601.

From that decree the receiver has appealed to this court—the present appellant having succeeded Armstrong.

The principal contention of the appellant is that under the principles announced in *Western National Bank v. Armstrong* the Fidelity National Bank incurred no liability on account of the money obtained from the Chemical National Bank. But the appellee insists that the language of this court in that case, so far as it relates to the power of a national bank as incidental to its business to borrow money was much broader than was necessary for the determination of the issues then before the court, and, if interpreted as is done by the appellant, is in conflict with the adjudged cases, inconsistent with sound principle, and should be modified.

In the last-named case the Western National Bank of New York alleged that the Fidelity

[625]ity Bank was indebted to *it on account of a loan made May 28th, 1887, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf," and which loan, it was further alleged, was secured by collateral, signed by one Gahr and indorsed by Harper, and by the indorsement and delivery to the Western Bank by Harper, of certificates for 1,600 shares of the capital stock of the Fidelity Bank. It was also alleged that the collateral was without value, and that the stock was wholly invalid and void. The Fidelity Bank denied that the Western Bank made any loan to it, or that it had any connection with or interest in the transaction referred to in the bill. The pleadings and evidence raised the question whether Harper, in his transactions with the New York bank, could legally bind the Fidelity Bank of which he was vice president. This court said: "It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice president and managing officer, and that by 'managing officer' he [626] meant that Harper was 'the *general manager of the business of the bank.' No such officer as that of 'general manager' is known or named in the national bank acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the 8th section of the national bank act (Rev. Stat. § 5136, ¶ 7): A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business

of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 127, 23 L. ed. 679, 681, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting *for the bank had [627] special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown."

In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan. If the present case depended upon that question it might be necessary to consider whether the language in *Western Nat. Bank v. Armstrong* required modification.

It may be well, however, to observe that this court, in *Auten v. United States Nat. Bank*, 174 U. S. 125, 141, 143, 43 L. ed. 920, 926, 927, 19 Sup. Ct. Rep. 628, 635, held that the borrowing of money was not out of the usual course of banking business. We said: "A power so useful cannot be said to be illegitimate, and

declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities." It is important also to observe that the court said that *Western Nat. Bank v. Armstrong* was not to be regarded as an adjudication to the contrary.

We may further observe that the last-named case differs from the present case in many important particulars.

[628] *In *Western Nat. Bank v. Armstrong* the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice president. This court took care in that case to say that it did "not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In the present case it appears that the following letter, under date of February 28th, 1887, and signed by E. L. Harper as vice president of the Fidelity Bank, was addressed to the cashier of the Chemical Bank: "Enclosed herewith we hand you for credit our certificate of deposit No. 345 for \$300,000, with bills as collateral, as follows: [Here was given a list of twenty-seven notes.] We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate." This letter having been received by the Chemical Bank, its cashier wrote to the cashier of the Fidelity Bank under date of March 2, 1887: "Your favor of the 28th inst. has been received. We credit Fidelity National Bank \$300,000, and shall be considerate as to the rate of interest when the loan is paid." Before this last letter could have reached Cincinnati the book-keeper of the Fidelity Bank, acting under instructions from Harper, credited him personally on the books of that bank with \$300,000. But the credit of \$300,000 given to the Fidelity Bank on the books of the Chemical Bank remained unaltered, and that amount was drawn from the latter bank in the ordinary course of business on the authorized checks of the Fidelity Bank and went to discharge its legal obligations. And it may be added that the Fidelity Bank had notice of the above credit in its favor; for, besides other evidence, it was shown that in the monthly statement sent by the Chemical Bank to the Fidelity Bank covering the transactions of March, 1887, there appeared under the date of March 2d a credit to the Fidelity Bank as follows: "Tem. loan, \$300,000."

We have then a case in which a national bank having used in its business money which its vice president obtained as a loan to it from another national bank denies all [629] liability to "account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally 176 U. S.

borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of the adjudged cases. We proceed to the examination of those cases.

In *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 644, 19 L. ed. 1008, 1028, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase.

In *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. ed. 1040, 1043, it was held that "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In *United States v. State Nat. Bank*, 96 U. S. 30, 36, 24 L. ed. 647, 648, which were actions brought in the court of claims against the United States to recover the amount of certain gold certificates deposited in the subtreasury at Boston and forwarded, after being canceled, to the treasurer of the United States, and in which transactions fraud was imputed to the cashier of the subtreasury at Boston, this court said: "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved. . . . Surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the *nation by means of a fraud to which its [630] agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal."

The rule was illustrated in *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153, which was an action against a municipal corporation to compel it to repay money received and paid into its treasury on account of bonds sold by it, but which it had issued without authority of law. This court held that the law implied from what was done a contract that the city would return the money paid to it by mistake. To the same effect is *Chapman v. Douglas County*, 107 U. S. 348, 355, 27 L. ed. 378, 381, 2 Sup. Ct. Rep. 62 et seq.

In *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. ed. 238, 245, 1 Sup. Ct. Rep. 442, it

appeared that the city of Parkersburg, West Virginia, pursuant to an act of the legislature of that state, issued its bonds to be loaned to persons engaged in manufacturing and to be secured by deed of trust or mortgage on real estate. The bonds were held to be void under the principles announced in *Citizens' Sav. & Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, and the question arose whether the city was bound to account for the property conveyed to it in trust to secure bonds so issued and loaned to persons engaged in manufacturing. This court said: "Notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received *property for the unauthorized purpose, the value of that which it has actually received. *White v. Franklin Bank*, 22 Pick. 181; *Morville v. American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40; *Davis v. Old Colony R. Co.* 131 Mass. 258, 275, 41 Am. Rep. 221, and cases there cited."

In *Read v. Plattsburgh*, 107 U. S. 568, 575, 27 L. ed. 414, 417, 2 Sup. Ct. Rep. 208, 214, where the question was as to the validity of bonds issued by a municipal corporation, the court said: "In the present case the statute in question does not impose upon the city of Plattsburgh, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over \$15,000, were void, because unauthorized, the city of Plattsburgh received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used immediately arose."

A case aptly illustrating the principle adverted to is *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 74, 78, 35 L. ed. 107, 110, 112, 11 Sup. Ct. Rep. 496, 499, 500. The facts in that case were these: Townsend, it was alleged, sold to the Logan County National Bank, through its cashier, bonds of a railroad corporation in consideration of a named sum and the agreement of the bank that it would, upon his demand, replace the bonds to him at the same price or less. The bank refused to comply with the agreement to replace the bonds, and Townsend sued to

recover from it the damages sustained by him, to wit, the difference between the price paid by the bank and the value of the bonds. The bank, in its defense, denied that it had any connection with the transaction between Townsend and its cashier otherwise than that the latter having deposited the proceeds in the bank it had paid them to the plaintiff. Its principal defense was that the cashier as such had no authority to make the contract set out, and that the defendant had itself no right, power, or authority to make it. Taking it to be true, as found by the jury, that the alleged agreement was made by the cashier for the bank, and not upon his individual account, and assuming from the record *that the bank held the bonds at the time Townsend sued, this court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff on demand, the question would still remain whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. It would seem, upon defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without authority to make. True, it is not under a duty to surrender possession until reimbursed the full amount due it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power under the statute to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract,—and we are assuming, for the purposes of this case, that it may be,—it is bound upon demand, accompanied by a tender back of the price paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act." Again: "Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is, that if the bank had no authority to purchase the bonds in question, it is yet not exempt, by reason of anything *in the national banking act, from liability to the plaintiff for the difference between the price it paid for them and

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their value at the time it refused, upon plaintiff's demand, to comply with the contract made by it for their purchase and held on to the bonds."

In *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478, 488, which involved the validity of a certain contract whereby one corporation leased and transferred all its cars, contract rights, and personal property to another corporation, and which lease was held to be void, this court said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creating, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." This principle was recognized and enforced in *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808, 813, in which it was said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

[634] In *Dithey v. Dominion Nat. Bank*, 43 U. S. App. 613, 615, 75 Fed. Rep. 769, 771, 22 C. C. A. 376, 377, which was an action against a receiver of a national bank to recover the amount of a loan made by its president without the knowledge of the directors and for which he gave the note of the bank,—the object of the transaction being to cover up certain frauds of the president,—the court, speaking by Judge Taft, said: "In our opinion, even if the president may not have had authority to effect the loan, yet when he, in order to conceal his previous embezzlement, *deposited the sum to the credit of the Citizens' Bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman as its president had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion Bank. We think the same principle applicable in this case which was applied in the case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the

annual settlement of one company he drew checks of the other and deposited them to the credit of the one company in bank. The question was whether the company whose bank account had been swelled by the checks of the other was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take and hold it with the burden of his knowledge. So in this case the bank, having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do not see that the circumstance in one case that the treasurer stole the money, and in the other that the president obtained it on the false representation that he was authorized to borrow it for his bank makes any reasonable distinction between the two cases."

In *Perkins v. Boothby*, 71 Me. 91, 97, the question was as to the liability of a joint-stock company on account of notes given by its agent for money loaned and which was appropriated to the payment of the company's debts. The directors had no knowledge of the loan or the appropriation of the money, unless knowledge could be implied from the fact that those acts were done by the agent. The defense was that the agent's want of authority to effect the loan relieved the company *from responsibility, not only [635] on the notes, but for any claim under the common counts for money had and received. After observing that although the directors upon receiving notice of the acts of the agent in terms repudiated them, yet after knowledge of the facts retained the benefit of the loans effected and used the money in discharge of valid claims against the company which would have been in force except for the unauthorized acts of the agent, the court said: "If liable in one case why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.' Green's Brice's *Ultra Vires*, 618. The question whether, upon reason and authority, the application of this principle should be extended to municipal corporations, or whether, on the contrary, the purposes for which such bodies are organized, the limited powers conferred upon them, as well as considerations of public policy and safety, may remove them from such liability, is one of great importance. It does not arise in this case."

In *Bank of Lakin v. National Bank*, 57 Kan. 183, 45 Pac. 587, a bank was held lia-

ble for the amount of certain notes executed in its name by its cashier without its authority, but the proceeds of which were received by the bank, the court saying that "a principal cannot receive the benefits of a transaction and at the same time deny the authority of the agent by whom it was consummated."

Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, (636) the *latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice president, the Chemical Bank credited the Fidelity Bank on its books with the sum of \$300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank by its check upon the Chemical Bank had drawn the whole \$300,000 at one time, and now had the money in its possession unused? It would not be allowed to hold the money, even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit money obtained by one of its officers from another bank under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate (637) *and use the money or property of others for its benefit without liability for so doing. If

the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former on the books of the latter with \$300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage, and from which it should not be permitted to derive profit to the prejudice of the other bank. So, if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defense is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor.

The fact that, after the Fidelity Bank had been credited on the books of the Chemical Bank with the \$300,000, Harper fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank had no connection, and cannot affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank, and was by it used in meeting its current obligations. The dishonesty of Harper in his management of the affairs of the Fidelity Bank did not discharge that bank from the obligation under which it came by using in its business the money obtained by its vice president under the guise of a loan to the bank.

It is no defense to the claim of the Chemical Bank to say that the directors of the Fidelity Bank were unaware of the fraudulent acts of Harper. We do not rest our conclusion in the present case upon any question as to diligence or want of diligence upon the part of directors. We rest it upon the fact, and the implied obligation arising therefrom, that the Fidelity Bank used in its business and for its benefit the money which the Chemical Bank placed to its credit in consequence of a loan negotiated by Harper who assumed to represent it.

*Independently, therefore, of any question (638) as to the scope of the power of a national bank to borrow money to be used in its business, we hold that the Fidelity Bank became liable to the Chemical Bank by using the money obtained from the latter, under the arrangement made by Harper in his capacity as vice president; consequently, the decree recognizing the claim of the Chemical Bank for the amount of the loan of March, 1887, was right.

2. It is assigned for error that the collections from collaterals securing the alleged loan prior to the declaration of dividends by the receiver were not deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical Bank, and that the Chemical Bank was not required first to exhaust its collateral security and apply the proceeds on its claim before proving it against the receiver for dividends.

This assignment of error was prepared by counsel prior to the decision of this court in *Merrill v. National Bank*, 173 U. S. 131, 135, 146, 147, 43 L. ed. 640, 642, 646, 19 Sup. Ct. Rep. 360, 366, 367, in which case this court said that the inquiry on the merits was whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full. It was held that in the distribution of insolvent estates, "the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, *though the receiver may redeem or be subrogated as circumstances may require. . . . When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

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3. It is also insisted that the Chemical Bank should have been required to deduct from its claim the amount, principal and interest, of the note for \$25,000 indorsed by J. V. Lewis, who, it is alleged, was released because of its failure to take the steps required by the rules of commercial law in order to charge him as indorser. Upon this point the circuit court of appeals, upon the first hearing of this case, said: "Our conclusion upon this main question in the case makes it unnecessary for us to consider the other questions discussed by counsel, which were material only in view of the position taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether it could not properly be charged with the note for \$25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collateral, including as such the note just referred to, will fall far short of paying the \$300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case." 16 U. S. App. 465, 176 U. S.

539, 59 Fed. Rep. 372, 382, 8 C. C. A. 155, 165, 28 L. R. A. 231, 238. We concur in that view.

Having noticed all the questions that require consideration, *the decree below is affirmed.*

*HANCOCK NATIONAL BANK, *Plff.* [640]
in *Err.*,
v.

JONATHAN W. FARNUM.

(See S. C. Reporter's ed. 640-645.)

Federal question—judgment of other state against corporation binding on stockholder.

1. A contention that a state court denies to a judgment of another state the effect to which it is entitled by U. S. Rev. Stat. § 905, involves a Federal question for the purpose of a writ of error from the Supreme Court of the United States.
2. A judgment against a corporation which by the laws of the state in which it is rendered is binding on the stockholders must be given by a court of another state the same conclusive effect against a stockholder who is sued therein; and the only defenses which he can make against it are those which he could make in the courts of the state in which it was rendered.
3. A judgment of a circuit court of the United States must be given the same effect in other states that it is entitled to in the state in which it is rendered, and that is the same as if it were a judgment of a state tribunal of equal authority.

[No. 89.]

Argued December 21, 1899. Decided March 12, 1900.

IN ERROR to the Supreme Court of the State of Rhode Island to review a decision sustaining a demurrer to a declaration in an action against a stockholder based on a judgment against the corporation in another state. *Reversed.*

See same case below, 20 R. I. 466, 40 Atl. 341.

Statement by Mr. Justice **Brewer**:

*The facts of this case are these: The [640] plaintiff in error, plaintiff below, a creditor of

NOTE.—As to full faith and credit to be given to judicial proceedings in courts of a sister state,—see notes to *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79; *Cumington v. Belchertown* (Mass.) 4 L. R. A. 131; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 578; *Rand v. Hanson* (Mass.) 12 L. R. A. 574; and *Mills v. Duryee*, 3 L. ed. U. S. 411.

As to conclusiveness and effect of judgments as between Federal and state courts,—see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478.

As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered,—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

the Commonwealth Loan & Trust Company, a corporation duly organized under the laws of the state of Kansas, recovered a judgment on December 8, 1893, in the circuit court of the United States for the district of Kansas against the corporation for the sum of \$16,136.76 debt, and \$28.45 costs of suit. Thereafter, on April 27, 1894, an execution was issued on the judgment, and after due search and diligence no property of the corporation could be found to be taken in satisfaction thereof, and it was returned wholly unsatisfied. The corporation was not a railway, religious, or charitable corporation. The defendant is a stockholder in that corporation, holding ten shares of the capital stock of the par value of \$100 each, and appearing as such stockholder on the books of the corporation. Setting forth these facts with further detail of the provisions of the Kansas Constitution and statutes, the plaintiff filed its declaration in the common pleas division of the supreme court of Rhode Island to recover a judgment for a sum equal to the amount of defendant's stock. To this [641] declaration a demurrer was filed *and sustained and judgment entered for the defendant (20 R. I. 466, 40 Atl. 341), to reverse which judgment the plaintiff sued out this writ of error.

Mr. William Reed Bigelow argued the cause and, with *Messrs. H. J. Jaquith, William J. Cronin, and John E. Conley*, filed a brief for plaintiff in error.

Mr. Walter F. Angell argued the cause and, with *Messrs. Stephen O. Edwards, Seiber Edwards, and Albert Gerald*, filed a brief for defendant in error:

It is only as evidence, and not for all purposes, that judgments of a court of another state are to have the same effect which they have at home.

Story, *Conf. Laws*, § 609; *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Accordingly, no execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or privilege or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.

Story, *Conf. Laws*, § 609; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

And, similarly, a judgment against a corporation in another state does not have the effect of supporting a bill in equity against stockholders to compel payment of their stock subscriptions, although it would have that effect in the state where recovered.

National Tube Works Co. v. Ballou, 146 U. S. 517, 36 L. ed. 1070, 13 Sup. Ct. Rep. 165.

It is hardly open to doubt, therefore, that

such a judgment does not have the same effect which it has at home to the extent of compelling the court of another state, as a matter of constitutional obligation, to enforce it against a stockholder.

***Mr. Justice Brewer** delivered the opinion [641] of the court:

This case brings to our consideration the same constitutional and statutory provisions of the state of Kansas which were before us in *Whitman v. National Bank*, 176 U. S. 559, ante, 587, 20 Sup. Ct. Rep. 477. In that case we decided that a plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, could maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock. It is unnecessary to rediscuss the questions there considered.

It remains to be determined whether the action of the supreme court of Rhode Island in failing to recognize the right which, in the case just referred to, we have held that the plaintiff possessed, is one which can be revised by this proceeding in error. In order to give this court jurisdiction of a case decided in the courts of a state there must be some question arising under the Constitution of the United States; some alleged denial of a right or immunity secured by that Constitution. The plaintiff says that the decision of the supreme court of Rhode Island denied it a right given by § 1, article 4, of the Constitution of the United States, which reads: "Full faith and credit shall be given in each *state to the public acts, records, and [642] judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof," and the following statute passed in pursuance thereof, to wit, Revised Statutes, § 905:

"The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The plaintiff's contention that these Federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The

jurisdiction, therefore, of this court, is clear. It may examine and inquire whether any right secured by these provisions was denied by the state court, though if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling as a question of general law.

[643] The Constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the "records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Such is the congressional declaration *of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States.

What, then, is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas. The law and usage in Kansas, prescribed by its legislature and enforced in its courts, make such a judgment not only conclusive as to the liability of the corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it. *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875. In that case it was said, correcting an inference which was sought to be drawn from language in the case of *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759, in respect to the effect of a judgment against a corporation (pp. 617, 618, Pac. p. 876).

"The general holding in this court has been that a judgment is final and conclusive between the parties and their privies; and we think it must be held that every stockholder in a corporation is so far privy in interest in an action against the corporation that he is bound by the judgment against it. In the absence of fraud and collusion, the judgment must be held to be final and conclusive against the stockholder if the court

rendering it has final jurisdiction. As the judgment was valid, the court committed error in allowing the defendants to go *be-[644] hind it and contest matters which were conclusively settled by the judgment against the corporation."

This representative character of the corporation has been affirmed by this court in several cases. In *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739, it was held that "in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack." This was a case in which an assessment ordered by a court which had jurisdiction of the corporation was held binding upon stockholders residing in another state; and in the opinion, on page 329, L. ed. p. 191, Sup. Ct. Rep. p. 742, it was said by Chief Justice Fuller:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

See also *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 337, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810.

Now, as the judgment rendered in the Kansas court is in that state not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other states of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured.

In *Crapo v. Kelly*, 16 Wall. 610, 619, 21 L. ed. 430, 434, referring to the statute of Congress respecting the authentication of records, it was said:

"Under this statute it has been held in this court, from an early day, that the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission *as a record. It is held that [645] the same effect is to be given to the record in the courts of the state where produced, as in the courts of the state from which it is taken."

The fact that this judgment was rendered in a court of the United States, sitting within the state of Kansas, instead of one of the state courts, is immaterial; for, as said in *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 147, 30 L. ed. 614, 617, 7 Sup. Ct. Rep. 472, 475, citing *Dupasseeur v. Rochereau*, 21

Wall. 130, 135, 22 L. ed. 588, 590; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25:

"It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority."

See also *Metcalf v. Watertown*, 153 U. S. 671-676, 38 L. ed. 861-863, 14 Sup. Ct. Rep. 947; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

We are of the opinion, therefore, that the supreme court of Rhode Island has failed to give to the judgment in the circuit court of the United States for the district of Kansas that force and effect which it has within the limits of the state of Kansas, and that the failure so to do is an error available in this court. *The judgment of the supreme court of Rhode Island must therefore be reversed*, and the case remanded for further proceedings not inconsistent with the views herein expressed.

Mr. Justice **Peckham** dissents.

[646]*ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
CITY OF CHICAGO.

(See S. C. Reporter's ed. 646-667.)

Federal question—as to impairing obligation of contract—right of railroad company to fill in and use submerged lands on lake front—condition as to consent of city council—effect of enlarging city—continuance of condition.

1. The question whether the right of a railroad company to enter upon, take, and use "lands, streams, and materials of every kind for the complete operation of the road" is impaired by a statute and ordinance prohibiting any encroachment upon or obstruction in the

NOTE.—As to title to land under water,—see note to *Goff v. Cogle* (Mich.) 42 L. R. A. 161.

As to ownership of beds of lakes and ponds,—see note to *Gouverneur v. National Ice Co.* (N. Y.) 18 L. R. A. 695.

As to right to construct piers, wharves, etc.,—see notes to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89; *Hastings v. Grimshaw* (Mass.) 12 L. R. A. 617; *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632, and *Madison v. Mayers* (Wis.) 40 L. R. A. 635.

As to construction of corporate franchise,—see note to *People v. North River Sugar Ref.* Co. (N. Y.) 9 L. R. A. 33.

As to jurisdiction of Federal over state courts; necessity of Federal question,—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered,—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

harbor of a city without permission of the commissioner of public works, may constitute a Federal question for review by the Supreme Court of the United States on writ of error to a state court.

2. Submerged lands along the shore of Lake Michigan were not included in the grant to the Illinois Central Railroad Company by its charter, authorizing it to enter upon and use "any lands, streams, and materials of every kind," and declaring that "all such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes."
3. The consent of the common council of the city, required by the charter of the Illinois Central Railroad Company to "authorize said corporation to make a location of their track within any city," is required for the location of depots, engine houses, and the necessary track approaches to the same.
4. A portion of a city subsequently included by enlarging its boundaries is subject to the provision of a railroad company's charter requiring the consent of the common council for the location of the railroad track, depots, and engine houses within the city.
5. The condition that the power of a railroad company to locate its track within a city should be exercised only with the consent of the common council must be construed as attaching to the location of railroad structures after the original construction of the road, if the power itself continues as to them.

[No. 114.]

Argued January 24, 25, 1900. Decided March 12, 1900.

IN ERROR to the Supreme Court of Illinois to review a judgment denying an injunction against interfering with the filling in and use of submerged lake front by a railroad company. *Affirmed*.

See same case below, 173 Ill. 471, 50 N. E. 1104.

Statement by Mr. Justice **Brown**:

*This was a bill in equity instituted by the Illinois Central Railroad Company in the superior court of Cook county, to obtain an injunction restraining the city of Chicago from interfering with the exercise of the right of the railroad company to fill in, for railroad purposes, certain lands submerged by the shallow waters of Lake Michigan in front of property owned by the railroad company, in fee, and situated between Twenty-fifth and Twenty-seventh streets in said city. The purpose of the railroad company in reclaiming the land was to erect thereon an engine house and locomotive stalls necessary to the operation of the road.

*The case was heard upon bill, answer, cross bill, and demurrer to cross bill, in which were set forth substantially the following facts, as recited in the opinion of the supreme court (173 Ill. 471, 50 N. E. 1104):

By an act of Congress approved September 20, 1850 (9 Stat. at L. 466, chap. 61), "the right of way through the public lands be . . . granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction

of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said state, to Dubuque, in the state of Iowa, with the right, also, to take the necessary materials, of earth, stones, timber, etc., for the construction" of the railroad. The act also granted to the state of Illinois, for the purpose of aiding and making the railroad and branches above named, every alternate section of land designated by even numbers, for six sections in width, on each side of the railroad and branches. By the act it was further provided that the railroad and branches should be and forever remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

The company was created, organized under, and now exists by virtue of, an act of the legislature of the state of Illinois approved February 10, 1851, entitled "An Act to Incorporate the Illinois Central Railroad Company" (Private Laws of 1851, p. 61), and by its charter it was authorized to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines of rail, from the southern terminus of the Illinois & Michigan Canal, to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same into Chicago, on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa. By § 3 of its charter it was provided as follows: "The said corporation shall [648] have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporations,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided; . . . *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

The bill also avers that the company constructed its line of railroad within the then 176 U. S.

limits of the city of Chicago in the year 1852, and completed its railroad between the *termini* named in its charter, in the state of Illinois, in the year 1857; that the total number of miles of its railroad in the state, upon completion, was 706; that at the time of the construction of its railroad, in 1852, into the city of Chicago, the southern limits and boundary of the city extended only to Twenty-second street; that in 1852 it constructed its line of railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, then the southern boundary of the city, and that its railroad was constructed into the city of Chicago through the waters of Lake Michigan, pursuant to an ordinance of the city; [649] that its railroad within the limits of the city was constructed on piling set in the open waters of Lake Michigan east of the shore; that between Park Row and Randolph street the distances in a direct east and west line between the shore line and the inner or west line of the piling on which the railroad of the company was constructed through the open waters of Lake Michigan varied from 5 feet at Park Row to 310 feet at Madison street, and that the depth of the water along the line of piling between the points above named varied from 2½ to 9½ feet; that the company now owns or controls by lease, and is now operating under one management, the whole of the trunk line as one continuous line from New Orleans, through the states of Louisiana, Mississippi, Tennessee, Kentucky, and Illinois, into the city of Chicago; that it controls, by lease or otherwise, under the same management, many other lateral lines in the states above named, and also in the states of Wisconsin, Iowa, Minnesota, and Dakota, which connect with and are tributary to the parent line of the company; that the number of miles now owned or controlled by the company under one management exceeds 4,600.

It is further alleged in the bill that the city of Chicago is the business center of the various lines which constitute the system owned by the company; that the business carried on over the terminal tracks and facilities of the company within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto, within said limits, are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks, and other structures, all of which are absolutely necessary as terminal facilities to enable the company to carry on and conduct its business as a common carrier of freight and passengers, and that all the tracks, structures, and appliances of its terminal facilities are necessary and essential to enable the company to carry on its business; that the business of the company as a common carrier greatly increases from year to year, and that it has so continued to increase that its terminal facilities in the city are not wholly [650] adequate for the purposes and uses prescribed and intended by its charter. The

bill sets out in detail its business and its increase from year to year, and alleges that its terminal facilities in the city of Chicago have been found to be wholly inadequate to enable the company to carry on its business; that in order to meet the increased business necessities and requirements of the company it is absolutely necessary that the company should construct, operate, and use an engine house 316 feet in diameter, and containing forty stalls, together with a machine shop, turn table, coal chute, and other structures; that it has no engine house whatever at which it is practicable for its engines to be overhauled and fitted for operation; that it has no land whatever unoccupied by other necessary tracks and structures, which is either sufficient in dimensions or suitably located, upon which to locate and construct an engine house of the necessary dimensions and capacity, with the necessary appurtenances thereto, required and necessary for the business of the company, and that in order to build such engine house and the appurtenances it is necessary to construct the same upon land covered by the shallow waters of Lake Michigan, at a point between Fifty-first street and Eighteenth street.

It is also set up in the bill that, in 1852, at the time of the construction of the road within the city of Chicago, it purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan; that in the deeds the shore of Lake Michigan was designated as the east boundary line thereof, and that the company, as owner, was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land; that in the year 1882 it constructed a breakwater or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the land which the company purchased in 1852, above referred to, the east and west line of the breakwater on the north extending from a point on the shore continuous with the northern boundary of the land conveyed to the company in 1852, and extending to a point 200 feet easterly from the shore line, running thence south-
[651]erly *a distance of 781 feet, and thence westerly to the shore line, a distance of 325 feet; that the breakwater built by the company in 1882 was constructed on two rows of piling driven into the bed of Lake Michigan, and the space between the rows of piling was filled in with stone, in order to strengthen the breakwater and enable it to withstand the force of Lake Michigan during periods of storm; that all the shore land embraced within the lines of the breakwater now is, and ever since the year of 1852 has been, owned in fee simple by the company, and that it is entitled to all the riparian rights and privileges incident to the ownership in fee of the shore land; that the superficial area of the land covered by the shallow waters of Lake Michigan lying within the lines of the breakwater and the shore line of Lake Michigan is 195,200 square feet, or 4.48 acres; that the superficial area of the ground necessary for the construction of

the engine house, machine shop, coal chute, and other necessary structures appurtenant thereto is 168,426.9 square feet, or 3.86 acres.

The bill further states, that in the year 1894 a part of the breakwater referred to as having been constructed by it in the year 1882 was destroyed by a storm on Lake Michigan; that it being necessary, to enable the company to carry on and conduct its business, that an engine house, of sufficient capacity to meet its necessary requirements and demands in conducting its business and to accomplish the objects for which the company was chartered, be constructed and erected at a reasonably suitable and proper location, and it being necessary that such engine house should be erected and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of land on the shore of Lake Michigan owned in fee simple by the company, the company caused plans to be made, as before stated, for an engine house 316 feet in diameter, and containing forty stalls or compartments, and under the power, authority, and right given and vested in the company by its charter, and in the exercise of its rights as riparian owner, it elected and determined to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan lying within the limits of *the breakwater, and to repair the
[652] breakwater, and fill in the submerged lands lying within the limits of the breakwater, for the purpose of constructing thereon said engine house and the necessary appurtenances thereto; that the breakwater does not in any way interfere with the navigation of Lake Michigan; that the Secretary of War gave his consent to the repair of the breakwater; that the commissioner of public works of the city of Chicago also gave his consent to the repair; that the company placed upon the ground large quantities of material for repairing the breakwater, the filling in of the lands covered by the shallow waters of Lake Michigan embraced within the lines thereof, and for the construction of the engine house and appurtenances thereto on the lands to be filled in; that it repaired the breakwater by driving two rows of piling, and filled in a large part of the space between the exterior and interior line of piling with stone, for the purpose of enabling the breakwater to withstand the force of Lake Michigan; that the company was prevented by the police force of the city of Chicago, acting under the orders and direction of the mayor, from completing the work; that the city of Chicago, without right or authority, interferes with and prevents the company from filling in the lands within the lines of such breakwater.

The answer of the city set up its charter and authority under an act of the general assembly of the state of Illinois, entitled "An Act to Provide for the Incorporation of Cities and Villages (Approved April 10, 1872, in Force July 1, 1872)," and the several acts amendatory thereof and supplementary thereto, and that, among other things, it was "empowered to regulate and

control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage, and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof, and that all the acts and doings complained of as done and performed *by this defendant, its officers, agents, and employees, have been done strictly in the line of its duty in that behalf for the purpose of protecting its own rights and the rights of the public generally, in the premises, so as to prevent obstructions in the harbor and the seizure and appropriation by the complainant of the bed and navigable waters of the said lake;" and also pleaded the decision of this court in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, as *res judicata* of all the questions in controversy. The cross bill prayed a counter injunction against any interference by the railroad company.

Upon a hearing upon these pleadings the superior court denied the injunction demanded by the railroad company and dismissed its bill. On appeal the supreme court affirmed this decree. 173 Ill. 471, 50 N. E. 1104. Whereupon the railroad company sued out a writ of error from this court.

Mr. William D. Guthrie argued the cause and, with *Messrs. Benjamin F. Ayer* and *James Fentress*, filed briefs for plaintiff in error.

Mr. Granville W. Browning argued the cause and, with *Mr. Charles M. Walker*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[653] ***Mr. Justice Brown** delivered the opinion of the court:

The supreme court of Illinois disposed of this case upon two grounds: (1) That the power given by the charter of the Illinois Central Railroad Company of February 10, 1851, to "enter upon and take possession of and use all and singular any lands, streams, and materials of every kind, for the location of depots and stopping stages for the . . . complete operation of said road," and the grant to said corporation of "all such lands, waters, materials, and privileges belonging to the state," did not include lands covered by the waters of Lake Michigan. (2) That, even if the grant were broad enough to include the waters of the lake, it did not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the [654] lands covered *by such waters, provided only that the navigation of the lake was not interfered with.

1. The ultimate jurisdiction of this court is invoked by the allegation of the bill that the above provision of the railway's charter

was and is an irrevocable contract between the state of Illinois and the complainant, conferring upon it "a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan for such purposes, when such use is reasonably necessary for the business of your orator; provided, that the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon;" and that "any law of the state of Illinois, or any judgment, decree, or decision of any court or tribunal thereof, which denies or in any way impairs its right to use the submerged land of Lake Michigan for the purpose of constructing and using engine houses, shops, and other buildings thereon, etc., impairs the obligation of the contract created by said charter," etc.

The answer of the city avers that, under an act of the general assembly of the state, approved April 10, 1872, it was empowered "to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage, and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof;" and that the city was also empowered to regulate its police and pass and enforce all necessary police ordinances; and that in pursuance of this authority the city council made and established an ordinance (793) that "no person or persons shall drive or place or caused to be driven or placed any pile or piles, stone, timbers, earth, or other obstruction in the harbor of the city without the permission of the commissioner of public works," etc.

This was the only authority claimed in the answer, but as all this legislation was subsequent to the charter of the railroad company, the city now sets up in support of [655] its motion, to dismiss for want of a Federal question that it was provided in § 8 of the railroad's charter of 1851 that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city," and that this section operates as a restriction upon the power of the railroad to locate its track, or other structures, depots, engine houses, or otherwise, over any lands contiguous to the city under Lake Michigan, or any other public property over which the police power of the city extends.

It is also insisted that the city had, in 1851, even greater powers over the submerged lands on its lake front under its charter than it has now; but the only support for this contention lies in an amended charter of the city of Chicago, passed February 14, 1851, four days after the charter of the Illinois Central Railroad Company was adopted. As this was a subsequent act, it is impossible to argue from it that the

police power of the city at the date of the charter was as ample as that conferred by the act of April 10, 1872, set up in the answer. The extract to which attention is called by counsel from the opinion of the supreme court of Illinois in *Illinois C. R. Co. v. Rucker*, 14 Ill. 353, 356, to the effect that under the charter of the city of Chicago the common council was empowered to regulate, control, and protect the bed and waters of the lake as a part of the city of Chicago, may have been, and probably was, based upon the act of February 14, 1851, and, in any event, is too indefinite to be made the basis of any adjudication as to the power of the common council.

We have examined the first charter of the city of Chicago, adopted March 14, 1837, and the amendments thereto, down to the charter of February 14, 1851, and find nothing prior to the last-mentioned date defining the powers of the common council over the waters of Lake Michigan adjacent to the city, or anything from which it can be argued that the authority of the common council, with respect to the harbor and adjacent waters, was as ample as that conferred by the acts [656] of the general assembly subsequent to the chartering of the railroad company.

The question then is reduced to this: Giving to the charter of the railroad company the broadest construction claimed by it (and, in determining the existence of a Federal question, we are bound to do this), may it not be reasonably insisted that, under the act of 1872 and ordinance No. 793, that "no person or persons shall drive or place or cause to be driven or placed any pile or piles, stone, timbers, earth, or other obstruction in the harbor of the city without the permission of the commissioner of public works," the right of the railroad company "to enter upon and take possession of and use all and singular lands, streams, and materials of every kind for the complete operation of the road," is impaired? We think it may. Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to contention. *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 5, 10, 43 L. ed. 342, 345, 19 Sup. Ct. Rep. 77. The claim is certainly not a frivolous one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit. Said Chief Justice Chase in *Millingar v. Hartupce*, 6 Wall. 258, 261, 18 L. ed. 829, speaking of the validity of an authority exercised under the United States: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions

against claims of authority under the United States. . . . If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist." So, in *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, we held that the bare averment of a Federal question is not always sufficient; that such averment "must not be wholly without foundation, since if it were otherwise a Federal question might be set up in almost every case, and the jurisdiction of this court invoked simply for the purpose of delay."

But as we are of opinion that the Federal question in this case was properly set up in the record, and is not destitute of merit, the motion to dismiss must be denied.

2. Upon the merits, the case turns upon the proper construction of the charter of the Illinois Central Railroad Company, granted by the general assembly February 10, 1851. As was said in the case just decided, of *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, ante, 548, 20 Sup. Ct. Rep. 393, and the prior cases therein cited, whenever a contract created by a state statute is alleged to have been impaired by subsequent legislation, it is for this court to determine the proper construction of such statute, as well as the question whether the subsequent legislation has impaired it.

The sections of the charter upon which the railroad company relies for taking possession of this property, so far as the same are pertinent to this case, are as follows:

"Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporations,' approved November fifth, *one thousand eight hundred and forty-nine; [658] and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided; . . . Provided, that nothing in this section contained shall be so construed as to authorize the said cor-

poration to interrupt the navigation of said streams."

"Sec. 8. . . . Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city."

"Sec. 10. Said corporation may construct their said road and branches over or across any stream of water, watercourse, road, highway, railroad, or canal, which the route of its road shall intersect, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. . . ."

"Sec. 15. . . . *Third.* That said company shall proceed to locate, survey, and lay out, construct, and complete said road and branches, through the entire length thereof, . . . with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan. That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turnouts, stations, equipments, and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date."

The position of the railroad company under these sections, presupposing as it does a vested, continuing, and irrevocable right for all time, to use such of the shallow waters and submerged lands of Lake Michigan as it may now or hereafter find to be necessary to the proper and complete operation of its road, and a surrender by the city of all power of interference, is certainly a somewhat startling one. It is no matter of surprise that the magnitude of the claim should have at once aroused the authorities of the city to inquire into its soundness.

[659] *Under the law of the state of Illinois, as laid down by the supreme court, not only in the case under consideration, but in the prior case of *People ex rel. Moloney v. Kirk*, 162 Ill. 146, 45 N. E. 830, "the state holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The state has no power to barter and sell the lands as the United States sells its public lands, but the state holds the title in trust in its sovereign capacity, for the people of the entire state." Such was also the ruling of this court in a case between the same parties (*Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, Affirming *Illinois C. R. Co. v. Illinois*, 33 Fed. Rep. 730). This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 21; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

But we are now asked to say that, not the 176 U. S.

state, but a railway company, is vested with a power which, in the course of time and in the increasing magnitude of its business, may enable it to do, by indirection or piecemeal, what it has been held the state could not do directly—take the whole water front of the city to the limit of navigation for the operation of the road, and that, too, without the consent and against the protest of the city. If such authority be possible, it should be granted in the clearest and most unmistakable language.

But on examining § 3 of the charter—the source of this almost unlimited power—we find that, so far from its being conferred in precise and definite words, the implication is clearly against the power claimed. In fact, it is only by a strained and unnatural construction that any intention on the part of the legislature to abdicate its authority over the submerged lands of Lake Michigan can be raised.

Referring to the particular language of the grant in that section, it is manifest that such authority must arise either from the right given "to enter upon and take possession of and use all and singular any *lands, streams, and materials of every kind,*" etc., or from the grant of "all *such lands, waters, materials, and privileges belonging to the state.*"

*We do not question the general principle [660] that the word "lands" includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Queen v. Leeds & L. Canal Co.* 7 Ad. & El. 671, 685: "Lands are not the less land for being covered with water." See also *Brockett v. Ohio & P. R. Co.* 14 Pa. 241; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *King v. Wharton*, Holt, 499; *Buckingham v. Smith*, 10 Ohio, 288; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the state does not pass title to submerged lands below high-water mark (*Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 471, 13 L. ed. 220; *United States v. Pacheco*, 2 Wall. 587, 17 L. ed. 865; *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. ed. 331, 336, 14 Sup. Ct. Rep. 548), and that this principle also applies to the Great Lakes. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838;

Scaman v. Smith, 24 Ill. 521; *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 146, 45 N. E. 830; *Revell v. People*, 177 Ill. 479, 43 L. R. A. 790, 52 N. E. 1052.

It is true, as was said by the court in *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. ed. 331, 336, 14 Sup. Ct. Rep. 548, that if either the language of the grant or long usage under it clearly indicates an intention that waters submerged by the sea shall be included, it is within the power of the sovereign to grant them. But we know of nothing in the way of constant usage with regard to these submerged waters which lends support to the argument of the railroad company that this case is within the exception, and not within the general principle, of *Shively v. Bowlby*. To make usage significant of the proper interpretation of the grant, it should

[661] *appear that it was a usage for the railroad company to appropriate such lands without the express consent of the city, but with its silent acquiescence. Undoubtedly such usage might be inferred from repeated appropriations by the railroad without objection from the city authorities. But the facts seem to be that, wherever the railroad has taken such lands, it has done so with the express consent or subsequent ratification of the state or city. Thus, the railroad originally entered the city under an ordinance adopted June 14, 1852, giving it the right "to enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section 15, and continue northerly across the open space in front of said section 15 to such grounds as the said company may acquire between the north line of Randolph street and the Chicago river, . . . upon which said ground shall be located the depot of said railroad," and express permission was given in § 3 of this ordinance to extend the railroad company's works and "fill out into the lake to a point on the southern pier not less than 400 feet west from the present east end of the same."

In *Illinois C. R. Co. v. Rucker*, 14 Ill. 353, it was held that the company had the right by its charter to locate its road over these premises, the city having consented to such location. That was an application by the railroad company for the condemnation of certain lands along the water front. The petitioner alleged that the railroad had been located and was to be constructed in the waters of the lake, along the margin, in front of the premises of the landowners, and partly over the same. One of the defenses was that the corporation had no power to locate its road in the waters of Lake Michigan, and that the premises in question were a part of the harbor of Chicago and an encroachment thereon. Counsel for the road took the position that the state had, by the express words of the charter, given to the company authority to locate its road in the waters of the lake. The opinion *is very brief, and the report of the case unsatisfactory, but the

court did hold that the company had the right by its charter to locate the road over the premises in question, the city having assented. In the case under consideration the supreme court took the view that the controversy in that case concerned only the 200-foot strip for the location of the main track; that no question was raised or decided in regard to the right of the railroad company to go beyond the 200-foot right of way, and take submerged lands for an engine house or other purposes named in the charter. This is entirely true; at the same time it is difficult to see wherein authority to take this 200-foot strip is distinguishable from an authority to take such other submerged lands as are necessary for the complete operation of the road. It is highly probable that, if the case had been presented in the light of subsequent authorities, a different conclusion might have been reached. It is sufficient to say of the *Rucker Case*, however, that the city was no party to the litigation, having expressly consented to the location of the main track, and that it is in no sense estopped by the adjudication. It was entirely competent for the supreme court in the instant case to take a different view of the law.

It would appear that, prior to 1869, other encroachments had been made upon these submerged lands, and upon April 16, 1869, the general assembly by an act condoned these encroachments, and declared that the right of the company "under the grant from the state in its charter . . . and under and by virtue of its appropriation, occupancy, use, and control . . . in and to the lands submerged," was confirmed, a procedure which seems to have been quite unnecessary upon the present theory of the railroad company that it has a perpetual right under its charter to take such submerged lands as were necessary for its complete operation. *McAuley v. Columbus, C. & I. C. R. Co.* 83 Ill. 352.

The position here taken, that the grant of the railroad company did not include the submerged lands along the lake shore, is not in conflict with the New York cases, which related *to submerged lands admittedly be- [663] longing to private parties. In the principal case, *Re New York C. & H. R. R. Co.* 77 N. Y. 248, the proceeding was for the condemnation of lands in the city of New York, along the Hudson river, a large portion of which was under water. It was held that, so far as they belonged to private parties, they might be condemned, but so far as the lands formed a part of the streets and avenues of the city, the company could not acquire title to them for the reason that they belonged to the city and were for the benefit of the public, citing *People v. Kerr*, 27 N. Y. 188. It was also held that, so far as respected the lands of private parties, the fact that they were submerged made no difference. In *Re Staten Island Rapid Transit Co.* 103 N. Y. 251, 8 N. E. 548, it appeared that the statute authorizing the formation of railroad corporations empowered them to acquire lands, under the right of eminent domain, not only from individuals, but also

from the state; but, as observed by the court in the opinion, all questions as to the right of a railroad company to acquire lands under navigable waters, as against the state, were excluded from the controversy. In the case of *Kerr v. West Shore R. Co.* 127 N. Y. 269, 27 N. E. 833, it was held that proceedings taken by the company to acquire a right of way across plaintiff's lands were effectual to vest in the company whatever title plaintiff had in the upland or in the land under the waters of the river, but it was said in the opinion to be familiar law that the shores of navigable rivers and streams, and the lands under the waters thereof, belong to the state, and may be appropriated by the state to all municipal purposes.

The grant of "waters" in the second sentence of § 3 is, as shown by the context, still less decisive of an intent on the part of the legislature to make a general grant of the waters of Lake Michigan. By the first sentence of this section power is given to the corporation to appropriate land not exceeding 200 feet in width through its entire length, and "to enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the [664] location of depots and stopping stages, *etc., for . . . the complete operation of said road;" and by the second sentence "all such lands, waters, materials, and privileges, belonging to the state, are hereby granted to said corporation for the said purposes, . . . provided that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." Obviously the words "such waters" in the second sentence is limited to the "streams" specified in the first sentence, and power was given to the railroad company to take possession of such streams for the purpose of constructing bridges, dams, embankments, excavations, station grounds, etc., upon the theory that the navigable streams of the state could not be bridged, diverted, or encroached upon except with the express authority of the state. The object of the section was evidently to confer such authority, subject, of course, to the navigation laws of the United States. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; *Illinois River Packet Co. v. Peoria Bridge Asso.* 38 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295.

The word "streams" was evidently used to denote running waters, and is wholly inapplicable to a body of water like Lake Michigan. *Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N. E. 243. That this was the intention of the legislature is also evident from the proviso of the section "that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." The use of this word "streams" was not only intended to differentiate the waters of rivers from the waters of the lake, but also has its bearing as tending to show that the word "land" was used in the sense of dry lands, or upland, as distinguished from submerged

land. It is incredible that, if the general assembly had intended to authorize the company to take possession of submerged lands, as it found it necessary or convenient so to do, it would not have employed more explicit language to that effect.

3. But even if the grant were as broad as claimed, and gave the company a right to take parcels of submerged land, as it became necessary for its railroad purposes, we are yet constrained *to hold that it could not do so [665] without the consent of the common council. The 8th section of the charter provides that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city." We see nothing in the act from which an intention can be inferred to confine this proviso to the main track of the road, and agree with the supreme court of Illinois that it included its depots, engine houses, and the necessary track approaches to the same. Such seems to have been the practical construction placed upon it by the city and the railroad company. If the position of the company, that it applies only to the main track, were sound, it would be possible for it, upon establishing the necessity for additional facilities, to locate these engine houses and work shops in localities where they would be an intolerable nuisance to the inhabitants; or perhaps miles distant from the main line to which approaches would become necessary by tracks laid through populous portions of the city, regardless of the wishes of its constituted authorities.

It is also insisted by the company that this restriction applies only to the city as bounded in 1851, at the date of the charter, and that as the southern limit of the city at that time was Twenty-second street, no such consent is now necessary to be obtained, though the boundaries of the city have long since been extended to a point below the land proposed to be taken. Had the company signified a desire to take possession of these lands before the limits of the city had been extended, it is possible that it might claim a vested right to do so, though the boundaries were subsequently enlarged; but the object of the provision was evidently for the protection of cities in general, and not for the protection of cities as they existed at the date of the charter. The road, as originally constructed, ran through an almost uninhabited country, and yet a country which gave promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the state should not have been foreseen and contemplated in this legislation. Indeed, it is impossible to suppose that the legislature intended *that the road, so far as it [666] passed through existing cities, all then insignificant, should be subject to the will of the common council, but so far as it passed through cities that might arise in the future, or existing cities whose boundaries would shortly be enlarged, it abdicated such power.

The case of *Regina v. Cottle*, 3 Eng. L. & Eq. 474, is pertinent in this connection. A

turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of Taunton, or in any other town through or into which the roads might pass or be made. It was held that the prohibition extended to the erection of a gate within the limits of a town as it existed at any time during the operation of the act, and not merely at the time when the act passed. Said Lord Campbell: "We think that the legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants, as it increased, should be exempt from the annoyance of a turnpike gate cutting off the free intercourse between neighbors in the same street. . . . This construction is fortified by the reference to 'any other town through or into which the said roads may pass,'—meant, probably, to protect the inhabitants of any new town which might spring up within the district while the act should be in force."

The case of *People ex rel. Woodhaven Gas-light Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787, is also apposite in this connection. In that case a grant by the town authorities to an incorporated gas company of a power to lay conductors "for conducting gas in and through the public streets and highways of said town," without any express limitation was held not to be restricted to existing streets and highways, but to be construed as extending to such as were subsequently enlarged, changed, or opened. In delivering the opinion the court observed: "When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege [667] may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity, or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose, and duration."

There is nothing in these cases in conflict with those of *People ex rel. Chope v. Detroit & H. Pl. Road Co.* 37 Mich. 195, and *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275, in both of which it was held that a toll gate, lawfully erected upon land which was subsequently taken into the city, could not be declared a nuisance by reason of the extension of the boundaries, and that the same could not be abated without a violation of the Constitution.

In the case under consideration, however, no invasion of the right of property is contemplated. The subjection of the railroad company to the will of the common council deprived the company of nothing it before possessed, but limited the exercise of a right which had not yet become vested and was still subject to the police power. The question is really one of the intention of the gen-

eral assembly in incorporating this provision into the charter of the company, and in view of the need of some control of this kind and the condition of the country at the time the charter was adopted, we can have no doubt whatever that the assent of the common council was intended to be required as a permanent condition. Especially is this so in view of the insistence of the railroad company that the power to appropriate these submerged lands is a continuing one. In such case the condition upon which the power should be exercised, namely, the consent of the common council, should also be construed as continuous. In other words, the railroad company cannot assert the power and in the same breath repudiate the condition.

In conclusion, we are of opinion that *the decree of the Supreme Court of Illinois was clearly right, and it is therefore affirmed.*

*COLLIS P. HUNTINGTON, as Special Receiver of the Central Land Company of West Virginia, *Appt.*,

v.

JOHN B. LAIDLEY *et al.*

(See S. C. Reporter's ed. 668-680.)

Appeal from circuit court—question of jurisdiction.

1. A direct appeal from a circuit court to the Supreme Court of the United States on the ground that the jurisdiction of the circuit court is in issue may be sustained when the final decree dismissing a bill and the order allowing the appeal therefrom, as well as the distinct and contemporaneous certificate by the court, show that the only question on which the decree was based was that of jurisdiction.
2. The dismissal by a circuit court of the United States, for want of jurisdiction, of a suit to set aside a deed as a cloud on title, cannot be justified by the fact that the matter was *res judicata* or was under control of the state court, since these matters affect the merits of the case, rather than the jurisdiction.

[No. 105.]

Argued January 18, 19, 1900. Decided March 19, 1900.

APPEAL from a decree of the Circuit Court of the United States for the District of West Virginia dismissing a bill for want of jurisdiction. *Reversed.*

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause and, with *Mr. F. B. Enslow*, filed a brief for appellant:

When defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion and to meet it by appropriate evidence.

Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

The test of exclusive jurisdiction is determined by the actual physical seizure of the property.

Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Pulliam v. Osborne*, 17 How. 471, 15 L. ed. 154; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Ex parte Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735; *Brown v. Clarke*, 4 How. 4, 11 L. ed. 850; *Peale v. Phipps*, 14 How. 368, 14 L. ed. 459; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Frceman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Riggs v. Johnson County*, 6 Wall. 166, *sub nom. United States ex rel. Riggs v. Johnson County Supers.* 18 L. ed. 768; *Lammon v. Feusier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; *Rio Grande R. Co. v. Gomila*, 132 U. S. App. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409, Fed. Cas. No. 17,775.

Messrs. Z. T. Vinson and Holmes Conrad argued the cause, and *Messrs. W. R. Thompson, W. K. Cowden, and Z. T. Vinson* filed a brief, for appellees:

The court that has first acquired jurisdiction of the action of the parties and subject-matter of the controversy retains it to the end of that controversy, to the exclusion of the process of all other courts of co-ordinate jurisdiction.

Smith v. McIver, 9 Wheat. 532, 6 L. ed. 152; *French v. Hay*, 22 Wall. 253, 22 L. ed. 858; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Riggs v. Johnson County*, 6 Wall. 196, *sub nom. United States ex rel. Riggs v. Johnson County Supers.* 18 L. ed. 776; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Ex parte Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Actual seizure of the property is not essential to give complete jurisdiction over the subject-matter after the parties litigant are before the court, whenever the transfer of the possession thereof is necessary to give ade-

quate effect to any judgment which may be rendered concerning the same.

Adams v. Mercantile Trust Co. 30 U. S. App. 204, 66 Fed. Rep. 617, 15 C. C. A. 1; *Moran v. Sturges*, 154 U. S. 283, 38 L. ed. 990, 14 Sup. Ct. Rep. 1019.

Messrs. Brown, Jackson, & Knight and *W. S. Laidley* also filed a brief for appellees.

*Mr. Justice **Gray** delivered the opinion[669] of the court:

This is a direct appeal to this court, under the act of March 3, 1891, chap. 517, § 5, from a decree of the circuit court of the United States for the district of West Virginia, dismissing for want of jurisdiction a bill in equity filed by Collis P. Huntington, a citizen of New York, as special receiver of the Central Land Company of West Virginia, a corporation of West Virginia, against John B. Laidley, a citizen of West Virginia, and against citizens of other states, to charge a tract of 240 acres of land in that state with a trust.

The question of jurisdiction, and the aspect in which it was presented to the court below, will be best understood by first giving an outline of the undisputed facts and of the proceedings in this case, as gathered from the voluminous record transmitted to this court.

On February 25, 1870, Sarah H. G. Pennybacker, a married woman, owning a tract of land of 240 acres in West Virginia, executed with her husband a deed thereof, with a separate acknowledgment by each, to Huntington, who on October 16, 1871, conveyed his title therein to the Central Land Company; and that company afterwards, and before April, 1882, sold parts of the tract to one Remley and to other persons. The sufficiency of Mrs. Pennybacker's acknowledgment was doubted; and on January 26, 1882, she, having become a widow, executed and acknowledged, in due form of law, a deed of the tract to Laidley. All those deeds were duly recorded.

In April, 1882, Laidley brought, in the circuit court of Cabell county, in the state of West Virginia, an action of ejectment against the Central Land Company to recover the tract of land; and a verdict and judgment obtained by the Central Land Company in that action were, in November, 1887, set aside and reversed by the supreme court of appeals of West Virginia, and a new trial ordered, upon the ground that Mrs. Pennybacker's acknowledgment to her first deed was defective. 30 W. Va. 505, 4 S. E. 705.

*The Central Land Company filed in the[670] county court in June, 1887, a bill in equity, and in March, 1888, an amended bill, against Laidley, Huntington, Mrs. Pennybacker, and the several grantees of the Central Land Company, alleging that Laidley obtained his deed from Mrs. Pennybacker by fraud, and held the land in trust for the Central Land Company, and should be restrained from proceeding with the action at law. The county court dismissed that bill, and its decree was affirmed in February, 1889, by the

supreme court of appeals. 32 W. Va. 134, 3 L. R. A. 826, 9 S. E. 61.

In September, 1890, the action of ejectment of Laidley against the Central Land Company (proceedings in which had been stayed to await the decision in the equity suit) was tried again in the county court, and a verdict and judgment returned for Laidley. A petition for a writ of error to review that judgment was afterwards denied by the supreme court of appeals; and on March 26, 1891, the county court issued a writ of possession in favor of Laidley. A writ of error from this court to the supreme court of appeals was sued out by the Central Land Company on July 7, 1891, and was dismissed by this court for want of jurisdiction on June 3, 1895. 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

In November, 1883, Laidley brought in the county court separate actions of ejectment against Remley and the other persons who had taken deeds from the Central Land Company of parts of the tract of 240 acres. In each of those actions, the defendant filed a claim for improvements, and Laidley (pursuant to the provisions of the Code of West Virginia of 1891, chap. 91, §§ 10-13) elected to allow the improvements, and on September 10, 1890, took judgment for the value of the lot recovered, with an order for its sale, instead of a judgment for the possession of the land, and for the transfer of the title. On December 15, 1890, the court appointed special commissioners to make the sales. On October 21, 1897, the court substituted, instead of those commissioners, William R. Thompson, and he advertised the lots for sale.

[671] Meanwhile, on November 11, 1890, Huntington and others, *stockholders in the Central Land Company, had filed in the circuit court of the United States a bill in equity against the company to wind up its affairs, because its charter was about to expire; and on the same day the court appointed Frank B. Enslow temporary receiver to take possession of all its property. On December 16, 1890, Enslow reported to the court that he had taken possession of all the property of the company, including the tract of 240 acres; and the court appointed Huntington special receiver, and directed Enslow to turn over all its property to him, which was accordingly done.

On February 28, 1891, Huntington, as such special receiver, filed in the circuit court of the United States against Laidley, and against sundry persons claiming under grants from him, the bill in the present case, which set forth the conveyances from Mrs. Pennybacker to Huntington, from him to the Central Land Company, from that company to Remley and others, from Mrs. Pennybacker to Laidley, and from him to the other defendants, and the appointment of Huntington as receiver; alleged that the deed from Mrs. Pennybacker to Huntington was duly acknowledged by her, and was valid; and that Laidley's acts, in obtaining the later deed from her to himself, and in conveying parts of the land to other persons,

were in fraud of the rights of the Central Land Company, and created a cloud upon the title of that company and of those claiming under it; and prayed for an injunction against the defendants from interfering with the plaintiff's possession of the tract of 240 acres, and from doing any act tending to affect his title, or to cast a cloud upon it, and from proceeding to enforce any claim to, or taking possession of, or making any sales of, any of the lots sold by the Central Land Company; and further prayed that the deed from Mrs. Pennybacker to Laidley, and his deeds to the other defendants, be declared void. On the filing of the bill, a temporary injunction was issued as prayed for.

On January 12, 1892, a demurrer by Laidley to this bill, and a motion by him to dissolve the injunction, were both overruled.

*On January 26, 1894, the plaintiff filed an [672] amended bill in this cause, repeating the allegations and prayers of the original bill; and further alleging that, by reason of certain facts fully and specifically set forth, and alleged to have been discovered by the plaintiff since he filed the original bill, the acts of Laidley in procuring the deed to himself from Mrs. Pennybacker were done while he stood in a confidential relation to Huntington, and were fraudulent as against Huntington and the Central Land Company; and also alleging that, if the legal title passed to Laidley by his deed from Mrs. Pennybacker, he and his grantees held the legal title in trust for the plaintiff and the grantees of the Central Land Company; and therefore praying that the defendants might be decreed to convey the lands, so held by them respectively, to Huntington as receiver of the Central Land Company, and to the grantees of that company.

On February 26, 1896, Laidley and the other defendants filed a plea and answer in which they denied the allegations of the bill; set up by way of estoppel the judgments in the state courts in favor of Laidley and against the Central Land Company, in the action of ejectment, and in the suit in equity, between them; and claimed to be allowed the amounts awarded to Laidley in his actions of ejectment against Remley and others.

On December 26, 1896, the plaintiff was allowed to further amend his bill in particulars which need not be stated; and the defendants filed the same plea and answer to the bill as so amended.

On July 12, 1897, the court, upon a hearing of the parties, adjudged that "said plea of *res judicata*" be overruled; and gave the defendants leave to answer the bill; and denied motions of the defendants to dissolve the injunction, and to remove Huntington from the office of receiver.

On July 13, 1897, Laidley filed another plea and answer, setting up, in different form, substantially the same defenses as in the former plea and answer. On September 4, 1897, the other defendants filed an answer to that bill; and the plaintiff obtained an order on Laidley, returnable January 10, 1898, to show cause why his new plea and

[673] answer should not be stricken *from the files as irregular. On October 4, 1897, the plaintiff filed a general replication to the answer of the other defendants.

On December 17, 1897, Huntington, as plaintiff in the case at bar, filed a petition in the circuit court of the United States for a rule against Laidley and against his attorneys, Z. T. Vinson and William R. Thompson, to show cause why they should not be fined and attached for contempt in violating the injunction granted by that court in February, 1891, by undertaking to sell the lots described in Laidley's actions of ejectment against Remley and others. On December 20, 1897, Laidley and Thompson filed answers to this rule, and annexed thereto as exhibits copies of the proceedings in those actions of ejectment.

On December 20, 1897, on motion of the plaintiff, the court extended the time for taking the testimony in the cause until ninety days after the hearing on the motion to strike out Laidley's plea and answer.

On March 3, 1898, the rule for an attachment for contempt was argued. On June 25, 1898, the court entered an order discharging that rule, because, as the order stated, the court found that the circuit court of Cabell county, West Virginia, had taken jurisdiction of the parties and the subject-matter, prior to the institution of this suit, and the cause was still pending in that court, and therefore the circuit court of the United States had no jurisdiction to grant the injunction restraining the sale of the property under decrees of the state court.

On the same day, and without any further hearing in the cause, the court, of its own motion, entered a final decree, as follows: "This cause having come on this 25th day of June, 1898, to be considered by this court upon a petition filed by the complainant herein on the 17th day of December, 1897, praying that a rule be issued requiring that John B. Laidley, one of the defendants herein, and his attorneys, Z. T. Vinson and W. R. Thompson, should appear and show cause why they should not be fined and attached for contempt for violating the injunction order heretofore entered in the above-entitled cause, and upon the answer and exhibits

[674] attached thereto of the said *defendant, John B. Laidley, to said petition, and upon the answers and exhibits attached thereto of his attorneys, Z. T. Vinson and W. R. Thompson, thereto, and upon the bill and the answers to said bill; and the court having considered the matter, and having duly examined the bill and amended bills herein, and the answers of the defendant and the exhibits attached thereto, and the records in the ejectment suits in the circuit court of Cabell county, in which John B. Laidley was plaintiff and the Central Land Company of West Virginia and others were defendants, and the record in the chancery cause in the circuit court of Cabell county, in which the Central Land Company of West Virginia was plaintiff and John B. Laidley and others were defendants, which said records in said state court actions were not disputed or de-

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nied by the complainant; and it appearing from such examination to the satisfaction of this court, upon consideration thereof, that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, because of the pendency in the state court, prior to the commencement of this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, which was begun in the circuit court of Cabell county, West Virginia, on the first Monday of April, 1882, and of the other actions in ejectment brought in said state court by the said John B. Laidley as plaintiff in relation to the property in question in this suit, prior to the commencement of this cause, and of the chancery cause in said state court in which the Central Land Company of West Virginia was plaintiff and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause; and this court being therefore, for the aforesaid reason, of the opinion that it is required to dismiss this suit by the 5th section of the act of Congress, approved March 3, 1875, and entitled 'An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for Other Purposes,' it is now, therefore, on this court's own motion, adjudged and decreed that this suit and the bill and amended bills therein be, and *they hereby [675] are, dismissed and stricken from the docket of this court, without costs."

On the same day, the following proceedings took place, and were filed in the circuit court of the United States, namely: The plaintiff presented a petition for an appeal from that decree to this court, under the act of March 3, 1891, chap. 517, § 5, alleging that he was aggrieved by the final decree by which the circuit court of the United States, notwithstanding that it had the first actual physical possession of the land involved in this cause, dismissed the suit on the ground that it had no jurisdiction thereof, because of the pendency of the suits in the state court, begun prior to the commencement of this cause. And the district judge signed an order "that the appeal be allowed as prayed for," approved an appeal bond, and signed a citation to the appellees, as well as a certificate in these terms: "A final decree having been entered herein on the 25th day of June, 1898, dismissing this suit and the bill and amended bills therein: Now therefore this court, in pursuance of the second paragraph of the fifth section of the act of Congress, approved March 3, 1891, and entitled 'An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes,' hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause as follows: Is this court without jurisdiction of this cause, because of the pendency in the state court, prior to the commencement of

this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, which was begun in the circuit court of Cabell county, West Virginia, on the first Monday in April, 1882, and of the other actions in ejectment brought prior to this cause in said state court by the said John B. Laidley as plaintiff in relation to the property in question in this suit, and of the chancery cause in which the Central Land Company of West Virginia was complainant and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause?"

[676] *The appeal in this case is taken under that clause of the act of March 3, 1891, chap. 517, § 5, which provides that appeals or writs of error may be taken from the circuit court of the United States directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." 26 Stat. at L. 827.

The appellees have moved to dismiss the appeal, upon the ground that the decree of dismissal involved the consideration and determination of the legal effect and conclusiveness of the several judgments and decrees of the state courts, and therefore the appeal should have been to the circuit court of appeals, and not to this court; and upon the further ground that the district judge could not certify a question decided by the circuit judge, or allow an appeal from his decree.

In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Davis v. Geissler*, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796. In the case at bar it appears in both ways.

The final decree of the circuit court of the United States recited that, at the hearing upon the petition for a rule for an attachment for contempt, the court examined the bill and amended bills and the answers thereto, and the undisputed records of the suits in the state court; and that from such examination it appeared to the satisfaction of the court that this suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, because of the pendency of those suits in the state

court, and for that reason the court was of opinion that it was required by § 5 of the act of March 3, 1875, chap. 137, to dismiss the suit; *and it was therefore, upon the court's own motion, adjudged and decreed that the suit be dismissed. The act of March 3, 1875, chap. 137, § 5, referred to in that decree, provides that if, in any suit commenced in a circuit court of the United States, it appear to the satisfaction of that court, at any time after the suit is brought, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," that court shall dismiss the suit. 18 Stat. at L. 472. And such dismissal for want of jurisdiction is reviewable by this court under the act of March 3, 1891, chap. 517, § 5. *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293. The final decree, therefore, clearly shows that the question decided below was a specific question of jurisdiction only. This dismissal of the suit for want of jurisdiction was the only ground assigned for the appeal; and the appeal was allowed "as prayed for."

The same question is also distinctly stated in the certificate made and filed by the district judge on the same day on which the final decree was entered, and on which he allowed the appeal and signed the citation. It does not appear from the record, and is immaterial, whether the final decree was rendered by the circuit judge or by the district judge. The district judge was a judge of the circuit court of the United States, and as such had authority to allow the appeal and to sign the citation, even if the decree was rendered by the circuit judge. Rev. Stat. §§ 999, 1012; *Rodd v. Heartt*, 17 Wall. 354, 21 L. ed. 627. We can have no doubt that the district judge, who as a judge of the circuit court lawfully allowed the appeal and signed the citation, was authorized also to certify to this court the question of jurisdiction determined by that decree.

The question of jurisdiction then, appearing by the decree itself and by the order allowing the appeal therefrom, as well as by the distinct and contemporaneous certificate, to have been the only question on which the decree below was based, is rightly before this court for determination.

The condition of the cause, at the time when the circuit court of the United States entered a final decree dismissing it for want of jurisdiction, was as follows: An injunction *had been granted upon the filing of the bill. The court had overruled a demurrer to the bill, as well as a plea of all the defendants setting up the judgments in the state courts as *res judicata*; and had given leave to the defendants to answer the bill. Thereupon the defendant Laidley filed a plea and answer setting up substantially the same defenses as before; and the plaintiff obtained an order to show cause why this plea and answer should not be stricken out as irregular. The other defendants answered the bill, and the plaintiff filed a general replication to their answer. The court extended the time for taking testimony in

the cause until ninety days after hearing the motion to strike out Laidley's plea and answer. That motion was never heard; the time allowed for taking testimony had not expired; and the cause was not heard, or ready to be heard, as between the plaintiff and any of the defendants, except upon a rule (which had been obtained by the plaintiff and argued by both parties) for an attachment against Laidley and his attorneys for contempt in violating the injunction previously granted. Yet the court not only discharged the rule for an attachment for contempt, but at the same time, of its own motion, and without any further hearing of the cause, or of any matter therein, entered the final decree dismissing the suit for want of jurisdiction. This action of the court was irregular. The defendant, as the case stood, was not entitled to present any objection to the jurisdiction of the court over the principal cause; and the plaintiff was entitled to be heard upon any such objection taken by the court of its own motion. *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 315, 327, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; *Wetmore v. Rymmer*, 169 U. S. 115, 122, 123, 42 L. ed. 682, 684, 685, 18 Sup. Ct. Rep. 293.

Independently of that consideration, the decree dismissing this suit for want of jurisdiction was erroneous. It may be that the order discharging the rule for an attachment for a contempt in violating the injunction by proceedings under orders of the state court was correct. *Rev. Stat. § 720; Diggs v. Wolcott*, 4 Cranch, 179, 2 L. ed. 587; *Riggs v. Johnson County*, 6 Wall. 166, 195, *sub nom. United States ex rel. Riggs v. Johnson County Supers.* 18 L. ed. 768, 776; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 460, 42 L. ed. 807, 817, 18 Sup. Ct. Rep. 403. But it by no means follows that the circuit [679] court of the United States had no jurisdiction to entertain this suit for any purpose.

Before the commencement of the present suit, all the proceedings between Laidley and the Central Land Company in the state court, which affected the whole tract of 240 acres, had been brought to an end—Laidley's action of ejectment against the Central Land Company, by a judgment and a writ of possession in Laidley's favor, and the Central Land Company's bill to restrain Laidley from proceeding with that action, by a decree dismissing the bill. And Laidley's proceedings in ejectment in the state court against Remley and others concerned only the legal title in parts of the tract of 240 acres.

The present suit seeks to charge the whole tract with a trust in favor of the plaintiff as receiver of the Central Land Company. Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense—either by way of *res judicata*, or because of any control acquired by the state court over the subject-matter—to this bill in the circuit court of the United States, was not a ques-

tion affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The circuit court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case.

In any aspect of the case, the decree of the circuit court of the United States, dismissing the suit for want of jurisdiction, must be reversed, and the cause remanded to that court for further proceedings therein.

The case of *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497, cited by the appellees, has no tendency to support the opposite conclusion. In that case, this court dismissed the appeal, because the decree below was not founded solely upon a want of jurisdiction in the circuit court of the United States, but also upon the *grounds that the plaintiff's remedy [680] was at law and not in equity, and that certain judgments of the state courts could not be reviewed on the reasons put forward. And of the last ground this court, speaking by the Chief Justice, said that it "was not in itself a decision of want of jurisdiction, because the circuit court was a Federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts." 173 U. S. 507, 43 L. ed. 785, 19 Sup. Ct. Rep. 499.

Decree reversed, and cause remanded for further proceedings.

Mr. Justice **Brewer** dissents:

I dissent from the opinion and judgment in this case. In a purely technical sense it may not be open to criticism. But when, as disclosed, it appears that in the state courts by final determinations, beyond any opportunity of review, the legal and equitable title to the tract in controversy has been adjudged to be in Laidley (even if there be question of the correctness of those decisions), it seems to me that under the act of March 3, 1875, referred to in the opinion of the majority, the Federal court not only may rightfully, but also should, hold that whatever may be the state of the pleadings the litigation in that court must stop. Of course, everybody knows that when there has been in separate actions in courts of law and equity final determination as to both the legal and equitable title there is no excuse for further litigation, and I think that we sacrifice substance to form when we hold that the Federal court should not, when these facts are disclosed, act promptly, but must wait until the issues presented by pleadings have been attempted to be supported by testimony and the case is ready for final hearing. *Interest reipublicæ ut sit finis litium.*

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[681]*COUNTY OF COCONINO, *Appellant*, v. COUNTY OF YAVAPAI. [No. 110.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Edward M. Doe for appellant. No counsel for appellee.

January 29, 1900. Decree affirmed with costs, on the authority of *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183.

EDWARD S. DREYER, *Appellant*, v. JAMES PEASE, Sheriff, etc. [No. 117.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Levy Mayer for appellant. Mr. Charles S. Deneen for appellee.

January 29, 1900. Order affirmed with costs, on the authority of *Markuson v. Boucher*, 175 U. S. 184, ante, 124, 20 Sup. Ct. Rep. 76; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805, and cases cited.

KITTANING COAL COMPANY, *Appellant*, v. J. L. ZABRISKIE *et al.*, Executors, etc. [No. 120.]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Mr. John B. Uhle for appellant. Messrs. Henry P. Wells and Henry Crofut White for appellees.

January 29, 1900. Dismissed for want of jurisdiction, on the authority of *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, and *Blythe v. Hinekley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

FARMERS' NATIONAL BANK OF ARKANSAS CITY, KANSAS, *Plaintiff in Error*, v. GEORGE W. ROBINSON, Receiver, etc. [No. 191.]

In Error to the Supreme Court of the State of Kansas.

Messrs. E. L. Hamilton and Carroll L. Swarts for plaintiff in error. Messrs. John C. Pollock and F. C. Bryan for defendant in error.

[682] *March 5, 1900. Judgment affirmed with costs, on the authority of *Conde v. York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234, and *Leyson v. Davis*, 170 U. S. 36, 43 L. ed. 939, 18 Sup. Ct. Rep. 500.

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NEW YORK LIFE INSURANCE COMPANY, *Petitioner*, v. FRANK E. DINGLEY, Administrator, etc. [No. 325.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. E. J. McCutchen, Charles Page, G. W. Hubbell, G. H. Durham, and F. D. McKenney for petitioner. Mr. Henry P. Blair for respondent.

January 15, 1900. Denied.

MECHANICS' SAVINGS BANK, *Petitioner*, v. FIDELITY INSURANCE, TRUST, & SAFE DEPOSIT COMPANY, Administrator, etc. [No. 463.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Russell Duane for petitioner. No opposition.

January 15, 1900. Denied.

ANNIE T. BOWEN, *Petitioner*, v. NEEDLES NATIONAL BANK *et al.* [No. 440.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Walter S. Carter for petitioner. Mr. Henry C. Dillon for respondents.

January 15, 1900. Denied.

TURRET STEAM SHIPPING COMPANY (LIMITED), Claimant, etc., *Petitioner*, v. A. G. HALL *et al.* [No. 484.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

January 15, 1900. Granted.

FARMERS' LOAN & TRUST COMPANY, *Petitioner* v. W. H. WHITEHEAD *et al.* [No. 485.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. E. O. Wolcott and Joel F. Vaile for petitioner. Mr. John F. Shafroth for respondents.

January 15, 1900. Denied.

MCCORD LUMBER COMPANY *et al.*, *Petitioners*, v. FRANK L. DOYLE. [No. 494.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. A. L. Sanborn for petitioners. Mr. Thomas J. Davis for respondent.

January 22, 1900. Denied.

[683] *P. J. WILLIS & BROTHER *et al.*, *Petitioners*, v. F. A. RICE *et al.* [No. 311.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Eugene Williams and George Clark for petitioners. Mr. John G. Winter for respondents.

January 29, 1900. Denied.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, *Petitioners*, v. DENVER & RIO GRANDE RAILROAD COMPANY. [No. 502.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Henry T. Rogers, L. M. Cuthbert, and A. H. Joline for petitioners. No opposition.

January 29, 1900. Denied.

CHARLES DENNEHY & CO. *et al.*, *Petitioners*, v. JOHN McNULTA, Receiver, etc. [No. 155.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. M. Salomon for petitioners. No opposition.

February 5, 1900. Denied.

PEOPLE OF THE STATE OF ILLINOIS *ex rei*, GEORGE HUNT, Attorney General, *Petitioner*, v. ILLINOIS CENTRAL RAILROAD COMPANY *et al.* [No. 516.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[684] *Mr. E. C. Akin and John H. Hamlin for petitioner. Mr. John N. Jewett for respondents.

February 26, 1900. Denied. Announced by Mr. Justice Harlan. (THE CHIEF JUSTICE took no part in the consideration or decision of this petition.)

OBERLIN M. CARTER, *Petitioner*, v. BENJAMIN K. ROBERTS. [No. 513.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. A. J. Rose and L. Laflin Kellogg for petitioner. The Attorney General and the Solicitor General for respondent.

February 26, 1900. Denied. (Mr. Justice McKenna took no part in the consideration and disposition of this application.)

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LAMPORT & HOLT, Owners, etc., *Petitioners*, v. JOHN J. KING. [No. 515.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Frank D. Sturges for petitioners. Mr. Wm. C. Beecher for respondent.

February 26, 1900. Denied.

WILLIAM G. PETERS, *Petitioner*, v. UNITED STATES. [No. 519.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. W. H. Pritchard and F. D. McKenney for petitioner. Solicitor General Richards for respondent.

March 5, 1900. Denied.

INTERNATIONAL NAVIGATION COMPANY, *Petitioner*, v. FARR & BAILEY MANUFACTURING COMPANY. [No. 509.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

March 5, 1900. Granted.

FRED A. MAYNARD, Attorney General, etc., *Petitioner*, v. GRANITE STATE PROVIDENT ASSOCIATION *et al.* [No. 510.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

March 5, 1900. Granted.

HENRY M. BAKER, *Petitioner*, v. HORACE S. CUMMINGS. [No. 535.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

March 5, 1900. Granted.

*FRED A. McMASTER, Administrator, etc., *Petitioner*, v. NEW YORK LIFE INSURANCE COMPANY. [No. 523.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

March 12, 1900. Granted.

BETHLEHEM IRON COMPANY, *Petitioner*, v. JOHN WEISS. [No. 548.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. F. P. Prichard and John G. Johnson for petitioner. Mr. George Demming (by leave) for respondent.

March 12, 1900. Denied.

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OREGON RAILROAD & NAVIGATION COMPANY
et al., *Petitioners*, v. ROBERT BALFOUR *et*
al. [No. 486.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Mr. A. B. Browne for petitioners. No op-
position.

March 19, 1900. Denied.

WESTINGHOUSE AIR BRAKE COMPANY, *Peti-*
tioner, v. NEW YORK AIR BRAKE COMPANY
et al. [No. 539.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Messrs. Thomas B. Reed, F. H. Betts, and
George H. Christy for petitioner. Messrs.
F. P. Fish, John C. Spooner, and Charles
Neave for respondents.

March 19, 1900. Denied.

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THOMAS A. HAMILTON *et ux.*, *Petitioners*, v.
J. GURNEY FOWLER *et al.* [No. 538.]

Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Sixth Circuit.

Messrs. William M. Randolph and T. B.
Turley for petitioners. No opposition.

March 19, 1900. Denied.

WILLIAM P. LANDON, *Petitioner*, v. JUSTUS
L. BULKLEY *et al.* [No. 526.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Edward Winslow Paige for petitioner.
Messrs. John E. Parsons, O. N. Bovee, Jr.,
and James L. Bishop for respondents.

March 19, 1900. Denied. Announced by
Mr. Justice Gray. (THE CHIEF JUSTICE
took no part in the consideration and dispo-
sition of this application.)

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1899.

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THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1899.

[1]*FELIX JELLENIK, George Shiras, 3d, C.
C. Dickey, Trustee, *et al.*, Appts.,
v.

HURON COPPER MINING COMPANY, J.
C. Watson, *et al.*

(See S. C. Reporter's ed. 1-14.)

*Actions—bringing in parties—shares of
stock as personal property.*

1. Shares of stock in a Michigan corporation, being by the laws of that state deemed personal property, must be so considered within the meaning of the act of Congress of March 3, 1875, authorizing an order to bring in absent defendants who are not inhabitants of or found within the district in a suit to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought.
2. The law of a state making shares of corporate stock personal property should be enforced by a circuit court of the United States sitting in that state, as part of the law of the state in respect of corporations created by it.

[No. 100.]

*Argued and Submitted January 16, 1900.
Decided March 12, 1900.*

APPEAL from a decree of the Circuit Court of the United States for the Western District of Michigan dismissing a bill for want of jurisdiction over indispensable parties. *Reversed.*

See same case below, 82 Fed. Rep. 778.

NOTE.—As to state laws as rules of decision in Federal courts—see notes to *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Wilson v. Perlin.* 11 C. C. A. 71; *Hill v. Hite,* 29 C. C. A. 553.

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Statement by Mr. Justice Harlan:

*This is an appeal from a decree of the circuit court of the United States for the western district of Michigan dismissing the bill of the plaintiffs, appellants here, for want of jurisdiction over some of the defendants who were held to be indispensable parties to the suit. [2]

The case made by the bill is as follows: The plaintiffs are stockholders of the Huron Copper Mining Company and citizens of other states than Michigan. The company is a Michigan corporation, the mines operated by it, all its other property, and its principal offices for business being at Houghton, Michigan, with a branch office at Boston, Massachusetts.

During the transactions complained of in the bill, the board of directors of the company, whose members are the other defendants in this suit, were J. C. Watson, D. L. Demmon, Samuel L. Smith, H. J. Stevens, and Johnson Vivian. Watson, Demmon, and Stevens (the last-named having since died) were residents of Boston, Watson being president and Demmon secretary and treasurer of the company. They had charge and control of the branch office in Boston. Smith resided at Detroit, Michigan, but was frequently in Boston. Vivian resided at Houghton, Michigan, and was for many years the general manager of the mining operations and the business of the company at its mining location in Houghton county. Smith and Vivian disclaimed any connection with the alleged fraudulent transactions set forth in the bill, but were put upon their proof by the plaintiffs as to the matters stated therein.

In June, 1890, the board of directors made an assessment upon the capital stock of the company of \$5 per share *payable on July 7th of that year. Notice of the assessment was [3]

given to the stockholders, accompanied by the statement that it would be sufficient to pay off all the indebtedness of the company and leave a cash balance in its treasury of over \$30,000 in addition to the unsold copper and other personal property of the company.

It was alleged that upon receiving the amount of the assessment, \$200,000, the board of directors, for the purpose of defrauding the plaintiffs and other stockholders, applied a portion of it to the payment of spurious debts of the company, and wasted and misapplied another large portion, diverting it from the treasury of the company and from the purpose for which it was made, and applying it to the personal uses of the directors and officers of the company and their confederates.

On October 25, 1891, the board of directors made another assessment upon the stock of the company of \$3 per share, which aggregated \$120,000. This assessment was made without the knowledge of the stockholders and at a time when, as appeared from the statement of the board, there were sufficient assets of the company, exclusive of its mines and mining property, to pay all its legal debts.

The bill charged that the board of directors or their representatives had disposed of the stock held by them before the making of the above assessments, and were the holders of none or at least a very small portion, except as they held stock purchased at a sale to be presently referred to as trustees for the plaintiffs and other stockholders, so that they had but a nominal, if any, interest in the company; that they had so manipulated the assessments as to enable them to speculate in the stock of the company to the detriment of the stockholders; that they had contracted fraudulent debts by means of false and illegal salaries, allowances, and commissions to themselves, by making fraudulent contracts for the company at extravagant prices, and by borrowing large sums of money for the company at usurious interest, in which contracts and usurious loans the directors and their confederates were interested as *contracting parties with the company; that while acting as directors and trustees for the stockholders they had betrayed their trust and mismanaged the affairs of the company for their own profit and advantage; and that for many years they had continued the mining of copper at an apparent loss by reason of such fraudulent practices and mismanagement and by false statements concealed the same from the stockholders.

On November 1st, 1891, the plaintiff Jellenik, acting for himself and as attorney for several of the plaintiff stockholders, applied to Watson and Demmon for leave to examine the books of the company for the purpose of determining the true state and condition of its affairs, but the demand was refused; and for that reason Jellenik refused and advised his clients to refuse to pay the \$3 assessment.

On February 9, 1892, the assessment of \$3 not having been paid, a sale of the stock was made by order of the directors at the office of

the company in Boston. The sale took place in the private office of the defendant Demmon, the secretary and treasurer of the company. No one was present but the plaintiff Edwards and three other persons, besides the officers and directors of the company and their clerks. The directors or their clerks did all the bidding on the stock, except the bids made for twenty shares, ten of which were purchased for each of the plaintiffs Dickey and Kennedy, trustees. One of the clerks in the office of the company bid in 2,725 shares, and Watson, the president of the company, took 38,315 shares. The total number of shares sold was 41,060, or 1,060 more than the company possessed, its capital stock being 40,000 shares.

Notwithstanding the assessment of \$5 and thesecond assessment of \$3, which weremade upon notice to the plaintiffs and other stockholders that they would not only be ample to pay all the indebtedness of the company, but would leave its property free and clear, with a large balance in the treasury, and notwithstanding the defendants Watson and Demmon, in making the sale of the stock under the \$3 assessment, required Dickey and Kennedy, trustees, and other stockholders not in conspiracy with the defendants, to pay the *full amount of the assessment on [5] such sale, Watson and Demmon, the bill charged, either fraudulently sold the stock upon that sale to themselves individually or to their fellow conspirators for a mere pittance, without realizing the assessment thereon, or they realized the money and squandered it and allowed the indebtedness of the company to be put in judgment in Houghton county, Michigan, with the fraudulent intent through and by that means to buy in and absorb the property and render valueless the stock of the plaintiffs.

In carrying out this scheme, it was alleged that the directors permitted judgments to be taken against the company for \$180,230.08, of which amount \$106,251.84 was a judgment by the defendant Demmon to himself, growing out of illegal transactions with himself as a director and officer. All the judgments were obtained on the same day, December 30, 1891, by consent between the attorneys appearing for the company and those for the judgment creditors, Demmon's judgment having been fraudulently procured by using his power and influence to prevent any investigation as to the honesty and legality of his claim.

All of the judgments, except the one procured by Demmon, were assigned to J. B. Sturgis, trustee, of Houghton, Michigan, and on May 7, 1892, the mining property of the company was sold under the judgments so assigned to Sturgis and a certificate of sale given him by the sheriff of Houghton county. On August 21, 1893, the sheriff of that county, in pursuance of the certificate of sale, executed a sheriff's deed of the property to Sturgis. This deed was duly recorded August 24th, 1893, and so far as the records showed, no transfer of title to the property had since been made by Sturgis.

It was alleged that the purpose of making

[6] the fraudulent assessment and pretended sale of stock was to exclude the plaintiffs and other stockholders from any right of inquiry into the affairs of the company; that the purpose of the directors and officers in causing the property of the company to be seized and sold by legal process for spurious and fraudulent debts was to extinguish the title of the corporation and of its stockholders to the mining property and to vest the same in *the directors and their confederates; and that the pretended sale of stock was made in defiance of the protest of the plaintiffs and other stockholders of the company and upon notice given to the directors, at the time and place of the sale of the stock, of the fraudulent character of the assessment and of the proposed sale, like notice being given to all purchasers before the making of the sale.

It was stated in the bill that on September 15th, 1892, the plaintiffs filed in the court below a bill similar to the one herein. A plea and demurrer were interposed by Watson, and upon a hearing had thereon by consent, the court held that the bill was defective in its jurisdictional allegations and declined to proceed further until one was filed having proper allegations and giving it jurisdiction to act.

The present bill contained this paragraph:

"Your orators allege that the shares of stock in the said defendant company are personal property, and its location is where the company is incorporated and nowhere else, and that the *locus in quo* of the stock of the defendant company has been since its incorporation at Houghton county, Michigan, that being its principal office for business and place of incorporation, and this bill is filed to remove any encumbrances, lien, or cloud upon the title of your orators in said personal property thus located caused by the fraudulent acts of the defendants, as herein alleged, and for such other and further relief as the nature of the case shall require."

The plaintiffs also averred that they filed their bill in their own behalf because the company, acting fraudulently through its board of directors, and controlled particularly by the defendants Watson and Demmon, refused them any information with regard to its affairs or to allow them to see the books or to procure a statement therefrom, and because there was no other mode of relief, as there were no agents of the company authorized to act for the relief of stockholders, except the defendants thus fraudulently conspiring to break down and ruin its stock.

[7] The relief asked was that a receiver be appointed to take possession of all the property and assets of the company, wind *up its business, and make sale of its property; that the directors and officers, their agents, servants, attorneys, and representatives, be restrained and enjoined from in any manner intermeddling with the property and business of the company, from levying upon, attaching, seizing by execution, or selling, or causing to be levied upon, attached, seized by execution, or sold, any of the property of the company, and from prosecuting by any

mesne or final process any claim or claims whatever against the company, and also from canceling any of the stock of the plaintiffs as set forth and described in the bill, and issuing new stock therefor to the pretended purchaser thereof under the pretended sales for delinquent assessment, and if such cancelation had been attempted by the defendants or any of them, and new certificates issued therefor to the defendants or any of them or their confederates, that they be restrained from further transferring the same upon the books of the company until the final order of the court; that an account might be taken under the direction of the court of the loss occasioned to the company and its stockholders by means of the covin, breach of trust, mismanagement, and neglect of duty, and embezzlement of the directors and their confederates, and of the profits made by the directors and officers, or any of them, and of their confederates, or any of them, by means of such covin, deceit, fraud, unlawful confederacy, conspiracy, and misappropriation of assets, and that the directors and officers and every of them be ordered and decreed to pay over to such receiver or the court the entire sum or sums so ascertained; that the court might adjudge and decree that the pretended sale made on the 9th day of February, 1892, was a nullity, and passed no title to any of the stock, that Watson and Demmon and their codirectors and confederates be adjudged to hold the stock which they pretended to acquire at such sale in trust for the plaintiffs and other stockholders of the company, and that the latter then held respectively in the company the respective shares of stock which they held prior to the date of the sale, and that by the decree of the court any cloud upon the title of such stock of the plaintiffs might be removed therefrom; and that such other and further relief be granted as the *exigencies [8] of the case might require and to the court should seem meet in the premises.

Such was the case made by the averments in the bill.

Mr. F. O. Clark argued the cause and filed a brief for appellants.

Mr. T. L. Chadbourne submitted the cause for appellees.

Contentions of counsel sufficiently appear in the opinion.

***Mr. Justice Harlan**, after stating the [8] facts, delivered the opinion of the court:

Process was served upon the Huron Copper Mining Company and the other defendants residing in Michigan. Watson, Demmon, and Smith, being nonresidents, were proceeded against by publication, but they failed to appear. The company appeared and pleaded to the jurisdiction of the court: (1) That Watson, Demmon, and Smith were indispensable parties to the suit, but not inhabitants of the western district of Michigan, and that no subpoena or process of any kind had been served upon them in the district, nor had they voluntarily appeared and

submitted themselves to the jurisdiction of the court; (2) that the stock of the Huron Copper Mining Company belonging to the complainants was not personal property within the district.

The plea was sustained and the bill was dismissed without prejudice to the bringing of such further suit by the complainants as they might be advised.

The circuit court correctly held that the defendants Watson, Demmon, and Smith were necessary parties to the controversy made by the bill. 82 Fed. Rep. 778. But could they not have been brought before the court in the mode and for the limited purposes indicated in the 8th section of the act of March 3d, 1875, entitled "An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts and for other Purposes," which section provides:

"§ 8. That when in any suit, commenced in any circuit court of the United States, to [9] enforce any legal or equitable *lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property if any there be; or where such personal service upon such absent defendant or defendants is not practicable such order shall be published in such manner as the court may direct not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his

appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded *with to final judgment according to law." [10] 18 Stat. at L. 470, 472, chap. 137.

That section was expressly saved from repeal by the 5th section of the act of March 3d, 1887, 24 Stat. at L. 552, 555, chap. 373, as corrected by section 5 of the act of August 13th, 1888, 25 Stat. at L. 433, 436, chap. 866, and is in full force. *Mellen v. Moline Mal-leable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781.

Prior to the passage of the above act of March 2d, 1875, the authority of a circuit court of the United States to make an order directing a defendant—who was not an inhabitant of nor found within the district and who did not voluntarily appear—to appear, plead, answer, or demur, was restricted to suits in equity brought to enforce legal or equitable liens or claims against real or personal property within the district. Rev. Stat. § 738. But that act extended the authority of the court to a suit brought "to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

One of the objects of the present suit was to remove an encumbrance or cloud upon the title to certain shares of the stock of a Michigan corporation. No question is made as to the jurisdiction of the court so far as it rests upon the diverse citizenship of the parties. The plaintiffs alleged that they were the equitable owners of that stock, although the legal title was in certain of the defendants. The relief asked was a decree establishing their rightful title and ownership; and in order that such a decree might be obtained, the defendants referred to were ordered to appear, plead, answer, or demur; but as they refused to do so, the circuit court decided that it could not proceed further. That court was of opinion that "the shares of stock in question are not personal property within the district within the purview of the statute of the United States authorizing the bringing in by publication of notice to nonresident defendants who assert some right or claim to the property which is the subject of suit." 82 Fed. Rep. 778, 779. The proper forum, the court said, for the litigation of the question involved would be in the state of which the defendants were citizens.

*The question to be determined on this ap-[11] peal is, whether the stock in question is personal property within the district in which the suit was brought. If it is, then the case is embraced by the act of 1875, and the circuit court erred in dismissing the bill.

By the statutes of Michigan providing for the incorporation of companies for mining, smelting, and manufacturing iron, copper, silver, coal, and other ores or minerals, it is provided: "The stock of every such corporation shall be deemed personal property,

and shall be transferred only on the books of the company in such form as the by-laws direct or as the directors shall prescribe; and such corporation shall at all times have a lien upon the stock of its members for all debts due from them to such corporation." By the same statutes it is provided: "It shall be lawful for any corporation formed under the provisions of this act to conduct its mining and manufacturing business in whole or in part at any place or places in the United States (or any foreign country); and any such corporation shall be subject to the laws of this state in regard to corporations, so far as the same shall be applicable to corporations formed under this act." "It shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this state, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for; but every such company having its business office out of this state shall have an office for the transaction of business within this state, to be also designated in such articles of association." "Any share or interest of a stockholder in any bank, insurance company, or any other joint-stock company that is or may be incorporated under the authority of, or authorized to be created by, any law of this state, may be taken in execution and sold in the following manner: The officer shall leave a copy of the execution certified by him with the clerk, treasurer, or cashier of the company, if there be any such officer, and if not, then with any officer or person who has, at the time, the custody of the books and papers of the corporation; and the property shall be considered seized on execution when such copy is left." *"[12] If the shares or interest of the judgment debtor shall have been attached in the suit in which the execution issued, the purchaser shall be entitled to all the dividends which shall have accrued after the levying of the attachment." "In attaching real estate or any right or interest in land, it shall not be necessary that the officer should enter upon the land or be within view of it; and in attaching shares of stock or the interest of a stockholder in any corporation organized under the laws of this state, the levy shall be made in the manner provided by law for the seizure of such property on execution." 1 and 2 Howell's Anno. Stat. Michigan (1882) §§ 4094, 4097, 4105, 7697, 7698, 7701, 7993; 2 Compiled Laws Mich. 1897, pp. 2197, 2200; 3 Ib. 3131-2, 3187.

These provisions make it clear that by the law of Michigan the shares of stock in the defendant company are to be deemed personal property, transferable on the books of the company; and that the share or interest of a stockholder may be taken in execution or reached by attachment, a copy of the execution or attachment being left by the officer with the clerk, treasurer, or cashier of the company. The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted. We

need not discuss, in the light of the authorities, whether the shares of stock in the defendant company may not be accurately described as chattels or choses in action, or property in the nature of choses in action. Chief Justice Shaw, in *Hutchins v. State Bank*, 12 Met. 421, said: "If a share in a bank is not a chose in action, it is in the nature of a chose in action, and what is more to the purpose, it is personal property." The court of appeals of New York, speaking by Judge Comstock, held certificates of stock to be simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 627; Angell & Ames on Corp. § 560. It is sufficient for this case to say that the state under whose laws the company came into existence has declared, as it lawfully might, that such stock is to be deemed personal property. *That is a rule which the circuit [13] court of the United States sitting in Michigan should enforce as part of the law of the state in respect of corporations created by it. The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the circuit court being regarded as personal property, the act of 1875 must be held to embrace the present case, if the stock in question is "within the district" in which the suit was brought. Whether the stock is in Michigan so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another state, at which a book showing the transfers of stock may be kept.

It is suggested that the requirement in the act of 1875 that a copy of the order of publication "shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be," is inapplicable here, because no one in Michigan is alleged in the bill to have possession of the shares in question. But the bill does show that the property represented by the certificates of shares is held by a Michigan corporation, which being subject personally to the jurisdiction of the

court may be required by a final decree in a suit brought under the act of March 3d, 1875, to cancel such *certificates held by persons outside of the state and regard the plaintiffs as the real owners of the property interest represented by them.

It is also contended that the words in the act of 1875, "when a part of said property shall be within another district but within the same state, said suit may be brought in either district in said state," indicate that the act had reference only to tangible personal property capable of being located in more than one district. This would be too narrow an interpretation of the statute. No reason can be suggested why suits involving the title to shares of the stock of a corporation or company should have been excluded from the operation of the statute. On the contrary, the statute contemplated that there might be cases involving the title to personal property not in the actual manual possession of some person; for the direction is that the order of the court be served upon the person or persons in possession or charge of the property, "if any there be." The corporation being brought into court by personal service of process in Michigan, and a copy of the order of court being served upon the defendants charged with wrongfully holding certificates of the stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court. We think the circuit court may rightfully proceed under the act of 1875, for the purpose of determining such ownership, and that in dismissing the bill error was committed.

The decree is reversed and the cause is remanded with directions for such further proceedings as are consistent with this opinion and with law.

Reversed.

Mr. Justice **Brown** and Mr. Justice **Shiras** did not participate in the decision.

[15] *WILLIS THORP, *Plff. in Err.*,
v.

S. A. BONNIFIELD *et al.*

(See S. C. Reporter's ed. 15-20.)

Writ of error—amount in dispute—effect of settlement reducing judgment.

1. A voluntary settlement by a judgment debtor with one of the plaintiffs, and payment to him, which leaves the amount unpaid on the judgment less than that which is necessary to give jurisdiction to review it, is fatal to the right of review, since the real matter in dispute in such case is the balance still remaining due on the judgment.
2. The validity of a settlement and part payment of a judgment, which leaves the amount in dispute insufficient to sustain a writ of error, cannot be contested by the defendant

NOTE.—As to amount necessary to give the United States Supreme Court jurisdiction—see note to *Schunk v. Moline, M. & S. Co.* 37 L. ed. U. S. 256.

so as to prevent the dismissal of a writ of error which he has taken, when it is not questioned by either of the judgment creditors, but is ratified by their joining in a motion to dismiss.

[No. 153.]

Argued March 1, 1900. Decided March 19, 1900.

CASE transferred from the United States Circuit Court of Appeals for the Ninth Circuit, to which an appeal had been taken from the District Court of the United States for the District of Alaska in an action on a contract. *Dismissed for want of jurisdiction.*

The facts are stated in the opinion.

Mr. **J. T. Ronald** argued the cause and filed a brief for plaintiff in error.

Mr. **S. M. Stockslager** argued the cause and, with Mr. **George C. Heard**, filed a brief for defendants in error.

*Mr. Justice **Peckham** delivered the [15] opinion of the court:

This case has been transferred from the United States circuit court of appeals for the ninth circuit, under and by virtue of an act of Congress (30 Stat. at L. 728) providing for such transfer. The act is set forth in the margin.†

*By the terms of this act it is to operate [16] only upon those cases of which this court would have had jurisdiction under the law existing at the time the case was taken to the circuit court of appeals, if a proper appeal had been taken to this court at the time the case was filed in the circuit court of appeals. If this act be valid, therefore, we must inquire whether the case was one over which this court would have had jurisdiction if a proper appeal had been taken.

The case was commenced in the United States District court for the district of Alaska in April, 1895, for the purpose of recovering moneys alleged to be due under the terms of a contract for the leasing of certain mining properties, situated in that district.

†That all cases, civil and criminal, filed on appeal from the district court of the United States for the district of Alaska, in the United States circuit court of appeals for the ninth judicial circuit, and pending on appeal therein, on and prior to the thirteenth day of December, 1897, of which the Supreme Court of the United States would have had jurisdiction under the then existing law, if a proper appeal had been taken thereto at the time said cases were filed on appeal in said circuit court of appeals, be, and the same are, deemed and treated as regularly filed on appeal in the Supreme Court of the United States as of the date when filed in said circuit court of appeals. The clerk of said circuit court of appeals is directed to transmit to the Supreme Court of the United States, as soon as practicable, the records of such cases, and the clerk of said Supreme Court is directed to receive and file the same for hearing and determination in the Supreme Court of the United States when regularly reached on the docket, subject to any rules made or to be made by said court which may be applicable.

Approved July 8, 1898.

The plaintiffs (defendants in error) demanded judgment for \$7,231.25, besides costs of the action. The defendant (plaintiff in error) demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and leave given to answer, which the defendant failed to do within the time granted, and judgment was entered by default for the amount claimed in the complaint, with costs.

The defendant then moved to vacate and set aside the judgment and that motion was denied, and he sued out a writ of error from the United States circuit court of appeals for the ninth circuit. The defendants in error moved to dismiss the writ on the ground that the circuit court of appeals had no jurisdiction.

[17] The circuit court of appeals certified the question to this court for the purpose of receiving its instruction upon the question of jurisdiction. This court answered the question in the negative, denying the jurisdiction of the circuit court of appeals. *168 U. S. 703, 42 L. ed. 1207, 18 Sup. Ct. Rep. 947. The mandate from this court was duly issued, and the circuit court of appeals, in conformity therewith, dismissed the writ of error, and on January 4, 1898, it issued its mandate to that effect, directed to the district court of the United States for the district of Alaska, which was filed in the office of the clerk of that court on February 3, 1898, and in obedience to that mandate the writ of error was duly dismissed by the district court.

On March 29, 1898, an execution upon the original judgment was issued from the district court, directed to the United States marshal of the district, under which certain property of the defendant was sold and a return made by the marshal to the court, and on June 14, 1898, the sale was duly confirmed by the district court.

It thus appears that nearly a month before the passage of the act of July 8, 1898 (*supra*), the judgment of the district court of Alaska had been carried into effect, an execution issued, the property sold, a report made of the sale to the court, and that sale confirmed.

The defendants in error made a motion in this court to dismiss the writ for want of jurisdiction. That motion was postponed by the court until the hearing of the case upon its merits, and upon the argument thereof the motion to dismiss was renewed upon the ground (among others) that the act of Congress, if applicable to cases such as this, was unconstitutional and void.

A further ground for dismissal was setup because, as alleged, it appeared from the record that the amount in dispute between the parties was less than the sum necessary to give jurisdiction to this court. This ground necessitates the statement of a few additional facts, and if it be well founded, it relieves us from a discussion of the constitutional question.

After the demurrer of the defendant to the plaintiffs' complaint had been overruled and

leave given to answer, and the defendant made default, judgment was entered for the amount of the plaintiffs' claim. This was on January 25, 1896. By the complaint it appears that under the lease of the mine by the plaintiffs to the defendant Thorp, the latter agreed to mine, work, and operate the premises, and after making certain payments, *etc., he was to retain for himself [18] seven sixteenths of the profits or net proceeds arising from the operation of the mine, and was to pay to the plaintiffs the remaining nine sixteenths in the proportion of seven sixteenths to the plaintiff Bonnifield and two sixteenths to the plaintiff Heid.

Immediately after the entry of the judgment it appears by the affidavits in the case, presented for the purpose of setting the judgment aside, that the defendant and the plaintiff Bonnifield entered into negotiations in regard to the judgment, and Bonnifield became satisfied that it had been entered for more than was equitably due from the defendant, and, accordingly, upon the payment of a certain sum to him (much less than by the face of the judgment appeared to be due him) Bonnifield "made a complete settlement of all his matters and differences with the defendant, and received a full and complete settlement and satisfaction for his interest in the judgment obtained in the case," and Bonnifield thereupon "executed a satisfaction of all his right, title, and claim in and to said judgment, to wit, seven eighths thereof." This satisfaction was given the defendant on the 28th of January, who filed the same in the clerk's office on the tenth day of February, 1896. After he had filed the satisfaction, and on the same day, the defendant filed his petition for a writ of error to the United States circuit court of appeals for the ninth circuit.

The judgment in the case continued to stand on the face of the record at its original sum, \$7,231.25 recovery and \$33.55 costs. By the defendant's voluntary settlement with and payment to Bonnifield, one of the plaintiffs, the balance remaining unpaid was less than the amount necessary to give this court jurisdiction.

The plaintiff in error cites various cases to maintain the proposition that when the defendant in the case below brings it here for review the amount of the judgment or decree against him governs our jurisdiction, and, as in this case, the judgment is for more than \$7,000, he maintains that this court has jurisdiction, notwithstanding the payment and settlement above mentioned.

But those cases have no application when the defendant by his *own action has reduced [19] the judgment by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it. The real matter in dispute is in such case the balance still remaining due on the judgment. Otherwise he might voluntarily settle the controversy and pay the whole judgment, and then seek to review it. In this case it appears there was a "full, final, and complete settlement of all matters and differences" between the defendant

and plaintiff Bonnifield, and the latter then executed "a full and complete satisfaction of all his rights, title, and claim in and to said judgment." And this was procured by the defendant's own voluntary act. Clearly there was no matter in dispute relative to that judgment after such voluntary settlement and payment beyond the sum remaining due thereon. Thus an event has intervened subsequently to the entry of the judgment, and one which owes its existence to the act of the defendant himself, which has taken away his right of review in this court. It is a compromise or settlement, *pro tanto*, between the parties; or it is like a case where, pending a suit concerning the validity of the assessment of a tax, the tax is paid; or the amount of the tax has been tendered and deposited in a bank which by statute had the same effect as actual payment and receipt of the money. *Dakota County v. Glidden*, 113 U. S. 222, 28 L. ed. 981, 5 Sup. Ct. Rep. 428; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876. In such cases the writs of error will be dismissed.

The facts as to the settlement and payment appear here in the record, although they may be shown by other evidence, as the above cases hold.

It is urged that the plaintiff Bonnifield had no right under the circumstances to make the settlement and to satisfy the judgment to the extent which he did. But this does not answer the objection. As matter of fact he and the defendant had a full settlement, and he did satisfy the judgment at the request of the latter, and both defendants in error now join in a motion to dismiss, predicated upon that settlement and payment, and they both thus ratify the same and acknowledge its sufficiency. The plaintiff in error is in no position to deny the validity of the settlement and payment [20] made at his own request *and by himself, when its sufficiency is acknowledged by the other parties.

Being satisfied that the amount in dispute in this case is less than the amount required by statute to give us jurisdiction, and without expressing any opinion upon the other ground for the motion, *the writ must be dismissed* for the want of jurisdiction, and it is so ordered.

JOHN N. QUACKENBUSH, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 20-28.)

Reappointment of naval commander—right to back pay—counterclaim for pay received without right.

1. The reappointment of a naval commander who had been dismissed or suspended from the service, under the act of Congress of February 16, 1897, suspending for his benefit

only the provisions as to appointments in the navy, and authorizing the President to appoint him, "late a commander in the navy," to the same grade and rank as of a certain date, and to place him on the retired list as of a later date, but providing "that he shall receive no pay or emoluments except from the date of such reappointment," precludes any claim by him to leave or waiting orders pay, or pay as a retired officer, for any time preceding the date of his reappointment, or the substitution for the actual date thereof of the date to which the appointment related.

2. The terms of a commission cannot change the effect of the appointment of an officer in the navy, as defined by a statute authorizing it.

3. Payments made to a late commander in the navy after he is lawfully out of the service cannot be recovered back by the government, but are ratified when Congress subsequently passes an act for his relief, providing for his reappointment to his original rank, but providing that he shall receive no pay except from the date of his reappointment.

[No. 145.]

Argued February 1, 1900. Decided March 19, 1900.

A PPEAL from a decision of the Court of Claims dismissing a petition for pay alleged to be due to a naval commander. *Affirmed.*

See same case below, 33 Ct. Cl. 355.

Statement by Mr. Chief Justice Fuller:

This is an appeal from a judgment of the court of claims dismissing the petition of claimant and the counterclaim of defendants in the above-entitled cause. 33 Ct. Cl. 355. The petition *was filed December 11, 1897, [21] and sought recovery for amounts alleged to be due from the government "from the 1st day of August, 1883, until the 1st day of June, 1895, at the rate of \$2,300 per annum, being the leave or waiting orders pay as prescribed by law for the grade or rank of commander, and from the 1st day of June, 1895, to the 26th day of May, 1897, at the rate of \$2,625 per annum, being three quarters of the sea pay as prescribed by law for the grade or rank of commander." The counterclaim averred that claimant was indebted to defendants "by reason of payments illegally made to him during the period from June 9, 1874, up to and including March 31, 1881, when the claimant was not in the naval service of the United States."

The facts were in substance as follows: Claimant was duly and legally commissioned a commander in the Navy of the United States by and with the advice and consent of the Senate on the 2d day of January, 1872, to take rank from the 25th day of May, 1871. Thereafter in the month of February, 1874, certain charges were filed against claimant before the Navy Department, and a court martial was duly organized to try the same, by which, after hearing, and in that month, claimant was sentenced to be dismissed from the naval service of the United States. This sentence was approved by the President, and the Secretary of the

Navy, June 9, 1874, addressed a letter to the claimant at Boston, Massachusetts, informing him of the sentence, its approval, and that from that day claimant would "cease to be an officer of the Navy." On June 12, the Secretary of the Navy addressed a letter to "Commander John N. Quackenbush, U. S. Navy," requesting him to "return to the Department the order dismissing you from the Navy." Both these letters were delivered to claimant on one and the same day, to wit, on or about June 15, 1874. In obedience to the order of June 12, claimant returned the letter of dismissal.

December 8, 1874, the Secretary of the Navy officially addressed a letter to claimant, in which, after setting forth the finding of the court martial and the sentence, the Secretary said: "This sentence was, on the 9th day of June, 1874, mitigated to suspension from rank and duty on furlough pay for six *years, the suspension to date from that day." December 13, 1877, the Secretary of the Navy transmitted to the Attorney General of the United States a statement of the facts in the case, embodying the correspondence, and requested his advice thereon. In answer, the Attorney General, March 16, 1878 (15 Ops. Atty. Gen. 463), advised the Secretary that the claimant remained an officer in the Navy.

In that correspondence the date of the President's approval of the sentence was given as June 5, 1874, but the Attorney General held that the letter of the Secretary of December 8, 1874, was satisfactory proof of the mitigation of the sentence by the President on June 9, and that it was competent for him to grant commutation on that day.

Section 1363 of the Revised Statutes provided that "there shall be allowed on the active list of the line officers of the Navy . . . ninety commanders . . . ;" which number was, by the act of August 5, 1882 (22 Stat. at L. 284, 286, chap. 391), reduced to eighty-five.

June 10, 1874, the President sent to the Senate the name of W. S. Schley to be commander in the Navy, "vice Quackenbush, dismissed," and the nomination was duly confirmed June 12, 1874. The records of the Navy Department show that there were ninety commanders borne on the active list of the Navy from the date of the appointment of W. S. Schley to August 5, 1882, when the number was reduced by law, except during the early part of the year 1879, when the list was temporarily increased to ninety-one by Congress.

After Schley's appointment, as Quackenbush was still on the register, the Secretary of the Navy, when his attention was called to the matter, directed that no nomination should be made to the next succeeding vacancy, and this recommendation was complied with, no appointment being made to the position subsequently becoming vacant by the retirement of Commodore Morris.

The court of claims found that, pursuant to the commuted sentence, and by virtue thereof, claimant was placed under suspension, on furlough pay, and was borne upon

the official printed Navy register as a commander in the Navy "undersuspension," from *the year 1874 up to and including the year 1880, when the sentence expired, and from and after the date of such expiration he was borne on said register as a commander of the Navy on waiting orders until the publication of the register for 1883, when his name was omitted and dropped from the same. "During the whole of said period he retained his proper and legal place on the official list of commanders in the Navy, and was advanced in numbers from year to year, as promotions of his seniors in said grade occurred, in the same manner and in all respects in the regular course, as other officers in his said grade and rank were advanced."

He was paid as on furlough for six years, and thereafter, from June 9, 1880, to March 31, 1881, was taken, by direction, on the rolls of the paymaster at the Navy Yard at Boston, Massachusetts, and paid as on "waiting orders."

On the 30th of March, 1881, the judgment of this court was announced in *Blake v. United States*, 103 U. S. 227, 26 L. ed. 462. It was there ruled that the President has the power to supersede and remove an officer of the Army or the Navy by the appointment, by and with the advice and consent of the Senate, of his successor. What direction, if any, was given at the time, in view of this decision, did not appear; but, at all events, from March 31, 1881, until May 26, 1897, claimant received no pay, allowances, or emoluments any kind.

In April, 1882, the views of the Secretary of the Navy were requested by the chairman of the committee on naval affairs in the House of Representatives in respect of the propriety of the passage of a pending bill "to confirm the status of John N. Quackenbush, a commander in the United States Navy," and the Secretary responded that it appeared to have been the intention of the President, in exercising clemency in the case of Commander Quackenbush, that he should be retained in the service, and that it seemed just, in view of all the circumstances, that he should be entitled to the benefit of that clemency.

The following entry appears opposite claimant's name on one of the records of the Navy Department: "208. John N. Quackenbush left off the register published 1st August, 1883, by direction of the Secretary of the Navy; his action being based upon a decision of the Supreme Court."

*December 6, 1883, the Secretary of the Navy designated to the President D. W. Mullan to be a commander in the Navy "vice John N. Quackenbush, no longer in the service;" and in that month the President sent to the Senate the nomination of said Mullan to be a commander in the Navy from the 3d day of July, 1882, "vice John N. Quackenbush, no longer in the service." The nomination was duly confirmed and Mullan commissioned.

Claimant filed a petition April 15, 1895, to the Secretary of the Navy asking that he be restored to his proper position on the list

of naval officers, but the Secretary declined to grant any relief, holding that the matter of his rights was *res judicata* under the action taken by his predecessor. In May, 1895, claimant exhibited a petition in the supreme court of the District of Columbia praying that a writ of mandamus issue to the Secretary of the Navy requiring him to put claimant's name back on the list of naval officers, which was dismissed February 11, 1896.

Bills for the relief of Commander Quackenbush were introduced in Congress from 1882 to 1897, and many reports made thereon.

February 16, 1897, an act entitled "An Act for the Relief of John N. Quackenbush, Late a Commander in the United States Navy," became a law without the approval of the President. 29 Stat. at L. 803, chap. 235. This act read as follows:

"That the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August first, eighteen hundred and eighty-three, and to place him on the retired list of the Navy, as of the date of June first, eighteen [25] hundred and ninety-five: **Provided*, That he shall receive no pay or emoluments except from the date of such reappointment."

In May, 1897, in accordance with the terms of the act, the President nominated claimant to the Senate to be a commander on the retired list of the Navy, and the nomination was confirmed. The claimant took the prescribed oath on May 26, 1897, since which last-mentioned date he has been paid three quarters of the sea pay of a commander in the Navy on the active list. Claimant reached the age of sixty-two on May 31, 1895.

Messrs. John Paul Jones and Richard R. Beall argued the cause and filed a brief for appellant.

Mr. George H. Walker argued the cause and, with *Assistant Attorney General Pradt*, filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

[25] **Mr. Chief Justice Fuller* delivered the opinion of the court:

In *Blake v. United States*, 103 U. S. 227, 26 L. ed. 462, it was held that the President has power, by and with the advice and consent of the Senate, to displace an officer in

the army or navy by the appointment of another person in his place, and that when that has been done he cannot again become an officer except upon a new appointment with like advice and consent. That ruling has been repeatedly affirmed and followed. *Keyes v. United States*, 109 U. S. 336, 27 L. ed. 954, 3 Sup. Ct. Rep. 202; *Mullan v. United States*, 140 U. S. 240, 35 L. ed. 489, 11 Sup. Ct. Rep. 788. And see *Parsons v. United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880.

When through mistake, or misapprehension, or for any other reason, injustice has been done, Congress has the power to accord relief, but the courts cannot of their own motion revise the grounds of action taken in the constitutional exercise of executive power.

Claimant is a commander in the United States Navy on the retired list by virtue of his appointment and retirement under the act of February 16, 1897. This suit was brought to recover pay as on leave or waiting orders from August 1, 1883, to June 1, 1895, *when claimant reached the age of [26] sixty-two years, and pay as a retired officer from June 1, 1895, to May 26, 1897, when he took the prescribed oath on his appointment; and if he is entitled to the amounts sued for, it is by reason of the act, and not otherwise.

The act described claimant in title and context as "late a commander in the United States Navy;" suspended as to him "the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States Naval service;" and authorized the President to appoint him to the same grade and rank as of the date of August 1, 1883, and to place him on the retired list as of the date of June 1, 1895.

Congress thereby declared that claimant had been prior to August 1, 1883, but was not then, a commander, and that, in order to enable him to be appointed to that grade and rank, it was necessary to suspend the act of August 5, 1882, which limited the number of commanders on the active list, and also forbade promotion or increase of pay in the retired list. 22 Stat. at L. 284, chap. 391.

If the act had contained nothing more, the effect of the appointment would have been, in addition to fixing claimant's status as to grade and rank as of August 1, 1883, to entitle him to pay from that date, but not to pay prior thereto, as by the terms of the act he was not a commander until appointed thereunder. The act did not stop there, however, but a proviso was added which read: "*Provided*, That he shall receive no pay or emoluments except from the date of such reappointment."

Provisos are commonly used to limit, restrain, or otherwise modify the language of the enacting clause, and that was the manifest purpose of this proviso. But it was not needed to limit the effect of the act prior

to August 1, 1883, or to enlarge its effect after that date. Its only apparent office was to forbid the allowance of pay or emoluments from August 1, 1883, by limiting such allowance to "the date of such reappointment," which in that view must be regarded as the date of appointment under the act.

[27] This result is in harmony with the language used. Claimant* had been a commander and had ceased to be such. He was again appointed, and that second appointment was a reappointment. The date of that reappointment was certainly when it was actually made, and to substitute the date to which the appointment related for the actual date would defeat the obvious object of the proviso, which was to narrow the effect of giving the reappointment a retroactive operation. It was allowed that effect as to grade and rank, but not as to current pay or emoluments between August 1, 1883, and the date of the reappointment. This fixed his relative position with reference to other officers in matters of privilege and precedence, and of command if detailed to active service in time of war. At the same time, by referring the appointment to the prior date the retired pay was sensibly affected. If claimant had been appointed without any such reference and had been immediately retired, he would have been entitled to only one half the sea pay of a commander under § 1588 of the Revised Statutes, for he would not have reached the age of sixty-two years while in the service; but as he was appointed as of August 1, 1883, he was put constructively in the service from that date and so, on being retired, became entitled to three quarters of such sea pay; and this he is receiving.

Something was said in argument in respect of the commission, which is not set out in the findings, but whatever its terms, the conclusion remains unaffected. The appointment and the commission are distinct acts, and the terms of the commission cannot change the effect of the appointment as defined by the statute.

Assuming claimant to have been lawfully out of the service June, 1874, the government preferred a counterclaim for the pay received by him from then to March 31, 1881. But the act of February 16, 1897, was remedial in its character, and although we cannot for that reason give to its terms any other than their obvious meaning, we think it should be construed as ratifying these prior payments.

[28] Congress had all the facts before it and intended to award some measure of relief in view of the circumstances. It went so far and no farther, but it went far enough to enable us to *hold that it would be inconsistent with the object of the act to sustain any recovery back.

In short we agree with the court of claims in its conclusions on both branches of the case.

Judgment affirmed.

177 U. S.

WATERS-PIERCE OIL COMPANY, *Plff.*
in *Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 28-47.)

Power of state to exclude foreign corporations—forfeiting permit of foreign company—permit as a contract—repeal of statute by unconstitutional act.

1. The right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, except with respect to business of a Federal nature.
2. A forfeiture of the permission to a foreign corporation to do business in the state for violation of the provisions of Tex. act 1889 under which the permit was given, and which provides for the forfeiture, does not violate any contract obligation, as the provision for the forfeiture was a part of the obligation.
3. A repeal of Tex. act 1889, permitting foreign corporations to do business in the state, does not result from the provision of Tex. act 1895, exempting labor organizations, on the ground that this provision is unconstitutional, since, if it were so, the entire act would be void and could not operate as a repeal of the former act.

[No. 97.]

Argued January 8, 9, 1900. Decided March 19, 1900.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a decision sustaining a forfeiture of a permit of a foreign corporation to do business in the state. *Affirmed.*

See same case below, 19 Tex. Civ. App. 1, 44 S. W. 936.

Statement by Mr. Justice **McKenna**:

The Waters-Pierce Oil Company is a private corporation incorporated under the laws of Missouri, and its principal offices are situated in St. Louis.

It was incorporated to deal in naval stores, and to deal in and compound petroleum and other oils and their products, and to buy and sell the same in Missouri and other states. Its capital stock was originally \$100,000, but was subsequently increased to \$400,000.

NOTE.—As to recognition or exclusion of foreign corporations—see note to Cone Export & Commission Co. v. Poole (S. C.) 24 L. R. A. 289.

That foreign corporations are amenable to local law—see note to Talbot v. Fidelity & Casualty Co. (Md.) 13 L. R. A. 584.

As to exclusion of corporation as regulation of interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. (Colo.) 24 L. R. A. 311.

As to regulation of business of a foreign corporation by state—see note to Boulware v. Davis (Ala.) 9 L. R. A. 601.

As to exclusion, regulation, and taxation of foreign corporations—see note to McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13.

On the 6th day of July, 1889, it filed in the office of the secretary of state of Texas, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business in the state for the term of ten years.

By virtue of the permit the company engaged in business in the state, and while so engaged, it is claimed, violated the statutes of the state against illegal combinations in restraint of *competition in trade (copies of the statutes are inserted in the margin),† and thereby incurred a forfeiture of its permit to do business in the state.

[29] *This suit is brought to enforce such forfeiture, and was tried in the district court of Travis county, Texas, before the court* and a jury. A verdict was rendered against the company, upon which a judgment was duly entered. The judgment was affirmed by the

court of civil appeals (19 Tex. Civ. App. 1, 44 S. W. 936), and this writ of error was sued out in due course.

*The pleadings are very voluminous, alleging the grounds of action and the grounds of defense, with much elaboration and many repetitions. [32]

*The basis of the action is an agreement which is set out in full in the complaint, made on the 2d day of January, 1882, *between a great many firms and partnerships, individuals and corporations, owning and controlling a large amount of the money and capital invested in the production of petroleum and its products, and in their shipment and sale. [33] [34]

The parties to the agreement embraced three classes: (1) Certain partnerships and corporations, of the number of eleven; (2) certain individuals, of the number of forty-

†Sec. 1. Be it enacted by the legislature of the state of Texas, that a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state. Fifth—To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall, in any manner, establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

Sec. 2. That any corporation holding a charter under the laws of the state of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the state, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state; and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the state of Texas.

Sec. 5. That the provisions of chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

Sec. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid, or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof, shall be punished by fine not less than \$50 nor more than \$5,000, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

Sec. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination and that the accused was a member of, acted with, or in pursuance of, it, without giving its name or description, or how, when, or where it was created.

Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Sec. 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all

four, who are enumerated; and (3) a portion of the stockholders and members of other corporations and limited partnerships, twenty-five being enumerated, one of which was the Waters-Pierce Oil Company. Other individuals, partnerships, and corporations [35] could afterwards *join upon the request of the trustees provided for by the agreement.

It was mutually agreed that a corporation should be formed in Ohio, New York, Pennsylvania, and New Jersey, or any existing corporation could be used, to mine, manufacture, refine, and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto.

To the several corporations thus organized all the business, rights, and stock of the parties to the agreement were to be transferred, and trust certificates issued in consideration thereof.

It is averred that the object of the parties in entering into said agreement and trust was to control and monopolize the petroleum industry in the United States and the several states thereof, and the business of manufacturing, refining, selling, and transporting petroleum and its products, refined, illuminating, and lubricating oils, and that they intended to and did create, make, and effect a combination of their capital, skill, and acts for such purposes and for the following purposes, to wit:

"1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating, and lubricating oil, in the United States, and in the domestic trade of the states thereof.

"2d. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

persons offending against its provisions whether within or without the state.

Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of \$50 which may be recovered in the name of the state of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general or the district or the county attorney to prosecute for and recover the same.

Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

Approved March 30, 1889. Acts of 1889, p. 141.

The Act of 1895.

Chapter 83.—[H. B. No. 404.] An Act to Define Trusts, Provide for Penalties and Punishment of Corporations, Persons, Firms, and Associations of Persons Connected with them, and to Promote Free Competition in the State of Texas, and to Repeal all Laws and Parts of Laws in Conflict with this Act.

Sec. 1. Be it enacted by the legislature of the state of Texas, That an act entitled "An Act to Define Trusts and to Provide for Penalties and Punishment of Corporations, Persons, Firms, and Associations of Persons Connected with them, and to Promote Free Competition in the State of Texas," approved March 30, 1889, be so amended as to hereafter read as follows:

Sec. 1. That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes:

1. To create or carry out restrictions in trade (or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state).

2. To increase or reduce the price of merchandise, produce, or commodities.

3. To prevent competition in manufacture,

making, transportation, sale, or purchase of merchandise, produce, or commodities (or to prevent competition in aids to commerce).

4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state.

5. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

Sec. 2. That any corporation holding a charter under the laws of the state of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the state where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the state of Texas.

"3d. To prevent competition in the manufacture, sale, and purchase of petroleum and its products.

"4th. To fix at a standard figure the price of petroleum and its products, whereby the price of the same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the state of Texas as well as other states.

[36]

"5th. For the purpose of agreeing, obligating, and binding themselves not to sell, dispose of, or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products, *between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining, and uniting any interest they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected."

That the trustees provided for in said agreement proceeded to execute it, and are still executing it, and for such purpose have divided the markets of the United States in various subdivisions, and one of them is composed of southwestern Missouri, Arkansas, Texas, Indian territory, Oklahoma territory, and a part of Louisiana.

That the means employed to effect the purpose of the agreement is to reduce prices below what is reasonable in order to destroy competition, and when it is destroyed raise

them again above the market price. A member of the trust is indemnified against loss by the combined power and wealth of all of its parties.

That the Waters-Pierce Oil Company has become a party to said agreement through the control that the trustees acquired by a transfer of stock of the oil company to them, and that the company has taken no corporate action against the transfer of such stock or such control, but has acquiesced in both, and, "through its directors, officers, and agents conforms its corporate action to the policy fixed by said nine trustees, . . . and pursues . . . and executes the purposes and objects of said trust agreement above set out in this state."

That in pursuance of the policy of said agreement it confines its business in the subdivision aforesaid; does not invade or transact business in any other; that no other party to the agreement transacts business in the territory allotted to and accepted by the Waters-Pierce Oil Company, and the latter adopts and pursues the methods of driving out and overcoming competition in the sale of oils that are adopted and pursued by the other members in the territory allotted to them; that in the market of Texas there is no competition between the Waters-Pierce Oil Company and such other parties; and that by reason of the facts stated the Waters-Pierce Oil Company has monopolized and still *monopolizes the trade [37] in petroleum and its products in Texas, and performs the unlawful purpose of said trust agreements "in reference to the trade in said

Sec. 5. That the provisions of chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

Sec. 6. If any person shall be or may become engaged in any combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

2. To increase or reduce the price of merchandise, produce, or commodities.

3. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state.

5. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption, below a common standard fig-

ure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions, or orders of such combinations, shall be punished by fine of not less than \$50 nor more than \$5,000, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

Sec. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with, or in pursuance of, it, without giving its name or description, or how, when, or where it was created.

Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the

commodities which are of prime importance and necessity to the people of the state."

That since the 6th day of July, 1889, the oil company has made contracts, sometimes in writing and sometimes verbally, with merchants and others through its agents in this state, in consideration of a small rebate on the oil purchased, or for other considerations unknown to the plaintiff, whereby the said merchants have contracted not to buy any oil from any other person, or corporation, but will "deal with and buy and sell oils obtained from said defendant company exclusively," and in some instances agreed with said company not to sell the oils so bought to anyone buying from or dealing with any other person or corporation dealing in oils in competition with the defendant.

The names of some of the persons and merchants are given.

That about the year 1890 the defendant company entered into contracts with certain jobbers and merchants of the city of Brownsville, whereby they respectively agreed to buy all the oil needed in their respective businesses of the defendant company for various rebates on the box or gallon, and they were respectively to sell such oil to retail dealers at the invoice price fixed by the company, and various penalties were agreed to be paid to the company if oil should be purchased from anyone else, and that business was done under said contracts until certain dates in the latter part of December, 1896.

That the company is seeking to renew all of said contracts, and is seeking to carry on its business in said city under the same.

defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Sec. 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of \$50, which may be recovered in the name of the state of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney general or the district or county attorney to prosecute for and recover the same.

Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state: *Provided*, this act shall not be held

That the Eagle Refining Company is a corporation legally incorporated in Ohio for the purpose of manufacturing, refining, compounding, and dealing in all kinds of oils, greases, and petroleum and its various products, and duly obtained a permit to do such business in the state of Texas on the 6th day of November, 1891, and began to transact such business in the state "in honest and sharp competition with the *Waters-Pierce Oil Company," and continued [38] to do so up to the 13th day of October, 1894, when the two companies "entered into a certain combination and trust," the exact terms of which are unknown to petitioner, whereby the oil company secured the control of all the property, business, and franchises of the Eagle Company, and the latter agreed to withdraw from doing any business in the state in competition with the oil company for fifteen years.

That since said date the oil company has been doing business in the name of the Eagle Company, in apparent, but not real, competition with itself, and that said contract has affected the production of petroleum and has affected also the sale of its products.

It is also averred that prior to the year 1890 one C. W. Robinson was engaged in the oil business in competition with the oil company, and that some day in that year the company entered into an agreement with him by the terms of which the company secured the control and management of his business, although it is conducted in his name; that by the terms of the agreement he is to buy and sell exclusively the oils of

to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

Sec. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the state to recover penalties, or to affect the right of the state to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this state, or affect the right of the state to maintain prosecutions for violations thereof, under any law of this state relating to trusts, for acts heretofore done.

Sec. 14. Any court, officer, or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury, may subpoena persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation.

Sec. 15. All laws or parts of laws in conflict with this act are hereby repealed.

Sec. 16. Whereas, the people of this state are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule which requires that all bills shall be read on three several days, be suspended, and it is so enacted.

Approved April 30, 1895.

the company, and the agreement is still in force.

That the contracts and agreements with the merchants aforesaid and with the Eagle Refining Company and said Robinson were for the purposes hereinbefore enumerated, and resulted in effecting such purposes.

That the oil company, since its permit to do business in the state, has abused its franchises and privileges; has monopolized the oil trade in the state; has unlawfully entered into the contract mentioned above, and is engaged in making similar ones; has lowered the price of its oils against competing oils below a reasonable and fair market price; either has refused to sell or would sell only at an exorbitant figure to any person who dealt in competing oils; has pursued and carried out a system of threats and intimidations and bribery to prevent parties from buying or selling competing oils; has threatened those dealing in such oils with a ruinous reduction of price; has given rebates to buyers from it as an inducement not to patronize a competitor; has offered money [39] or the payment *of expenses incident thereto, to get and induce parties ordering competing oils to countermand the orders, and refuse to take the same after contracting therefor. That this is the general course of dealing pursued by the oil company, and when competitive oils are driven out of the market thereby it raises the price of oil far above the true and reasonable market value of the same.

That such course of dealing has resulted in the complete monopolization by the oil company of the oil trade of the state, and is still stifling and threatening legitimate competition, to the great injury of the people of the state.

That by reason of the acts detailed the oil company has forfeited its right and permit to do business in the state.

To the petition of the state the oil company demurred and answered. In its demurrer it urged the repugnancy of the statutes of 1889 and 1895 to the Fourteenth Amendment of the Constitution of the United States, and the insufficiency of the allegations of the petition as a ground of forfeiture of its permit to do business in the state. In its answer it denied generally and specifically those allegations, claimed the permit as a contract, and invoked the Constitution of the United States against its impairment by a subsequent law of the state; claimed to be engaged in interstate commerce, and denied the jurisdiction of the state to regulate it.

There was evidence submitted on the issues, but the court instructed the jury that the evidence was not sufficient to show that the oil company became a member of or entered into the Standard Oil Trust agreement. Also that the contracts with the Eagle Refining Company and with C. W. Robinson were not in violation of the laws of the state, and confined their consideration to their bearing upon the course of dealing of the company in the state.

The court also withdrew transactions of

interstate commerce from the consideration of the jury, and submitted only those of local business.

Applying the facts of the case to the definitions of the statutes, the court instructed the jury as follows:

"Now, if you find from the evidence that the defendant company, *acting through its [40] duly appointed and authorized agents, entered into and performed a contract in the state of Texas with any of the parties dealing in, buying, and selling oils, as named and set out in plaintiff's petition, since July 6, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively for a specified time and from no other source, in consideration of rebates allowed them by defendant company, or for any other valuable consideration, or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into, and carried out a contract in this state with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all the oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, or if said defendant company, so acting since said date, made and entered into and carried out in this state a contract with any of the parties as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty, and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made, then you are instructed that the defendant would be guilty of violating the laws against trusts of this state, and if you so find the facts to be as above stated you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company."

*The jury rendered a verdict against the [41] defendant company, but in favor of the individual defendants, upon which the following judgment was entered against the company:

"It is therefore ordered, adjudged, and decreed by the court that the defendant, the Waters-Pierce Oil Company, be, and is here-

by, denied the right and prohibited from doing any business within this state, and that its permit to do business within this state, heretofore issued July 6, 1889, by the secretary of state of this state, be, and the same is hereby, canceled and held for naught, and that said defendant, the Waters-Pierce Oil Company, its managers, superintendents, agents, servants, and attorneys, be, and are hereby, perpetually enjoined and restrained from doing business within this state.

"Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this state."

On appeal to the court of civil appeals the judgment was affirmed, the court holding that the statutes were valid exercises of the police power of the state. It also held that the statute of 1889 was a condition of the permit of the Waters-Pierce Oil Company to do business in the state. A rehearing was denied. A writ of error to the supreme court of the state was denied, and the case was then brought here.

The assignments of error express in various ways the alleged discriminations of the statutes between persons and classes of persons, and the alleged deprivation of many persons of the right and liberty of contract while permitting such right and liberty to others; the denial to foreign corporations of the right to do any business in the state, interstate or otherwise; the assumption by the state of the power to punish acts done out of the state, and authorizing a conviction of what are claimed to be criminal offenses by a preponderance of proof.

Messrs. George Clark, J. D. Johnson, and John G. Johnson argued the cause and **Messrs. John D. Johnson, George Clark, and D. C. Bolinger** filed a brief for plaintiff in error.

Mr. S. C. T. Dodd also filed a brief for plaintiff in error.

Mr. T. S. Smith argued the cause and filed a brief for defendant in error.

Messrs. M. M. Crane and T. A. Fuller also filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[42] ***Mr. Justice McKenna** delivered the opinion of the court:

Transactions of interstate commerce were withdrawn from the consideration of the jury and were also excepted from the judgment. The transactions of local commerce which were held by the state courts, trial and appellate, to be violations of the statutes consisted in contracts with certain merchants by which the plaintiff in error required them to buy oils exclusively from it, "and from no other source;" or buy oils exclusively from it and not to sell to any person handling competing oils; or to buy exclusively from it and to sell at a price fixed by it.

The statutes must be considered in reference to these contracts. In any other as-
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pect they are not subject to our review on this record, except the power of the state court to restrict their regulation to local commerce, upon which a contention is raised. It is based on the following provision:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis county in the name of the state of Texas."

The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention, *United States v. Reese*, 92 U. S. 221, 23 L. ed. 565; *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; and some other cases, are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court, finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation.

The courts of Texas have like power of interpretation of the *statutes of Texas. What they say the statutes of that state mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, ante, 192, 20 Sup. Ct. Rep. 136; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419. [43]

We may return, therefore, to the propositions which were submitted to the jury.

They have been broadly discussed, and considerations have been presented which transcend them, and relate to grievances which do not affect plaintiff in error. We are confined to its grievance. *Clark v. Kansas City*, 176 U. S. 114, ante, 392, 20 Sup. Ct. Rep. 284; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, ante, 192, 20 Sup. Ct. Rep. 136.

What is it? It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it is asserted that the statutes make many discriminations between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called upon to answer those arguments or to condemn or vindicate the statutes on this record.

The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of Texas? This is the only in-

quiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the state over them. What those rights are and what that power is has often been declared by this court.

A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

[44] *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, involved the power of the Bank of Augusta, chartered by the state of Georgia, and invested by its charter with a function of dealing in bills of *exchange, to exercise that function in the state of Alabama. In passing on the question certain principles were declared which have never since been disturbed.

A contract of the corporation, it was declared, is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituent citizens.

Its charter confers its powers and the means of executing them, and such powers and means can only be exercised in other states by the permission of the latter.

Chief Justice Taney said, delivering the opinion of the court:

"The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have, upon several occasions, been under consideration in this court. In the case of *Head v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229, Chief Justice Marshall, in delivering the opinion of the court, said: 'Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, 4 L. ed. 659, the same principle was again decided by the court. 'A corporation,' said the court, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the character of its creation confers upon it, either expressly or as incidental to its very existence.' And in the case of *Bank of United States v. Dandridge*, 12 Wheat. 64, 3 L. ed. 552, where the

question in relation to the powers of corporations and their mode of action were very carefully considered, the court said: 'But whatever may be the implied powers of aggregate corporations, *by the common law, [45] and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.'"

The power of the bank to deal in bills of exchange in the state of Alabama was sustained, but it was put upon the ground that neither the policy of the state nor its laws forbade it, and that the law of international comity which prevailed there sustained it.

In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, the dependent and derivative rights of corporations were again declared. *Bank of Augusta v. Earle* was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of the sovereignty where created, and the recognition of its existence in other states and the enforcement of its contracts made therein depend purely upon the comity of those states.

"Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of § 2, article 4, of the Constitution of the United States, which gave to the citizens of each state the privileges and immunities of citizens of the several states. See also *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. Rep. 737; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972. And it has since been held in *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, and in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect.

In *Blake v. McClung*, a Virginia corporation was denied the *right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court. [46]

In *Orient Ins. Co. v. Daggs*, the right of the company, a Connecticut corporation, to limit by contract its liability to the actual damages caused by fire, notwithstanding a provision in a statute of Missouri making

the measure of damages in case of total loss the value of the property stated in the policy, was denied.

See also *Pembina Consol. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. Rep. 737.

In *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the state. All preceding cases were cited, and it was assumed as settled "that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state." And the exception to the rule was stated to be "only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the Federal nature of its business."

This exception was recognized in the case at bar, and the business of the plaintiff in error of a Federal nature excluded from the operation of the judgment.

The pending case might be rested on *Hooper v. California*, simply as authority, and we have entered upon the reasoning upon which it was based because its application to the contentions of the plaintiff in error is not properly estimated in the arguments of counsel.

[47] Nor can the plaintiff in error claim an exemption from the principle on the ground that the permit of the company was a contract inviolable against subsequent legislation by the state. That contention was presented to the court of civil appeals, and the court properly replied: "After the act of 1889 went into effect the state granted to appellant [plaintiff in error here] authority to engage in its business within the state for a *period of ten years. The act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. . . . The action in force when the appellant entered the state informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of the obligation, and as binding upon the appellant, as if it had been expressly made part of the permit." [19 Tex. Civ. App. 19, 44 S. W. 945.]

The statute of 1889, therefore, was a condition upon the plaintiff in error within the power of the state to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.

The statute was not repealed by the act of 1895. The only substantial addition made by the latter was to exclude from its provisions organizations of laborers, for the purpose of maintaining a standard of 177 U. S.

wages. The court of civil appeals said of it:

"If the clause in the act of 1895 which exempts from its operation labor organizations for the purpose of maintaining their wages would render that statute obnoxious to the Fourteenth Amendment to the Constitution (which we do not think the case), the entire act would be void, and could not operate as a repeal of the former law of 1889; and so that if it should be determined that this latter act was unconstitutional, the former act would be in force, and would not be subject to the objections urged against it, for the reasons stated by us in passing upon these objections, and therefore the state could maintain a case under this act." [19 Tex. Civ. App. 18, 44 S. W. 945.]

In other words, as to that act the situation is this: It is either constitutional or unconstitutional. If it is constitutional, the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not affect the act of 1889, and that, as we have seen, imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the state to forfeiture.

Judgment affirmed.

Mr. Justice **Harlan** dissented.

*JONAS GROSSMAYER, *Petitioner.* [48]

(See S. C. Reporter's ed. 48-51.)

Mandamus—to compel entry of judgment by default—service on local agent of partnership.

1. A writ of mandamus may lie to compel a court to enter judgment by default, where it erroneously declines to take jurisdiction of the case after sufficient service on the defendant, who does not appear, except specially to contest the jurisdiction.
2. A partnership is not one of the associations referred to in Tex. Rev. Stat. 1895, art. 1223, authorizing service of process on any local agent of a "corporation, joint-stock company or association, or acting corporation or association."

[No. 4 Original.]

Submitted February 26, 1900. Decided March 26, 1900.

PETITION for writ of mandamus. *Denied.*

The facts are stated in the opinion.

Mr. **Thomas H. Clark** submitted the cause and Mr. **Jonas Grossmayer** filed a brief for petitioner.

NOTE.—As to mandamus to control inferior court's discretion—see note to *Ex parte Morgan*, 29 L. ed. U. S. 135.

Mandamus, when proper remedy and when not—see note to *United States ex rel. International Contracting Co. v. Lamont*, 39 L. ed. U. S. 160.

Mr. W. W. MacFarland submitted the cause for respondent.

Contentions of counsel sufficiently appear in the opinion.

[48] ***Mr. Justice Gray** delivered the opinion of the court:

This is a petition for a writ of mandamus to the district judge of the United States for the eastern district of Texas, holding the circuit court of the United States for that district, to enter judgment by default for the petitioner in an action brought by him in that court.

The proceedings in that action, as appearing by the petition for mandamus and by the judge's return to a rule heretofore issued by this court, were as follows: The petitioner, a citizen of the state of Texas, and a resident of Galveston in the eastern district of Texas, brought an action in that court to recover damages in the sum of \$50,000 against Robert G. Dun, a citizen of the state of New York, and Robert D. Douglas, a citizen of the state of New Jersey, alleging that the defendants carried on business in that district and throughout the United States, as an association under the name of

[49] **R. G. Dun & Company**, *and praying for a summons to said R. G. Dun & Company, to be served upon John Fowler, alleged to be a resident of Galveston and the local agent of said R. G. Dun & Company. A summons was issued accordingly, and the marshal returned that he had served it upon Fowler as such local agent. The defendants having filed no plea, answer, or demurrer in the action, the plaintiff moved for a judgment by default. The defendants then, appearing specially for the purpose, filed a plea to the jurisdiction of the court, because the defendants were not and never had been a corporation, but were private individuals, citizens of the states of New York and New Jersey respectively, and not of the state of Texas; and in support of this plea filed an affidavit of Fowler to the truth of the facts therein stated. And the court thereupon entered the following order: "On this day came the plaintiff, by his attorney, and moved the court that judgment by default be entered against the defendant herein for the want of an appearance or answer, as required by law; and the said motion having been heard and argued before the court, and the court being sufficiently advised, it is considered and ordered by the court that the said motion be denied."

Two objections are made to the issue of a writ of mandamus: (1st) That, if the decision of the circuit court was erroneous, the remedy was by writ of error, and not by mandamus; (2d) that the circuit court had no jurisdiction of the action, for want of due service upon the defendants.

The objection to the form of remedy cannot be sustained. A writ of mandamus, indeed, cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the circuit court of the United States for the defendant upon a plea to the

jurisdiction cannot, therefore, be reviewed by writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Re Pennsylvania Co.* 137 U. S. 451-453, 34 L. ed. 738, 739, 11 Sup. Ct. Rep. 141; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* [50] 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; *Re Hohorst*, 150 U. S. 653, 664, 37 L. ed. 1211, 1215, 14 Sup. Ct. Rep. 221. In *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559, cited for the respondent, which was brought to this court by writ of error, the circuit court had entered a final judgment in favor of the defendant, setting aside the summons, and relieving the defendant from appearing to answer the complaint. But in the case now before us that court has done no more than to decline to enter a judgment in favor of the plaintiff. The plaintiff could not sue out a writ of error before a final judgment had been entered against him; and he could not compel the circuit court to proceed to final judgment, otherwise than by a writ of mandamus.

But the circuit court rightly held that it had no jurisdiction to enter judgment against the defendants, because there had been no lawful service of the summons upon them. It appears by the record, and is not now denied by the petitioner, that the defendants were a partnership. In the absence of local statute, no valid judgment can be rendered against the members of a partnership without service upon them. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648. The Revised Statutes of Texas of 1895 contain the following provisions:

"Art. 1223. In any suit against a foreign private or public corporation, joint-stock company or association, or acting corporation or association, citation or other process may be served on the president, vice president, secretary, or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint-stock company, or association, or acting corporation or association.

"Art. 1224. In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

It is argued, in behalf of the petitioner, that the defendants in this case were an "association," within the meaning of article 1223 of these statutes, and therefore service on their local agent within the state was sufficient. But upon reading that article in connection with article 1224, which immediately follows it, it is manifest that the words in the former section, "corporation, *joint-[51] stock company or association, or acting corporation or association," were not intended to include partnerships; and that the mode

of service in actions against partnerships was regulated by the latter section, which requires service in such actions to be made upon one of the firm. As no such service had been made in the case before us, the circuit court had no jurisdiction to entertain the action or to render judgment against the defendants.

Writ of mandamus denied.

FARMERS' LOAN & TRUST COMPANY,
Plff. in Err.,
v.
LAKE STREET ELEVATED RAILROAD
COMPANY, American Trust & Savings
Bank, and Northern Trust Company.

(See S. C. Reporter's ed. 51-62.)

*Courts—priority of jurisdiction—filing bill
and issuing summons, not yet served.*

1. The filing of a bill for foreclosure of a mortgage in a Federal court, and the issuing of a subpoena in the suit, give jurisdiction as against an action subsequently commenced in a state court by a summons which was served before service of the writ of subpoena issued by the Federal court.
2. An injunction against proceeding to foreclose a mortgage in a Federal court which has first acquired jurisdiction over the property cannot be granted by a state court in which suit is brought for removal of the trustee.

[No. 108.]

*Argued January 19, 1900. Decided March
26, 1900.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a decree for an injunction against proceedings in a Federal court. *Reversed.*
See same case below 173 Ill. 449, 51 N. E. 55.

Statement by Mr. Justice Shiras:

The Lake Street Elevated Railroad Company was incorporated under the laws of the State of Illinois in the month of August, 1892, with a capital stock of \$5,000,000, which was increased in the month of April, 1893, to \$10,000,000, *consisting of 100,000 shares of the par value of \$100 each.

On April 7, 1893, the company made and delivered a certain mortgage or trust deed to the American Trust & Savings Bank, a corporation of the state of Illinois, and to the

NOTE.—As to interference with other courts; comity—see note to Carson v. Dunham (Mass.) 3 L. R. A. 203.

As to when exclusive jurisdiction first attaches—see note to Tefft v. Sternberg (C. C. W. D. S. D. Ga.) 5 L. R. A. 221.

As to jurisdiction as affected by possession of the subject-matter—see note to Adams v. Mercantile Trust Co. 15 C. C. A. 6.

As to jurisdiction of Federal courts in mortgage foreclosure—see note to Seattle, L. S. & E. R. Co. v. Union Trust Co. 24 C. C. A. 523.

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Farmers' Loan & Trust Company, a corporation of the state of New York, as trustees, to secure the payment of bonds in the aggregate amount of \$6,500,000. The said trust companies duly accepted said trust, and the mortgage was afterwards, on May 6, 1893, recorded in the recorder's office of Cook county, Illinois. The amount and number of said bonds were afterwards, in pursuance of provisions contained in the mortgage, increased to 7,574 bonds of the par value of \$1,000 each, making the total mortgage indebtedness \$7,574,000. The mortgage contained the usual provisions authorizing the trustees, in case of default in payment of the interest coupons for a period of six months, to declare the entire principal debt to have become due and payable, and to proceed by foreclosure or otherwise to enforce the terms of the mortgage.

On January 30, 1896, at ten o'clock and thirty-five minutes A. M., the Farmers' Loan & Trust Company, as a corporation of the state of New York, filed in the circuit court of the United States for the northern district of Illinois a bill of complaint against the Lake Street Elevated Railroad Company, the Union Elevated Railroad Company, the Northwestern Elevated Railroad Company, the West Chicago Street Railroad Company, and the American Trust and Savings Bank, all corporations organized under the laws of the state of Illinois.

The bill alleged that default had been made by the Lake Street Elevated Company in the payment of all interest coupons payable on the 1st day of July, 1895, and on the 1st day of January, 1896; that the Lake Street Elevated Railroad Company had become insolvent, and was unable to pay its debts and obligations; that a foreclosure suit was necessary, and pending the proceeding that it was expedient and necessary to have a receiver appointed. The bill further alleged *that the Union Elevated Railroad Company, the West Chicago Street Railroad Company, and the Northwestern Elevated Railroad Company claimed to have acquired some interest, by lease or otherwise, in the mortgaged property, and that the American Trust & Savings Bank, named as cotrustee in the mortgage, had been requested to join with it as complainant in the bill of foreclosure, but had declined and refused so to do or to take any action in the premises, and was therefore made a party defendant. A subpoena was thereupon issued directed to the several defendants, commanding them to appear and answer on the first Monday of March next thereafter.

On the same day, January 30, 1896, shortly after the said bill had been filed and process had issued, the Lake Street Elevated Railroad Company filed in the superior court of Cook County, state of Illinois, a bill of complaint against the Farmers' Loan & Trust Company, the American Trust & Savings Bank, and the Northern Trust Company.

The bill, after setting forth the facts attending the issue of the mortgage, alleged that at the time said mortgage was executed and delivered the Farmers' Loan & Trust

[54]

Company, being a corporation under the laws of the state of New York, had not, and had not since, complied with the laws of the state of Illinois, which required a deposit with the auditor of public accounts for the benefit of the creditors of said company of the sum of \$200,000 in stocks of the United States or municipal bonds of the state of Illinois, or in mortgages on improved and productive real estate of such state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; that, at the time of the execution and delivery and acceptance of said trust under said mortgage, the Lake Street Company, the complainant, did not know that the Farmers' Loan & Trust Company had not complied with the laws of the state of Illinois; and that since the acceptance of said trust the Farmers' Loan & Trust Company had been doing business in the state of Illinois, and had appointed one William Burry as its agent to enforce compliance by the Lake Street Elevated Company with the trusts reposed *in the Farmers' Loan & Trust Company, under said mortgage or deed of trust, and that said Burry, as such agent, had acted and still was acting by virtue of the authority claimed to be vested in the Farmers' Loan & Trust Company under said mortgage.

This bill further alleged that the Lake Street Elevated Railroad Company had been unable to earn sufficient money in operating its railroad to pay the interest upon the bonded indebtedness secured by the said mortgage or deed of trust; that, notwithstanding such fact, one William Ziegler, of New York city, conspiring and confederating with various persons, and altogether representing 610 bonds of the total issue of 7,574 bonds, made a demand upon the Farmers' Loan & Trust Company and the American Trust & Savings Bank that they proceed to foreclose said mortgage, and take possession under and by virtue of the powers contained in said mortgage and the authority vested in said trustees, or to file a bill to foreclose such mortgage; that the complainant, the Lake Street Elevated Railroad Company, filed on December 30, 1895, a bill in the circuit court of Cook county, Illinois, against said William Ziegler and others, seeking to enjoin them, and each of them, and the Farmers' Loan & Trust Company and the American Trust & Savings Bank, from instituting any proceedings to foreclose said mortgage, and, for reasons set forth, an injunction immediately and without notice was prayed for.

It appears that such an injunction was issued, but that subsequently said cause was, on petition of Ziegler and other bondholders, removed into the circuit court of the United States for the northern district of Illinois.

The bill in the present case proceeded to allege that no other persons than Ziegler and those associated with him as holders of the 610 bonds were asking or demanding of the Farmers' Loan & Trust Company any action or proceeding, but notwithstanding it proposed and would file a bill to foreclose the said mortgage for failure to pay the inter-

est upon the bonded indebtedness; that the holders of 6,574 bonds, issued under said mortgage, had requested the trustees to take no action whatsoever under said mortgage or trust deed with reference to the *failure of said company to provide for or pay the interest due July 1, 1895, and January 1, 1896; that the American Trust & Savings Bank, in compliance with said request, declined and refused on January 28, 1896, to join with the Farmers' Loan & Trust Company in any proceedings whatsoever to enforce the provisions or conditions of said mortgage on account of the failure of the company to pay said interest. [55]

The bill further alleged that it was the wish of the holders of over 6,500 of said bonds that the Farmers' Loan & Trust Company should be removed from its position as trustee under said mortgage, first, for failure to comply with the laws of the state of Illinois, and, second, for assuming to act or take proceedings under said mortgage, contrary to the request of the holders of a majority of the bonds issued under said mortgage. Thereupon the bill proceeded to pray that a new trustee should be appointed by the court to act, under and by virtue of said mortgage, in place and stead of the Farmers' Loan & Trust Company; that an injunction *pendente lite* should be issued, restraining and enjoining said the Farmers' Loan & Trust Company from taking any proceedings or bringing or prosecuting suit or suits, or acting in any manner whatsoever under and by virtue of the terms, provisions, and conditions of said mortgage or deed of trust, and that, upon final hearing, said injunction should be made perpetual; and for other and further relief. A writ of injunction was forthwith issued and served.

On January 31, 1896, the Farmers' Loan & Trust Company filed, in the superior court of Cook county, its petition to remove said cause into the circuit court of the United States. The petition alleged that the Farmers' Loan & Trust Company was a corporation organized under the laws of the state of New York, and a citizen thereof; that the Lake Street Elevated Railroad Company, the American Trust & Savings Bank and the Northern Trust Company were corporations organized under the laws of the state of Illinois, and citizens thereof; that in said cause there were controversies between citizens of different states, which controversies could be fully determined as between them, and that said controversies were between the petitioner on the one part, and the Lake Street Elevated Railroad Company on the other, and were as follows:

*1. A controversy concerning the right of the petitioner to act as trustee under the mortgage. 2. A controversy concerning the removal of the petitioner as trustee under said mortgage. 3. A controversy concerning the enjoining of the petitioner from taking any proceedings or bringing or prosecuting any suits, or acting under and by virtue of the terms, provisions, and conditions of the mortgage. [56]

The petition further alleged that if the

controversy in the cause was one and inseparable, then such controversy was wholly between citizens of different states, and could be fully determined between them, and that said controversy was between the petitioner on the one part and the Lake Street Elevated Railroad Company on the other part, and that said other defendants, the American Trust & Savings Bank and the Northern Trust Company, were not proper or necessary parties in the cause.

The petition further alleged that on January 30, 1896, it had exhibited in the circuit court of the United States for the northern district of Illinois its bill in chancery for a foreclosure of said mortgage, and in doing so was acting under and by virtue of the terms, provisions, and conditions of said mortgage; that its said bill of complaint was filed prior to the commencement of this suit or of any notice thereof to the petitioner, or of any notice to the petitioner of the temporary injunction issued in this cause, and that the suit so commenced by the petitioner is still pending and undetermined: that the bringing of this suit and the issuing of said injunction tends to obstruct and impede the administration and jurisdiction of the said circuit court of the United States in the suit so commenced by the petitioner in said circuit court of the United States, and interferes with the property thereby brought into said circuit court, and that there is therefore involved in this suit a controversy arising under and by virtue of the laws of the United States, which controversy affects the jurisdiction of said circuit court of the United States in said cause so commenced therein by the petitioner.

[57] The petition made profert of a bond in the penal sum of \$500, conditional for the entering in the circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that might be awarded if said circuit court of the United States should hold that this suit was wrongfully or improperly removed thereto.

The petitioner thereupon prayed the court to proceed no further in the cause, except to make an order of removal, as required by law, and to accept said surety and bond, and to cause the record therein to be removed to said circuit court of the United States, according to the statute in such case made and provided.

The superior court of Cook county having denied the removal thereafter, on February 4, 1896, the Farmers' Loan & Trust Company procured an order from the circuit court of the United States giving leave to file a transcript of the record of this suit in the United States court, whereupon, on that day, such transcript of record was filed and the cause was docketed.

Thereafter motions were severally made by the Lake Street Elevated Railroad Company, the Northern Trust Company, and the American Trust & Savings Bank, in the circuit court of the United States, for an order remanding the cause to the superior court of Cook county. These motions were accompa-

nied by statements denying, among other things, that the suit involved controversies between citizens of different states, and alleging that the bond filed by the petitioner was insufficient in that said bond was not signed by the petitioning company, but by sureties only.

On March 16, 1896, after argument, the circuit court of the United States overruled and denied the motions to remand.

In February, 1896, the American Trust & Savings Bank, and on April 24, 1896, the Lake Street Elevated Railroad Company, filed, in the circuit court of the United States, demurrers to the bill of foreclosure. On April 21, 1896, the circuit court, on motion and after argument, set aside the *ex parte* injunction that had been entered by the state court, after the bill of foreclosure had been filed in the Federal court; and thereupon an appeal was taken from this order setting aside the injunction to the circuit court of appeals of the seventh circuit, which appeal was, on January 9, 1897, [58] overruled and dismissed. 46 U. S. App. 630, 77 Fed. Rep. 769, 23 C. C. A. 448.

On March 18, 1896, a motion was made in the state court to attach for contempt the attorney of the Farmers' Loan & Trust Company in disobeying the *ex parte* injunctive order. Thereupon the Farmers' Loan & Trust Company entered a special appearance in the state court, and moved to quash the service in the case: and on the same day, on a motion by the counsel of the Lake Street Elevated Company, the court entered an order finding that it had jurisdiction of the parties and the subject-matter, and ordering that the special appearance and motion by the Farmers' Loan & Trust Company should be stricken from the files as having been improperly and improvidently filed. The Farmers' Loan & Trust Company then applied for leave to enter a general appearance and for time to answer. Leave so to do was granted by the court, on condition that the answer be on or before March 25, 1896. Upon the coming in of the answer on that day the court appointed May 8, 1896, for a final hearing. The Farmers' Loan & Trust Company had leave to file an amended answer, in which, besides denying the several charges made against it in the bill, it was alleged that the state court did not have jurisdiction; that the case had been removed to the circuit court of the United States, and that, by reason of the action of that court in refusing, on motion by the Lake Street Elevated Railroad Company, to remand, the state court could not proceed with the case.

On May 28, 1896, the state court made its findings in favor of the Lake Street Elevated Railroad Company, the complainant, and on June 4, 1896, entered a final decree in the case.

By this decree it was decreed that the Farmers' Loan & Trust Company should be and was removed from its position as trustee, and it was further ordered that "the said defendant, the Farmers' Loan & Trust Company, and its attorneys, solicitors, officers, agents, and servants, and each and every of

[59] them, be, and they hereby are, perpetually enjoined and restrained from taking any proceedings, or bringing or prosecuting any suit or suits, to foreclose said mortgage or trust deed from said complainant to said American Trust & Savings Bank and said Farmers' Loan & Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions, and conditions of said mortgage or trust deed."

It was further ordered that the American Trust & Savings Bank, should, by an instrument in writing, appoint a trustee in place of the Farmers' Loan & Trust Company, and that the Farmers' Loan & Trust Company should execute an instrument of transfer to vest in such new trustee "all the property, privileges, and rights" of the said Farmers' Loan & Trust Company under said trust deed.

In October, 1896, an appeal from this decree was taken to the appellate court for the first district of Illinois, and on February 9, 1897, that court affirmed the decree of the trial court. 68 Ill. App. 669.

On appeal to the supreme court of the state the decree of the appellate court was affirmed on June 7, 1898. 173 Ill. 449, 51 N. E. 55.

It was held by the state courts that the case was not properly removed to the circuit court of the United States for the reason that the bond filed with the petition for removal was not signed by the Farmers' Loan & Trust Company, the petitioner, but only by the sureties. Those courts likewise held that the Farmers' Loan & Trust Company was properly removed as trustee because of its noncompliance with the provision of the state statute, requiring foreign trust companies to make a deposit of securities with the state auditor.

On July 7, 1898, a writ of error from this court to the supreme court of Illinois was allowed.

Mr. John J. Herrick and **William Barry** argued the cause and, with **Mr. Herbert B. Turner**, filed a brief for plaintiff in error:

As between courts of concurrent jurisdiction, the court that first obtains possession of the controversy or of the property in dispute must be allowed to dispose of it without interference or interruption from the co-ordinate courts.

Riggs v. Johnson County, 6 Wall. 196, *sub nom. United States ex rel. Riggs v. Johnson County Supers.* 18 L. ed. 776.

It is a well-recognized doctrine that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter proceedings in the state courts.

Logan v. Lucas, 59 Ill. 238; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 305, 28 L. ed. 733, 5 Sup. Ct. Rep. 135; *Mail v. Maxwell*, 107 Ill. 561; *Mason v. Piggott*, 11 Ill. 88; *Munson v. Harroun*, 34 Ill. 422, 85 Am. Dec. 316; 2 Story, Eq. Jur. § 900.

Mr. Clarence A. Knight argued the cause and filed a brief for the railroad company:

The service of the injunction writ and of

the summons were prior to the service of summons in the foreclosure case, and therefore, if this cause interfered with the foreclosure suit, the service of the process of the state court give prior jurisdiction to that court.

Zimmerman v. So Relle, 49 U. S. App. 387, 80 Fed. Rep. 417, 25 C. C. A. 518; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Union Mut. L. Ins. Co. v. University of Chicago*, 6 Fed. Rep. 443; *Sharon v. Terry*, 13 Sawy. 387, 36 Fed. Rep. 356, 1 L. R. A. 572; *Owens v. Ohio C. R. Co.* 20 Fed. Rep. 10; *Gaylord v. Ft. Wayne, M. & C. R. Co.* 6 Biss. 286, Fed. Cas. No. 5,284; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Farmers' Loan & T. Co. v. Hughes*, 11 Hun, 130; *Gibson v. American Loan & T. Co.* 58 Hun, 443, 12 N. Y. Supp. 444; *Merritt v. American Steel Barge Co.* 49 U. S. App. 85, 79 Fed. Rep. 228, 24 C. C. A. 530.

Mr. T. A. Moran argued the cause and, with **Mr. Levy Mayer**, filed a brief for the bank:

Service was first had in this suit. In such case the first suit is that in which service is first had, and the court in which that suit is brought is entitled to retain it, free from interference.

Desty, Removal of Causes, § 73a; *Rorer, Interstate Law*, 2d ed. pp. 16, 17; *Union Mut. L. Ins. Co. v. University of Chicago*, 6 Fed. Rep. 443; *Ward v. Todd*, 103 U. S. 327, 26 L. ed. 339; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287; *Foster v. Bank of Abingdon*, 68 Fed. Rep. 723; *Sharon v. Terry*, 13 Sawy. 387, 36 Fed. Rep. 337, 1 L. R. A. 572; *Foley v. Hartley*, 72 Fed. Rep. 570; *Merritt v. American Steel Barge Co.* 49 U. S. App. 85, 79 Fed. Rep. 228, 24 C. C. A. 530; *Zimmerman v. So Relle*, 49 U. S. App. 387, 80 Fed. Rep. 417, 25 C. C. A. 518.

The presentation of the bond and petition, the motions for removal, for time to file a certificate of evidence, and the argument before the superior court, constituted a general appearance giving the superior court jurisdiction over the parties and subject-matter prior to any jurisdiction over the same in the United States circuit court upon the bill to foreclose.

Sayles v. Northwestern Ins. Co. 2 Curt. C. C. 212, Fed. Cas. No. 12,421; *Tallman v. Baltimore & O. R. Co.* 45 Fed. Rep. 156; *Wabash Western R. Co. v. Brow*, 31 U. S. App. 192, 65 Fed. Rep. 941, 13 C. C. A. 222; *Caskey v. Chenoweth*, 23 U. S. App. 384, 62 Fed. Rep. 712, 10 C. C. A. 605; *New York Constr. Co. v. Simon*, 53 Fed. Rep. 1; *Foley v. Hartley*, 72 Fed. Rep. 573; *Howlett v. Central Carolina Land & Improv. Co.* 56 Fed. Rep. 162; *Central Trust Co. v. South Atlantic & O. R. Co.* 57 Fed. Rep. 3; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

***Mr. Justice Shiras** delivered the opinion [59] of the court:

Whether the state courts erred in refusing

[60] to accept the petition *and bond filed by the plaintiff in error, the Farmers' Loan & Trust Company, for removal of the cause to the circuit court of the United States, and whether the Lake Street Elevated Railroad Company, the American Trust & Savings Bank, and the Northern Trust Company, by appearing in the circuit court, by moving to remand, by demurring to the bill, after such motion had been overruled, and by appealing to the circuit court of appeals, were estopped from proceeding in the state court, are questions which have been argued at length before us, but which, for reasons presently to be stated, we have not found it necessary to decide.

Apart from those questions, the principal matters in dispute are the legal competency of the Farmers' Loan & Trust Company to act as trustee under the mortgage, and whether, in view of the controversy between the two sets of bondholders in regard to the right and expediency of a foreclosure proceeding, the Farmers' Loan & Trust Company can proceed to enforce the provisions of the mortgage. And these are matters which are necessarily involved, and can be properly raised and determined in the circuit court of the United States whose jurisdiction had attached by the filing of the bill of foreclosure before the commencement of the suit in the state court.

The contention that the jurisdiction of the state court first attached because, although the suit therein was not commenced till after the commencement of the suit in the Federal court, the summons issued by the state court was served before the service of the writ of subpoena issued by the Federal court, is not well founded.

A suit in equity is commenced by filing a bill of complaint. Story, Eq. Pl. 4th ed. § 7.

Such is also the rule by statute in Illinois. Ill. Rev. Stat. 1874, chap. 22; *Hodgen v. Guttery*, 58 Ill. 431.

It is true that in applying the doctrine of *lis pendens* to the case of a third person who is a bona fide purchaser, notice is held to begin from the date of service of the subpoena, and not from the filing of the bill. *Miller v. Sherry*, 2 Wall. 237, 250, 17 L. ed. 827, 830; 2 Maddock, Ch. Pr. 325; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Grant v. Bennett*, 96 Ill. 513.

[61] *But here no question is presented relating to rights acquired by any third person after the commencement of the suit and before the service of process on the defendants. As between the immediate parties, in a proceeding *in rem*, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served, in accordance with the rules of practice of the court.

The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another court and procuring an *ex parte* injunction seeking to restrain the service of process already issued.

As, then, the bill of foreclosure had been filed in the circuit court of the United States,

and the jurisdiction of that court had thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the state court to interfere by injunction or otherwise with the proceedings in the Federal court.

The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

*We think that this salutary rule is applicable to the present case. The bill filed in the Federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them.

Our conclusion is that the superior court of Cook county erred in its decree perpetually enjoining and restraining the Farmers' Loan & Trust Company, the plaintiff in error, from proceeding with or prosecuting the said foreclosure suit in the circuit court of the United States, and from acting in any manner whatsoever under and by virtue of the terms, provisions, and conditions of the said mortgage; that the appellate court of the first district of Illinois erred in affirming said decree, and that the supreme court of

Illinois erred in affirming the judgment of the said appellate court.

Accordingly, *the judgment of the Supreme Court of Illinois is reversed*, and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

[63] *WILLIAM CARMICHAEL, F. Kilgore, Robert Taylor, George Beardsley, James House, Thomas Coleman, William Flanagan, James Starkweather, Adam Hugg, Martha J. Shelton, George Shelton, T. M. Bertrand, and Charles Davis, *Plffs. in Err. and Appts.*,

v.

FRANCIS X. EBERLE.

(See S. C. Reporter's ed. 63-66.)

Appeal—equal division on motion for rehearing.

Equal division of the court on a motion for rehearing of a judgment of reversal previously rendered leaves that judgment in force, and does not result in affirming the judgment of the lower court.

[No. 166.]

Submitted March 5, 1900. Decided March 26, 1900.

IN ERROR to and APPEAL from the Supreme Court of the Territory of New Mexico reversing a judgment in an action of ejectment. *Dismissed.*

The facts are stated in the opinion.

Mr. W. B. Childers submitted the cause for plaintiffs in error and appellants.

Mr. H. L. Pickett filed a brief for appellants Davis and Sheldon.

Mr. T. B. Catron submitted the cause for defendant in error and appellee.

[63] *Mr. Chief Justice Fuller delivered the opinion of the court:

This was an action in ejectment brought in the district court for the county of Socorro, in the territory of New Mexico, which resulted in judgment against one of the defendants and in favor of the other defendants, whereupon Eberle, plaintiff below, carried the case on writ of error to the supreme court of the territory.

At the July term, 1895, of that court, and on October 16, the following judgment was entered: "This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justice Laughlin dissenting, reversing the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by

[64] *the court that the judgment in this cause of the district court in and for the county of Socorro, whence this cause came into this court, be, and the same

hereby is, reversed, and that this cause be, and the same hereby is, remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged by the court that the said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in this court expended, to be taxed, and that execution issue therefor."

December 17, 1895, defendants in error filed a motion for rehearing, pending which the court adjourned to court in course. At July term, 1896, and on August 11, this order was entered: "This cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing of said cause, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement."

December 18, 1896, judgment was rendered as follows: "This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, upon the motion of the said defendants in error for a rehearing of said cause granted herein at a former term, the court being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, reversing the judgment of the court below, and remanding said cause for a new trial for reasons stated in the opinion of the court on file herein. It is therefore considered and adjudged by the court that the judgment of the district court in this cause in and for the county of Socorro, whence this cause came into this court, be and the same is, hereby reversed, and that this cause be and the same is hereby remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged that said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in *this court expended, to be [65] taxed, and that execution issue therefor."

On the 1st day of February, 1897, the following motion was filed: "Now come the defendants in error in the above-entitled cause and move the court to set aside the entry heretofore made in said cause on the 11th day of August, 1896, as the same appears upon page 388 of the records of said court in Record B, page 388, and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896, as the same appears upon page 464 of Record B of the minutes and records of said court, and enter in lieu thereof an order affirming the judgment of the court below, and for grounds of said motion the said appellees show to the court that a rehearing was granted in said cause, and said cause reargued and taken under ad-

visement by the court and afterwards decided by a divided court, two of the members sitting in said cause being in favor of reversal and two in favor of affirmation, which entry in legal effect results in the affirmation of the judgment of the court below."

This motion was overruled March 1, 1897, in these terms: "This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc* granting the defendants in error a rehearing on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied." Thereupon the case was brought to this court on writ of error and also on appeal.

[66] The contention of plaintiff in error is that a rehearing was granted, and that, as the court was equally divided on such alleged rehearing, the judgment of the district court was affirmed. We are of opinion, however, that, in the light of the various orders of the supreme court, although that of December 18 was somewhat obscurely worded, a rehearing was not granted, but that the motion for rehearing was permitted to be argued, and as that was heard before four of the *judges of the court, and there was an equal division, it was denied. Had this been otherwise, the court would not have unanimously overruled the motion to amend the record so as to make it appear that a rehearing had actually been granted.

Moreover, counsel agree that under the rules of the court a rehearing could not be granted unless one of the justices who concurred in the judgment so desired, and a majority of the court so determined and that this was also true of permission to argue such application. It is evident that oral argument was allowed, and it also appears that no justice who concurred in the judgment desired a rehearing, and that a majority of the court did not determine to grant it.

The judgment of reversal therefore stood, and as it was not a final judgment, *the writ of error and the appeal must be dismissed*, and it is so ordered.

HOUSTON & TEXAS CENTRAL RAIL-
ROAD COMPANY, *et al.*, Plffs. in Err.,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 66-103.)

Writ of error—Federal question—impairment of obligation of contract—state

NOTE.—As to what are bills of credit within the United States Constitution; confederate notes are not—see note to Craig v. Missouri, 7 L. ed. U. S. 162.

As to what laws are void as impairing obligation of contract—see note to Fletcher v. Peck, 3 L. ed. U. S. 162.

As to jurisdiction of Federal over state
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treasury warrants circulating as money—violation of Constitution—legality of payment to state therein—warrants issued in aid of Rebellion.

1. A decision of a state court may give effect to a state statute and thereby impair the obligation of a contract with the state, although the court does not mention the statute.
2. A case is not removable to a Federal court on the ground that matters of a Federal nature are involved, when no such matter appears in plaintiff's original cause of action, but is first set up by his reply to a defense.
3. A finding by the court that warrants issued under and, by virtue of certain acts of the legislature were issued with intention to have them circulate as money is not a finding of fact, but is in the nature of a legal conclusion, which may be reviewable by the Supreme Court of the United States.
4. A warrant drawn by state authorities in payment of an appropriation made by the legislature for a debt due from the state to an individual, and payable upon presentation if there be funds in the treasury, cannot be deemed a bill of credit in violation of U. S. Const. art. 1, § 10, or to be a treasury warrant intended to circulate, as money in violation of Tex. Const. 1845, art. 7, § 8, although the state directs its officers to receive such warrants as money in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state, but not to reissue them when once they come back to the treasury of the state.
5. Payments actually received by state officers in pursuance of a state statute are not void because made in state treasury warrants which had been illegally issued in violation of constitutional provisions against issuing warrants to circulate as money or against bills of credit, or because they were issued in aid of the Rebellion, even if the offer of the state to receive them was not binding while unexecuted.
6. The obligation of the contract which the law raises from the transaction itself when a state actually receives in payment of an obligation treasury warrants which were void, and thereupon cancels them, would be impaired by any subsequent statute of the state which repudiated or permitted the repudiation of the payments.
7. A construction by a state court of a state statute, whereby a cause of action under the statute for default of payments is enforced on the ground that payments previously made and accepted by the state are void, operates to impair the obligation of the implied contract arising out of the acceptance of the payments, and therefore violates the Federal Constitution, although the state court does not mention the statute.

[No. 81.]

courts; necessity of Federal question—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

Argued December 13, 14, 15, 1899. Decided March 26, 1900.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a decision foreclosing a lien on railroad property. *Reversed.*

See same case below, 41 S. W. 157.

Statement by Mr. Justice **Peckham**:

[67] *This proceeding was commenced by the state of Texas against the defendant, the Houston & Texas Central Railroad Company (hereafter called the company), to recover the amount due on certain bonds issued to the state, and to foreclose the lien which existed upon its property as security for the payment of such bonds. The company is the legal successor of the two companies which received the loans and gave their bonds, and no question of liability arises on that ground. Judgment was given in the trial court for the amount found due, and a lien was declared and a sale of the property of the company ordered. From this judgment the company appealed to the court of civil appeals for the state, where it was modified, and then affirmed. The company brings the case here on writ of error.

The petition of the state by which the proceeding was commenced showed that the predecessors of the plaintiff in error borrowed money from the school fund of the state, and gave their bonds therefor. These bonds were not paid according to their tenor and effect, and the legislature, therefore, on August 13, 1870, passed a general act for the relief of railroad *companies indebted to the state, by which it was provided that if any company should on the 1st day of November, 1870, pay six months' interest on the aggregate amount of the loan which, on the 1st day of May, 1870, was due from it to the state, and 1 per centum of the principal and thereafter should make similar semiannual payments, the state would not exact any other payments.

[68] (What was the aggregate amount of the loans due on the 1st of May, 1870, from the two companies of which the present company is the successor, is the question in controversy, and its answer depends upon the validity of certain payments made by the companies to the state in treasury warrants during the war. Part of the discussion rests upon the meaning and effect of this act, and it is therefore given in full in the margin.)†

†An Act for the Relief of Railroad Companies Indebted to the State for Loans from the Special School Fund.

Whereas, the political disturbances since the year 1860, by unsettling the business of the country, have largely contributed to prevent compliance on the part of railroad companies indebted to the state for loans from the special school fund, with their engagements respecting the payment of the principal and interest of said loans; and,

Whereas, it is desired to relieve said companies from the liability of their railroads to sale consequent upon their noncompliance as aforesaid: Therefore,

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*Subsequently, semiannual payments of interest and sinking fund were made by or on account of the Washington County Railroad Company (one of the predecessors of the plaintiff in error) up to and including the 1st of May, 1879, but no payment was made on November 1, 1879, or at any time thereafter. Similar payments were made by or on account of the Houston & Texas Central Railway Company (the other of such predecessors) up to and including the 1st day of May, 1893, but a portion only of the semiannual interest claimed to be due in November, 1893, was paid, and nothing has been paid since November 1, 1893. Judgment was prayed for the sums of money stated to be due, with interest, for the foreclosure of the lien, and for a sale of the property under execution, the proceeds to be applied to the payment of the sum due with interest, and for such other relief as might be necessary. [69]

To this petition the defendant filed an answer, and therein, among other things, alleged that after the commencement of the civil war the various railroad companies were unable to fulfil their obligations to the state, and therefore the legislature of Texas, on the 11th day of January, 1862, passed an act for their relief, extending the time of payment of interest and sinking fund amounts until the 1st of January, 1864.

*The state legislature, on December 16, 1863, passed the first act in relation to receiving treasury warrants from railroad companies, which reads as follows: [70]

"Sec. 1. Be it enacted by the legislature of the state of Texas, that the comptroller of the state be, and he is hereby, authorized to receive from the railroad companies in this state who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in state bonds or in state treasury warrants, previous to the meeting of the next regular session of the state legislature.

"Sec. 2. That for all sums so paid in the comptroller and treasurer shall issue to the special school fund the bonds of the state bearing 6 per cent interest."

The legislature also passed another act on May 28, 1864, which reads as follows:

"Sec. 1. Be it enacted by the legislature of the state of Texas, that the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive state bonds or state treasury

Sec. 1. Be it enacted by the legislature of the state of Texas, that any railroad company indebted to the state for loans from the special school fund may avoid the sale of its railroad for the nonpayment of principal or interest by the payment into the treasury of the state, on the 1st day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the 1st day of May, A. D. 1870, and by the payment, in addition, on said 1st day of November of 1 per cent upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by contin-

warrants at par for freight or passage at the prices or rates established by law.

"Sec. 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the state that any railroad company has failed or refused to receive the state bonds or state treasury warrants at par for freight or passage at the rates established by law, he is required to refuse to receive the state bonds or treasury warrants for the interest due by said railroad upon its bond.

"Sec. 3. That the president of any railroad in this state be, and is hereby, required to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act, under a penalty of \$100, to be recovered for the benefit of the state by suit before any court of competent jurisdiction, upon information of any party."

On November 16, 1864, still another act was passed by the legislature which reads as follows:

[71] "Be it enacted by the legislature of the state of Texas, that the railroad companies of this state that are indebted *to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the state, and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner), provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the state are received by them at par with specie for freight and passenger travel.

"That all treasury warrants and bonds and coupons of the state, so received into the state treasury, shall be canceled; and the comptroller shall issue the bonds of the state, bearing 6 per cent interest, to the special school fund for the amount so paid in; and this act take effect from its passage.

Upon the passage of these various acts and in reliance upon the agreement and obligation of the state, as evidenced thereby, the two companies acquired treasury warrants upon good consideration, and after the passage of the act of May, 1864, they received treasury warrants at par in payment of freight and passenger services rendered by

ning to pay into the treasury of the state six months' interest, and 1 per cent on account of said sinking fund semiannually thereafter, to wit, on the 1st day of May and November in each year.

Sec. 2. That if any railroad company shall fail to pay any amount required to be paid in section one of this act at the time designated thereby, or within ten days thereafter, then the whole debt of such company, principal and interest, shall become due, and the governor shall proceed without delay to cause the railroad of said company and its franchises and property, so far as the lien or mortgage of the state covers the same, to be sold, the sale to be in all respects (when not in conflict with this act) conducted according to the provisions of the statute of August 13, A. D. 1856: *Provided, however*, That in case the governor should (for the protection of the school fund) deem it necessary, he may buy in any road to be sold under this act, in the

them to the various people who demanded the same, and they subsequently paid treasury warrants to the comptroller of the state in payment of interest due on their indebtedness (the amounts of such payments are set forth in the answer); and upon such payment and receipt of the warrants by the comptroller and treasurer they were canceled as authorized and required by the above-mentioned act; and thereupon the comptroller and treasurer issued the bonds of the state bearing 6 per centum interest to the special school fund for the amount so paid by the railroad companies in treasury warrants. By reason of all of which it was alleged that a valid and binding contract between the state and the railroad companies was made, that the payments in treasury warrants should be valid payments, at their par value, upon the various loans made by the state to the companies; and it was further alleged that the payments by treasury warrants had been received by the authorities of the state and canceled, and a credit for the amount thereof as payment given to the companies on the books of the state, and that the transaction thereby became fully executed, and the *state could not thereafter dispute or question the validity of such payments or the right of the company to the credits given it by the state.

It is also alleged that after the passage of the act of August 13, 1870, and about the 1st of November, 1870, the comptroller of the state, with the concurrence and approval of the governor, wrongfully and without authority of law, recharged each of the railroad companies respectively upon the books of the comptroller's office with the several amounts theretofore paid by them respectively in treasury warrants, and there was demanded from the respective companies on the 1st day of November, 1870, six months' interest and 1 per cent for the sinking fund on the aggregate amount of the loan, as made up by the comptroller, after striking out the payments made by the company with the treasury warrants. These amounts were paid under protest, as being illegally demanded and resulting in a violation of the contract existing between the companies and the state. Payments on the same basis were continued semiannually from that time, ac-

name of the state: *Provided, further*, That if the whole principal and interest which may become due as aforesaid, and all costs attending the advertisements and proposed sale, shall be paid before the day of sale, then the proceedings for sale shall be stopped.

Sec. 3. That the state of Texas will not exact of any railroad company not hereafter in default in respect to any of the payments required in this act the payment of the principal of the debt of said company, excepting said payments on account of the sinking fund as aforesaid, but that any company may pay the same in full at any time on thirty days' notice to the governor, and that said lien or mortgage of the state shall not attach to any extension of its existing road hereafter constructed by any of said companies.

Sec. 4. That this act shall take effect from and after its passage.

Approved, August 13, 1870.

accompanied by a protest similar to the one first mentioned, until, as the company contends, the full amount due by it to the state had been paid, provided the payments in treasury warrants were credited as valid payments. Since that time the company has refused to make further payments. It claimed that the act of August 13, 1870, as construed by the state authorities, impaired the obligation of the contract existing between the state and itself, and thereupon it prayed for judgment.

To this pleading the plaintiff filed its first supplemental petition, and therein specially set up that the three several acts of the legislature of the state, mentioned in the defendant's answer as the authority for the payment upon the bonds of the company in treasury warrants, were unconstitutional and void, because (1) the warrants in which payments were authorized to be made were issued for the purpose of being circulated as money and were in violation of the state Constitution; (2) also because they were bills of credit emitted by the state, and therefore in violation of section 10 of article 1 of the Constitution of the United States; and (3) [73] because the acts under which the *warrants were authorized to be paid, together with other acts passed at or about the same time, plainly indicated that the treasury warrants and other obligations in which payments were authorized to be made, and which were made by the defendant, were issued in aid of the Rebellion against the United States of America, and were therefore void.

Upon these pleadings a motion was made by the company to remove the case to the United States circuit court, on the ground that by the filing of the plaintiff's last above-mentioned pleading it became apparent for the first time, from plaintiff's statement of its own claim, that the case was one arising under the Constitution or laws of the United States, and defendant was therefore entitled to a removal. The motion was denied, and although further pleadings were thereafter served on each side they are not material to the matters discussed in the opinion.

The case was tried without a jury, there being no dispute as to the facts. The trial court held that the payments in treasury warrants were illegal because they were issued to circulate as money, in violation of the Constitution of the state. It also held that they were issued, or at least some of them were issued, in direct aid of the Rebellion, and were therefore void; that the burden rested with the defendant to show, if it could, which, if any, of the warrants were valid. Judgment was given in favor of the state.

The company then appealed to the court of civil appeals for the third supreme judicial district of the state, where the judgment was modified so as to render no personal judgment against the company, and to foreclose the lien of the state only upon that part of the road which the findings showed was in existence on August 13, 1870, and as thus modified it was affirmed, solely on the ground that the warrants were issued in violation of the

state Constitution, as paper intended to circulate as money. A writ of error was applied for to the supreme court of Texas, and by that court refused. The company then brought the case here by writ of error to the court of civil appeals. The defendant in error has made a motion to dismiss the writ on the ground that this court has no jurisdiction, for reasons stated in the opinion.

Messrs. R. S. Lovett and John G. Carlisle argued the cause and, with *Messrs. J. P. Blair and Maxwell Evarts*, filed a brief for plaintiffs in error:

To warrant the removal of a cause to a Federal court as one arising under the Constitution of the United States, it is not necessary that it should so appear from the first pleading filed by plaintiff. It is sufficient if it appears in a subsequent pleading, so long as that subsequent pleading is a pleading of the plaintiff and it is clear that the plaintiff invokes the aid of the Constitution and laws of the United States in order to sustain his case.

Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

When a case is brought here by writ of error to the highest court of a state, upon the ground that the obligation of a contract has been impaired by a subsequent act of the legislature of the state, this court will examine and determine for itself whether there is in fact a contract, and is not in any way bound by the decision of the state court in that regard.

McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Jefferson Branch Bank v. Skelly*, 1 Black. 436, 17 L. ed. 173; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Delmas v. Merchants' Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Shelby County v. Union & P. Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

Warrants drawn by the comptroller upon the treasurer, in conformity with the practice prescribed by law since the creation of the state government, for the purpose only of paying appropriations duly made by the legislature, and in accordance with the only method prescribed by law for disbursing the funds of the state, cannot be deemed bills of

credit, or considered as issued with the intention that they should circulate as money.

Briscoe v. Bank of Kentucky, 11 Pet. 257, 318, 9 L. ed. 709, 733, 928; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Pagaud v. State*, 5 Smedes & M. 491; *Gowen v. Shute*, 4 Baxt. 57; *Central Bank v. Little*, 11 Ga. 346; *Ramsey v. Cox*, 28 Ark. 366.

Regardless of the form of the warrants and the validity of the legislative acts, the warrants surrendered to the state by the railroad company represented valid obligations of the state; and their delivery to, and acceptance by, the state were lawful payments in execution of the contract.

Bond Debt Cases, 12 S. C. 200; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473.

Whether the warrants were unconstitutional or not, they had a market value, and it was a damage to the railroads to receive them at par and to surrender them to the state. Such damage, therefore, constituted a good consideration for the contract between the state and the railroads, and is entirely unaffected by the constitutionality or unconstitutionality of the warrants.

Hendrick v. Lindsay, 93 U. S. 143, 23 L. ed. 855; *Violett v. Patton*, 5 Cranch, 142, 3 L. ed. 61; *Townsend v. Sumrall*, 2 Pet. 170, 7 L. ed. 386; *Thorington v. Smith*, 8 Wall. 1, 19 L. ed. 361; *Delmas v. Merchants' Ins. Co.* 14 Wall. 665, 20 L. ed. 759; *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. Rep. 179; *Dull v. Gordon*, 24 La. Ann. 478; *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308, 25 L. ed. 108.

Even the supreme court of Texas always upheld such transactions prior to this case.

Van der Hoven v. Nette, 32 Tex. 183; *Ritchie v. Sweet*, 32 Tex. 333, 5 Am. Rep. 245; *Piegzar v. Twohig*, 37 Tex. 225; *Allen v. Baker*, 39 Tex. 220; *Long v. Walker*, 47 Tex. 173. See also *Burleson v. Cleveland*, 32 Tex. 397; *Rodgers v. Bass*, 46 Tex. 505; *San Patricio County v. McClane*, 44 Tex. 392; *Roberts v. Schultz*, 45 Tex. 184; *Dull v. Gordon*, 24 La. Ann. 478; *Brown v. Jacobs*, 24 La. Ann. 526.

If the treasury warrants are unconstitutional and the consideration of the contract illegal, it being an executed contract the parties must stand by it, and can get no relief.

Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804; *Davis v. Leonard*, 69 Ind. 213; *Raguet v. Roll*, 7 Ohio, pt. 2, p. 70; *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Brown v. Tarkington*, 3 Wall. 377, 18 L. ed. 255.

Even if the original contract was illegal, such illegality did not affect the implied contract resulting therefrom.

Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. ed. 473; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732.

Mr. Charles A. Culberson argued the cause and filed a brief for defendant in error:

It is well settled that a cause is not now removable to the Federal courts unless the

Federal question appears from the plaintiff's statement of his own cause of action.

Tennessee v. Union & P. Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Hanrick v. Hanrick*, 153 U. S. 197, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; *Chappell v. Waterworth*, 155 U. S. 108, 39 L. ed. 87, 15 Sup. Ct. Rep. 34; *Postal Teleg. Cable Co. v. United States*, 155 U. S. 487, sub nom. *Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 232, 15 Sup. Ct. Rep. 192; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; *United States v. American Bell Teleph. Co.* 159 U. S. 553, 40 L. ed. 257, 16 Sup. Ct. Rep. 69; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 495, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 258, 42 L. ed. 459, 18 Sup. Ct. Rep. 62; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 236, 42 L. ed. 1020, 18 Sup. Ct. Rep. 603; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 946.

The interposition to the defense of payment, that the warrants were issued in contravention of the Federal Constitution, would not give the circuit court original jurisdiction, even though in the course of the litigation it may have been necessary to construe the Federal Constitution on that point.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; *Tennessee v. Union & P. Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Fergus Falls v. Fergus Falls Water Co.* 36 U. S. App. 480, 72 Fed. Rep. 875, 19 C. C. A. 212.

This court will not pass upon the character or existence of a contract unless the judgment of the state court gives effect to a subsequent law of the state.

Bacon v. Texas, 163 U. S. 219, 41 L. ed. 137, 16 Sup. Ct. Rep. 1023; *Douglas v. Kentucky*, 168 U. S. 502, 42 L. ed. 557, 18 Sup. Ct. Rep. 199; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 68, 42 L. ed. 952, 18 Sup. Ct. Rep. 513; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; *McCullough v. Virginia*, 172 U. S. 116, 43 L. ed. 387, 19 Sup. Ct. Rep. 134; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 485, 43 L. ed. 524, 19 Sup. Ct. Rep. 247; *Turner v. Wilkes County Comrs.* 173 U. S. 463, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

The decision was based wholly upon the ground that the warrants and notes in which payment of the debt sued on purports to have been made were issued in violation of the state Constitution. This is purely a question of state law, and under all the authorities this court is without jurisdiction.

Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; *Klinger v. Missouri*, 13 Wall. 263, 20 L. ed. 637; *McManus v. O'Sullivan*, 91 U. S. 579, 23 L. ed. 390; *Bolling v. Lersner*, 91 U. S. 594, 23 L. ed. 366; *Crossley v. New Orleans*, 108 U. S. 105, 27 L. ed. 667, 2

Sup. Ct. Rep. 300; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 30, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; *De Saussure v. Gaillard*, 127 U. S. 234, 32 L. ed. 132, 8 Sup. Ct. Rep. 1053; *Bacon v. Texas*, 163 U. S. 216, 41 L. ed. 136, 16 Sup. Ct. Rep. 1023; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *White v. Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 171, 36 L. ed. 930, 13 Sup. Ct. Rep. 54.

The legislative acts which authorized payments in state warrants were unconstitutional and void as impairing the obligation of a contract evidenced by the bonds and coupons, which were payable in lawful money of the United States.

Bank v. Supers, 7 Wall. 30, *sub nom. New York ex rel. Bank of New York v. New York County Supers*, 19 L. ed. 61; *The Confederate Note Case*, 19 Wall. 557, *sub nom. Atlantic, T. & O. R. Co. v. Carolina Nat. Bank*, 22 L. ed. 200; *Legal Tender Case*, 110 U. S. 449, *sub nom. Juilliard v. Greenman*, 28 L. ed. 215, 4 Sup. Ct. Rep. 122.

These acts were also unconstitutional as authorizing the emission of bills of credit by the state in violation of U. S. Const. art. 1, § 10.

Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 709, 928; *Darrington v. Branch of Bank of Alabama*, 13 How. 12, 14 L. ed. 30; *Legal Tender Cases*, 12 Wall. 557, 20 L. ed. 314; *Virginia Coupon Cases*, 114 U. S. 284, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 190, 5 Sup. Ct. Rep. 903; *City Nat. Bank v. Mahan*, 21 La. Ann. 751; *Bragg v. Tuffts*, 49 Ark. 554, 6 S. W. 158.

Such acts were also unconstitutional as authorizing the issue of treasury warrants intended to circulate as money, in violation of art. 7, § 8, of the state Constitutions of 1845 and 1861.

Virginia Coupon Cases, 114 U. S. 284, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 190, 5 Sup. Ct. Rep. 903, and authorities cited.

These laws and the conduct of the railway companies thereunder were "intended to aid rebellion," and were consequently void.

Texas v. White, 7 Wall. 734, 19 L. ed. 240; *Thomas v. Richmond*, 12 Wall. 357, 20 L. ed. 457; *Hanauer v. Woodruff*, 15 Wall. 439, 21 L. ed. 224; *Taylor v. Thomas*, 22 Wall. 479, 22 L. ed. 789; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; *New Orleans, St. L. & C. R. Co. v. State*, 52 Miss. 877; *Baldy v. Hunter*, 171 U. S. 400, 43 L. ed. 212, 18 Sup. Ct. Rep. 890; *Hanauer v. Doane*, 12 Wall. 347, 20 L. ed. 441.

Even if payment may have been made in part in warrants issued for the lawful support of the civil government of Texas, which were also made receivable for the debts due the school fund, the legal and the wrongful are so blended in the laws that they are void for any and all purposes.

Taylor v. Thomas, 22 Wall. 488, 22 L. ed. 792; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Bragg v. Tuffts*, 49 Ark. 554, 6 S. 678

W. 158; *Western U. Teleg. Co. v. State*, 62 Tex. 630.

When the legislature or state officers proceed in violation of the state or national Constitution they do not act for the state.

Virginia Coupon Cases, 114 U. S. 293, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 193, 5 Sup. Ct. Rep. 903; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Re Tyler*, 149 U. S. 190, 37 L. ed. 697, 13 Sup. Ct. Rep. 785, 793; *Scott v. Donald*, 165 U. S. 67, 41 L. ed. 633, 17 Sup. Ct. Rep. 265; *Smyth v. Ames*, 169 U. S. 519, 42 L. ed. 839, 18 Sup. Ct. Rep. 418.

Mr. M. M. Crane also filed a brief for defendant in error:

The decision of the court of civil appeals on the question of fact involved in the record, to the effect that the warrants in question were issued during the war between the states and for the purpose of being circulated as money, is conclusive on this court.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; *Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129.

The warrants in which the payments were made, issued for the purpose of being circulated as money, the court of civil appeals held to be void because in contravention of the state Constitution, and that decision is conclusive on this court, and not open to review.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Merchants' & M. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Where two grounds of defenses are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment rested upon a decision of the Federal question; and if this does not affirmatively appear, the writ will be dismissed.

Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Jenkins v. Lovewenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Kreiger v. Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Hammond v. Connecticut Mut. L. Ins. Co.* 150 U. S. 633, 37 L. ed. 1206, 14 Sup. Ct. Rep. 236; 177 U. S.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

This rule will be adhered to, although this court may believe that the decision of the Federal question by the state court was erroneous.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

Messrs. T. S. Smith and C. A. Culberson filed an additional brief on motion to dismiss writ of error.

[74] *Mr. Justice **Peckham**, after stating the foregoing facts, delivered the opinion of the court:

The motion to dismiss the writ of error must be denied. The case involves a Federal question under the contract clause of the Constitution.

The claim on the part of the defendant in error, the plaintiff below, is that the state court decided the case under the provisions of the state Constitution only, and without reference to the act of 1870, which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings. Although the state court held that the payments in dispute were made by means of state treasury warrants issued to circulate as money, which were therefore void as in violation of the Constitution of the state, and that the delivery of the warrants by the company amounted to no payment whatever, the question still remains whether by that decision any effect was given to the act of 1870. We think the judgment of the state court did give effect to that act.

It will be seen that the 3d section provides that the state will not exact of any railroad company not thereafter in default, the payment of the principal of the debt, excepting as paid by the payments due the sinking fund under the provisions of the act; it also provides in the 2d section that if a railroad company failed to pay the amount required to be paid in section 1, at the times designated thereby or within ten days thereafter, then the whole debt of such company, principal and interest, should become due, and the governor was directed to proceed as therein stated.

The first thing to be done in order to be able to carry out the provisions of the act was to ascertain what the aggregate amount

[75] *of the loan was, as that amount stood on the 1st day of May, 1870, because it was upon that amount that interest semiannually was to be paid, and also 1 per cent of principal to the sinking fund. The authorities of the state determined what the aggregate amount was as it stood on the 1st day of May, 1870, and they arrived at that amount by refusing to recognize as valid any payment which the company had made in treasury warrants, and in that way they made the aggregate amount larger by those sums than that made by the company, which claimed to be credited with the amount of its payments in those warrants. Upon the aggregate amount as determined by the authorities of the state, payment of the interest and for the sinking

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fund was demanded under the act. This demand was complied with by the company under protest, and accompanied by a claim on its part that the aggregate amount due on the loan was less than that stated by the authorities of the state by just the amount of the payments which the company had made in these treasury warrants. The protest was overruled and the claim denied, and thereafter the same protest and the same claim were made and the same action taken upon the part of the state authorities on each semiannual occasion when payments were due and made. This lasted until the payments made by the company in cash and in the treasury warrants, upon the basis of the legality of the payments in such warrants, paid the indebtedness due from the company to the state, and from that time it has refused to make further payments. The state did not acknowledge that full payment had been made of that indebtedness, and thereupon commenced the present proceeding to recover the amount it claimed to be due, and to foreclose its lien against the company. This it could not do under the statute of 1870 unless the company had defaulted in respect to the payments required under that act.

It is admitted that the company had not so defaulted, provided the payments in treasury warrants were duly credited to it; nor is it denied, on the other hand, that if those payments were not valid payments and ought not to be credited to the company, then it had defaulted in respect to the payments required by the act before the commencement of these proceedings. *When the state court, therefore, decided that these warrants were issued in violation of the Constitution of the state, and that payments in them were in fact and in law no payments, and gave judgment accordingly, the effect of that decision was necessarily to hold that the company had defaulted in respect to the payments required under the act, and that the proceedings of the state to collect the sum due were permitted by the act, and effect was thus given to such act, although not one word was spoken in regard to it in the opinion delivered in the state court.

If the railroad company had not failed to pay any amount required to be paid in section 1 of the act, then the proceeding herein could not have been taken, by reason of the provision contained in the 3d section, and it is only after a failure to pay for ten days that the 2d section permits the proceedings to be taken to collect the amount. In giving judgment for the plaintiff, therefore, the court has in effect determined that the plaintiff was proceeding rightly under the act of 1870, and effect was thus given to its provisions.

The judgment of the court of civil appeals gives an additional effect to the act, because by its judgment there is struck out the provision in the judgment of the trial court in regard to the lien of the state, and it has limited that lien in accordance with the 3d section of the act, so that it should not attach to any extension of the railroad which

had been constructed since its passage. Although that modification may be a favor to the company, it nevertheless gives effect to the act. The company has not accepted that act so that it cannot draw in question its validity as construed by the state court, and hence no reason is shown for the granting of the motion to dismiss on that ground. The only acceptance consists in the payments made by the company to the state after its passage. The very first payment made by the company, under the act, namely, on the 1st day of November, 1870, was, however, made while asserting the claim that payments in treasury warrants were valid and should be acknowledged and credited to the company; and upon the refusal of the state authorities to admit those payments the company paid the interest and percentage on the larger sum demanded *by the state, under protest that such demand was illegal and improper, and every subsequent payment was made under the same protest by the company. Payments so made show no such acceptance of the act as to prevent the company from thereafter drawing in question its validity as construed by the state authorities.

[77]

Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state Constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Proprietors of Bridge v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Northwestern University v. People*, 99 U. S. 309, 25 L. ed. 387; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Central Land Co. v. Laidley*, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80; *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

In this case we think we have shown that the judgment did give effect to subsequent legislation, which, as construed by the state court, the company claims has impaired the obligation of the contract between itself and

the state. The writ of error was therefore well brought.

The motion for the removal of this case to the United States circuit court was properly denied. The statement of the cause of action as contained in plaintiff's first petition did not show that the suit was one arising under the Constitution, laws, or treaties of the United States.

*The suit, as it appears upon the face of [78] the petition of plaintiff, was upon the bonds given by the company for the loan of a portion of the school fund, and to foreclose the lien of the state upon the property of the company, and in the petition reference was made to the act of 1870 for the purpose of stating the amount due on the bonds for principal and interest. Nothing upon the face of this petition showed any fact upon which Federal jurisdiction could be based. The company answered by alleging certain payments in treasury warrants, which, if properly credited, would show that, with the other payments that had been made, there was nothing due the plaintiff on the bonds. As an answer to this defense the plaintiff set up the invalidity of the laws providing for payments in treasury warrants; that the warrants were issued by the state in violation of both the state and Federal Constitutions, and that the payments were therefore illegal and void. This was no part of the plaintiff's cause of action upon which suit was brought, and that cause of action did not in any way involve a question arising under the Constitution or laws of the United States. The defendant therefore made out no case for a removal to the United States circuit court. *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 494, 40 L. ed. 1048, 1049, 16 Sup. Ct. Rep. 869; *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 235, 42 L. ed. 1017, 1020, 18 Sup. Ct. Rep. 603.

The result of the authorities is that the Federal character of the suit must appear in the plaintiff's own statement of his claim, and that where a defense has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action, but are merely a reply to the defense set up by the defendant. The review of the Federal question by this court is not thereby precluded, for, it having been properly raised in the state court and decided against the contention of the party setting it up, this court may review it on error to the highest court of the state.

This brings us to the question, What, if any, contract existed between the state and the company consequent upon the payments by the company to the comptroller of the state in the treasury warrants heretofore mentioned?

*The company contends that by the pas- [79] sage of the acts of December 16, 1863, May 28, 1864, and November 16, 1864, and by its compliance with such acts, and its payment of treasury warrants to the comptroller, and their receipt by him, and his cancelation

thereof, there was an executed transaction, and an implied contract thereupon arose that such payments should remain and be regarded as valid and effectual, and that this implied contract was entitled to the protection of the Constitution of the United States, and its obligation could not be impaired by any subsequent act of the legislature of the state.

These acts have been already set forth. The company alleges that it fully complied with all of them, and that, relying upon the offers thus made, it paid to the State the warrants mentioned, which were received by the comptroller and canceled, and bonds of the state for a like amount, bearing 6 per cent interest, were issued by him to the school fund.

The provision in the state Constitution, which it is alleged was violated by the issuing of these warrants, is contained in the 8th section of article 7 of the Constitution of 1845, in which among other things, it was provided, ". . . and in no case shall the legislature have the power to issue 'treasury warrants,' 'treasury notes,' or paper of any description intended to circulate as money." The same provision is found in the Constitution of Texas adopted in 1861.

It is contended on the part of the state that these warrants were issued in violation of that section of the Constitution, inasmuch as they were treasury warrants intended to circulate as money.

It is stated in the opinion delivered in the court of civil appeals, "that the warrants of the state issued during the period of the war after January 1, 1862, were intended to be used and circulated as money. And in this connection it is well to say that we are of the opinion, from all that is shown by the record, together with various acts of the legislatures during that time, that the payments made in warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money."

[80] *The question whether the legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act; and a finding by the court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion, and not a finding of fact, and therefore it can be reviewed by this court.

To prove that these warrants were so issued, reference is made to various acts of the legislature (in addition to those above mentioned under which the payments were made by the company), among which are the following:

The act approved February 14, 1860, provided that when an account was presented

for payment for which an appropriation had been made it was the duty of the comptroller to audit it if legal, and to issue his warrant for the amount, and if there were any money in the treasury to pay the demand the comptroller was directed to issue his warrant upon the treasurer for the amount, with 10 per cent per annum interest, and those warrants were to be signed by the governor and indorsed by the treasurer. The act further provided that these warrants should not circulate as money, but might be assigned.

It is said that the warrants issued under this act were few, and they are not classed among the warrants in which any payments were made to the school fund. It is, of course, not contended that these warrants were intended to circulate as money, but the act was repealed in 1862, and the repealing act, while containing other provisions, omitted the provision that the warrants to be issued should not circulate as money, and that omission is regarded by counsel as suggestive of the intention of the legislature that the warrants issued under the act of 1862 should so circulate.

By the 2d section of that act it was provided that the comptroller on presentation of any warrant bearing interest, as well as on presentation of any other legal claim for which an appropriation had been made, [81] should draw a warrant on the treasury for the amount, and payment was to be made if there were any money in the treasury; but if not, the comptroller was authorized to issue one or more warrants for the amount that might be due and payable to the party entitled to payment, or bearer, "and said warrants shall be of such proportions of the claim as may be expressly required by the holder; provided, that not more than one tenth of the whole amount may be issued in warrants of \$1 each and the balance of \$5 or more each, and said warrants shall be indorsed by the treasurer, and every interest-bearing warrant that is superseded shall be canceled by the comptroller."

The 3d section of the act provided that when the warrants were presented at the treasury and paid they should be canceled, and should not be reissued.

By the act of January 11, 1862, it was provided that treasury warrants not bearing interest, in addition to the other provisions made for their reception in payment for lands (including certificates therefor), should be receivable as money in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes, and all other dues to be collected for the state or in its name, with exceptions therein stated.

By another act passed on the same day, January 11, 1862 (General Laws, Texas, 1862, page 38), the treasurer and every other officer of the state and of counties, who had received as public money, among other things, the treasury warrants of the state, were directed to disburse or transfer the same as money, at par, if the person or persons entitled to have a disbursement or transfer would receive such warrants as

money; and officers who were authorized to receive public money were authorized and directed to receive these warrants as money, except when expressly prohibited by some other law. Treasury warrants of the state received by the treasurer thereof were not to be reissued.

Also on December 16, 1863, another act was passed, section 2 of which reads as follows:

[82] "A tax of $\frac{1}{2}$ of 1 per cent shall be levied and collected *in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the state of Texas, and bank notes held or owned in this state, and all foreign bills of exchange and certificates of deposit, and other evidences of money upon deposit or secured beyond the limits of the state, owned by persons residing therein, shall be known as specie, and thereon shall be levied a tax of $\frac{1}{2}$ of 1 per cent in specie."

The court below has construed these various acts, in connection "with well-known matters of history relating thereto," and considering also the character of legislation during the period of the war, as establishing the intention of the legislature that the warrants should circulate as money. It is stated in the opinion that the legislation, providing the purpose for which they could be used and the small amounts for which they could be issued, and also the size, shape, and color of the warrants, together with the history of the times and the well-known depleted condition of the treasury during that period, and the scarcity of existing, reliable, and available circulating medium, as money, all showed that the purpose of the various acts of the legislature was to give to the warrants issued during that time as much as possible a standing and character as money. The court therefore held that the warrants were void, as issued in violation of the Constitution of the state; the payment made in them was in law no payment; that no contract arose between the state and the company by reason of the use made of the warrants in surrendering them to the comptroller, and that therefore no defense to plaintiff's cause of action was established.

[83] These warrants were issued pursuant to appropriations made by the legislature and in payment of debts existing at the time in favor of the individuals to whom they were delivered. They were payable at once, and if there had been funds of the state in the treasury they would have been immediately paid and canceled. It was only because there was no money in the treasury that they were not paid. The state therefore provided that they might be received in payment of taxes or dues to the state, and that its officers might disburse them in payment *of its debts to any person who would consent to receive them, but that when presented to the treasurer of the state and received by him they should be canceled.

We have been referred to no act making provision for the size, shape, or color of the paper to be used for the warrants, and such size, etc., cannot be regarded as evidence of

any weight as to the intent on the part of the legislature that they should circulate as money; nor does the depleted condition of the treasury or the scarcity of a circulating medium necessarily or properly induce to that conclusion. That the size of the warrant, both as to amount and shape, might somewhat facilitate a holder, upon occasion, to discharge a debt and in that way use it as money, is not at all sufficient, or indeed any proper, evidence of an unlawful intent on the part of the legislature. The act of December 16, 1863, is not the slightest evidence on the subject. It simply provided for taxing specie, treasury notes of the Confederate States, treasury warrants of the state, and bank notes held or owned in the state. It also provided a tax upon foreign bills of exchange and other evidences of money on deposit or secured beyond the limits of the state and owned by persons residing therein, and provided that they should be known as specie. The fact that treasury warrants were mixed up in such an act for the purpose of taxation with specie, bills of exchange, certificates of deposit, etc., has not the slightest tendency to prove the intent that the warrants should circulate as money.

It does not seem to us that this legislation shows that the warrants were thus issued within the meaning either of the state or the Federal Constitution. The only provision looking towards a treatment of the warrants in any manner as money is the direction to the state's own officers to receive them as payment for taxes and dues to the state, and to pay them as money to such persons as would receive them in payment of the indebtedness of the state to them.

The fact that a creditor of the state, willing to receive payment in these warrants, might demand that they should be issued to him in small sums, and not in one single warrant, does not bear with great force upon the intent of the legislature that the warrants should thereafter circulate as money. It does not *show that those warrants were [84] intended to so circulate between individuals for the ordinary purposes of society and in the general transactions of business between citizens. For the state to say that the warrants should be transferred or disbursed by its own officers as money, if the person entitled to a transfer or disbursement from the state would receive them as money, simply amounts to a declaration that the warrants should be issued to all such persons as would accept them in payment of the debts due them from the state. To encourage such willingness the provision was made that these warrants should be receivable as money; that is, as payment for certain debts due the state, as for taxes, etc. This use of the words "as money" has, in our judgment, no further significance, and has no force for the purpose of showing the intention of the legislature to have the warrants circulate generally as money and to form a circulating medium of that kind of paper.

It must not only be that they are capable of sometimes being used instead of money, but they must have a fitness for general cir-

ulation in the community as a representative and substitute for money in the common transactions of business. This is what is meant by the expression "intended to circulate as money." These warrants were payable to the individual to whom the state was indebted, or to bearer, and were issued to a creditor of the state. That the legislature may have desired to facilitate the use of the warrants by these provisions is perhaps true. But the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start. That the promise should be made to receive them in payment of debts due the state would add to their usefulness and to the willingness of people to take them in payment of debts due them from the state, and that while in their hands others might receive them in payment of debts, was a possibility or probability depending upon whether the person taking them had opportunity to use them to pay some of his own debts to the state. That he might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it does not bring the warrant so used within the *ordinary meaning of the term "money." [85] It is not money in that sense.

The provision in the state is substantially the same as that in the Federal Constitution, in that the legislature is prohibited from issuing treasury warrants, treasury notes, or paper of any description intended to circulate as money, while in the Federal Constitution the prohibition is against a state's emitting bills of credit; and the necessity exists in both that the paper shall be issued to circulate as money, in order to be in violation of either instrument. It has been held that the bills of credit prohibited by the Federal Constitution are those which were intended to circulate as money, and hence the authorities as to the meaning of that expression, when so used, are applicable here.

In *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903, Chief Justice Marshall, in referring to the meaning of the clause in the Constitution prohibiting a state from emitting bills of credit, said (page 432, L. ed. p. 911):

"The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

It is true the court in the *Craig Case* held that the certificates authorized by the state of Missouri were void because they were in effect bills of credit. They were issued on account of loans made from time to time to the state, and were held to have been issued

to circulate as money. The court then consisted of seven members, and Mr. Justice Johnson, Mr. Justice Thompson, and Mr. Justice McLean did not concur in the judgment. Mr. Justice Johnson thought that the term did not extend to certificates that bore interest and the value of which varied with each passing day; that they approximated to bills *drawn upon a fund, not to be withdrawn by any law of the state; that the promise was also to receive in payment of debts and taxes due the state, and the certificates did not depend for value upon the faith of the state only, and hence they were not bills of credit. [86]

Mr. Justice Thompson thought they were not bills of credit, for the reason, among others, that the act did not profess to make them a circulating medium or a substitute for money; it made them only receivable for taxes, etc., due the state, and those were special and limited objects not sufficient to enable the certificates to answer the purpose of a circulating medium to any considerable extent.

Mr. Justice McLean thought that to constitute a bill of credit it must be issued by a state, and its circulation as money enforced by statutory provisions. At page 454, L. ed. p. 918, he said: "Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit?" He thought not.

In the subsequent case of *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 709, the same question as to the meaning of the term "bills of credit" arose, and Mr. Justice McLean delivered the opinion of the court.

The question was whether bank notes issued by the Bank of the Commonwealth of Kentucky, declared by the state act of incorporation to be exclusively the property of the commonwealth, were bills of credit. In the course of the opinion the judge stated, page 312, L. ed. p. 731: "The terms 'bills of credit' in their mercantile sense comprehend a great variety of evidences of debt, which circulate in a commercial country. . . . But the inhibition of the Constitution applies to bills of credit in a more limited sense. It would be difficult to classify the bills of credit which were issued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies."

Reference is made in the course of the opinion to *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903, and to the views of the two dissenting judges (besides himself) as to the meaning of the expression, and he ends the discussion of that part of the question by referring to *what Chief Justice Marshall had said, and adding: "The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money." [87]

It was held that the bank notes in question did not fill that definition. In *Woodruff v. Trapnall*, 10 How. 190, 205, 13 L. ed. 383, the

question was again referred to by Mr. Justice McLean in delivering the opinion of the court, and he said that the notes of the banks therein mentioned were not bills of credit, upon the authority of the *Briscoe Case*. To the same effect is *Darrington v. Branch of The Bank of Alabama*, 13 How. 12, 14 L. ed. 30, the opinion being also delivered by Mr. Justice McLean. The state creating the bank in that case was the only stockholder and its credit was pledged for the ultimate redemption of the notes of the bank.

The court said it was impossible to hold that bills issued by the bank came within the definition of bills of credit. *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 709, was again referred to, and the definition approved, that the paper must be issued by a state, upon its faith, designed to circulate as money, and to be received and used as such in the ordinary business of life.

In *Poindexter v. Greenhow*, 114 U. S. 270, 283, 29 L. ed. 185, 190, 5 Sup. Ct. Rep. 903, 962, the coupons in question were in the ordinary form, and one of them was set out in the opinion of the court, and is as follows:

"Receivable at and after maturity for all taxes, debts, and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2,731.

"Coupon No. 20."

"Geo. Rye, Treasurer."

It was contended that this coupon was a bill of credit in the sense of the Constitution, because receivable in payment of debts due the state, and negotiable by delivery merely, and intended to pass from hand to hand and to circulate as money.

It was in consequence of unrestrained issues of paper money by the colonial and state governments, based alone upon credit, said the court, that this clause in the Constitution prohibiting the emission of bills of [88] credit by the states was adopted, and *the proper definition of the term was not founded on the abstract meaning of the words so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but was limited to those particular forms or evidences of debt that had been so abused to the detriment of both private and public interests.

Speaking of these particular coupons the court said:

"They are issued by the state, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the state, but they were not emitted by the state, in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transac-

tions of business, as money, nor that in fact they were so used."

The fact that the coupons were receivable in payment of taxes and other dues to the state, and hence might circulate from hand to hand as money, was held to fall far short of showing their fitness for general circulation in the community as the representative and substitute for money in the common transaction of business, which the court held was necessary to bring them within the constitutional prohibition against bills of credit. This reasoning applies with equal force to treasury warrants. Both classes of paper must be intended to circulate as money, and the same conditions regarding such intention, and the same evidence to prove it, would be necessary in each case.

In the light of these authorities, it seems to us that it cannot be properly said that the treasury warrants violated the Constitution, either of the state or of the United States, because there is no evidence that they were intended to circulate as money within the meaning of that term as already given. The record does not show that the legislature intended that these warrants should or that they could be so used as to circulate *among [89] the people as money, to be used by them as a paper currency or a circulating medium in their dealings with each other. Small denominations of the warrants would certainly facilitate their retirement through their use for payment of taxes and other debts due the state, and would increase their convenience for paying freight or passenger fare to the companies, which would then have an opportunity to present them to the state in payment of interest; and as the laws did not provide for their circulation as money, but only to be received or paid by the officers of the state between the state and its debtors and creditors and to the railroad companies, as stated, it cannot be supposed from such evidence that it was the intention of the legislature that these warrants should be circulated as money, and should thus violate the provisions of the Constitution.

A warrant drawn by the state authorities in payment of an appropriation made by the legislature, where the warrant is payable upon presentation if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the state to him, cannot, as it seems to us, be properly called a bill of credit or a treasury warrant intended to circulate as money. Although the state directed its officers to receive the warrants as money, in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state to such persons, yet, as we have already remarked, this direction was only another mode of expressing the idea that, as between the state and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made. When the warrants once came back to the treasurer of the state they were not to be reissued. The decisions of this court have shown great reluctance under this provision as to bills of

credit, to interfere with or reduce the very important and necessary power of the states to pay their debts by delivering to their creditors their written promises to pay them on demand, and in the meantime to receive the paper as payment of debts due the state for taxes and other like matters.

[90] If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the *part of the legislature that the paper should circulate as money. There must, in other words, be an intention to violate the Constitution.

A deliberate intention on the part of a legislative body to violate the organic law of the state under which it exists and to which the members have sworn obedience is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil, from the very acts themselves which are under discussion, and, if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction, rather than one which invalidates them because they were enacted with a direct purpose to violate the state Constitution.

But if for the purpose of this argument it should be assumed that the warrants, although issued to those who were the creditors of the state and in payment of the debts due from the state to those creditors, were nevertheless issued to circulate as money, and therefore in violation of the Constitution, it cannot be properly held, in our opinion, that the receipt of such warrants, pursuant to legislative authority and in payment of an indebtedness due the state from the individual paying them, is an illegal transaction and amounts in law to no payment whatever.

[91] The state was debtor to the individuals to whom the warrants were first issued in payment of that indebtedness, and all that can be said is that it violated the law, by giving this particular form to the instrument by which it assumed to pay its debt. Surely if for that reason the delivery of the warrants constituted no payment, the state would have the right to make such payment in some other way. If, by reason of the violation of the Constitution, its direction to the treasurer to pay the warrant was void, and no action could be maintained upon the warrant by reason of its invalidity (aside from the fact that the state would not be suable), there is certainly nothing to prevent the state from recognizing the debt it actually owed and which it assumed to pay by issuing these warrants. That recognition may be contained in the very law which authorizes their issue, or in some other law. When, therefore, it passed the statutes providing that the warrants should *be received in payment of taxes and other dues to it, and also by the comptroller in payment of the interest and sinking fund due from the railroad companies to the state, and when by virtue of such authority the state officers actually did receive the warrants for such payments, we see no illegality in the pay-

ments, and it seems to us that credit therefor should be given accordingly.

Suppose that the state, intending to issue these warrants to circulate as money, had paid them through its officers to its creditors, and had then become convinced that the warrants were a violation of the Constitution of the state and ought not to have been issued. Could not the state say to the creditors to whom these warrants had been paid, if you will give them back we will pay you in a form that is not a violation of the Constitution? Would anybody suspect that surrendering these warrants to the state and receiving other warrants in their stead, in a form which did not violate the Constitution, would be an illegal act on the part of the state? The original warrants having been issued to various creditors of the state, and they very likely having transferred them to others, wherein would consist the illegality if the state offered to and did receive those warrants from such others, and paid their amount in valid obligations? Instead of paying their amounts in valid obligations, where is the invalidity if the state offers to receive them and to cancel obligations which the party owes to it, to an amount equal to their face value? All this is but another way of paying the indebtedness which the state originally owed to the individuals to whom it issued these warrants, and when it cancels obligations due to it of an amount which equals the face value of the warrants, and receives the warrants in return, the legal effect is the same as if the warrants had never been transferred by the persons to whom they were originally issued, and they had brought them back to the state, and the state had given in exchange for them some valid evidence of indebtedness.

It seems to us that the same principle is involved as was enforced in *Hitchcock v. Galveston*, 96 U. S. 341, 350, 24 L. ed. 659, 661, where a city had contracted with the plaintiffs for the improvement of its sidewalks, and agreed to pay for the same in bonds which it *was beyond the power of the city to issue. It was held that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the performance of the contract. The court said: "If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payments need not be made at all."

Suppose in that case the bonds had been issued by the city in violation of its charter. Could not the city thereafter, upon discovering its inability to make such a contract, receive the bonds back and make payment in some other way? Or could it not have received the bonds as a payment to that extent of an indebtedness due from their holder to the city?

Unless such transactions be legal, then it follows that the state could obtain the property or labor of the individual, and pay therefor in an obligation which it had no right to issue, and which it could on that ac-

count subsequently repudiate, and then deny all liability to pay at all. The character of the transaction is not altered by the transfer of these warrants from the original holder to other parties, and the state has full power to recognize in favor of the bearer of the warrants, the validity of the debt which they originally represented, and to pay the same by allowing a credit to their bearers up to the value of the warrants. We see nothing in morals or in law which should prevent the state from recognizing and liquidating the indebtedness which was due from it and which was represented by the warrants.

The other theory would prevent the state from ever redeeming warrants in form invalid, but which had been issued in payment of debts due from the state to persons receiving them.

If payments such as were made in this case were not valid, but absolute nullities, then any person who used the warrants to pay his taxes with, although they were received by the collector and an acquittance given, was nevertheless liable to pay those taxes again. Such consequences ought not to follow from the fact that the form of the warrant in which the payment was made rendered the warrant itself illegal as issued in violation of the Constitution.

[93] *Their receipt by the state officers from the railroad company as directed by the legislature is also justified, as appears by the case of *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308, 25 L. ed. 108. This court held that even if the bonds mentioned therein were issued in violation of law, yet when the city accepted their surrender and redeemed them by giving other bonds in lieu of a portion and a credit on the books of the city for another portion of them so surrendered, such transaction was valid, and the holder of the bonds so given in lieu of the illegal ones could recover on them and also upon the credit given on the books of the city. We perceive no reason why the state could not, if it chose, receive these warrants in discharge of the debt *pro tanto* due it from the company.

The next question is whether the payments made are void because the warrants were issued, as alleged, in aid of the Rebellion.

If by reason of any fact existing at the time these transactions occurred, and which appears in this record, the payments in question were not valid, and no valid contract grew out of the same, then the judgment should be affirmed, notwithstanding we differ with the court below in regard to the effect of the payment, on the ground taken by that court. Until we are able to say there was a valid contract subsisting by reason of these transactions, by which payments were received as payment *pro tanto* of interest and sinking fund, we cannot be called upon to discuss the question whether any legislation subsequent to the making of the alleged contract has impaired its obligation. We must therefore pursue the inquiry in order to determine the existence and validity of the contract.

It is alleged that at least some of these

warrants were issued in aid of the Rebellion, and were therefore void, and no attempted payments made in them could be recognized as legal or binding. Various acts of the legislature have been referred to which provided for the issuing of bonds in return for loans to the state for military purposes. The findings of the trial court upon the subject were as follows:

"I find that it has not been proved whether the warrants actually used in making the payments were warrants issued for *indebt- [94] edness incurred prior to the civil war, or warrants issued for the state indebtedness incurred after the war began, or, if of the latter class, whether they were warrants issued for military purposes or for civil indebtedness; but from the circumstantial evidence I conclude that neither the railroad company nor the state discriminated as to the class of warrants the railroads received for carrying services or paid on their indebtedness, and that some of all kinds were used in making the payments.

"In reaching the foregoing conclusions of fact I have excluded from my consideration the statements made in official reports and governors' messages to the legislature, having concluded that defendant's objections that the statements contained in these papers were not admissible as evidence proving or tending to prove the facts therein stated were good. I have also eliminated from consideration certain other evidence, as shown by explanations attached to defendant's bills of exception."

Taking these findings, it seems that some of the warrants had been originally issued for military purposes, while others had been issued for civil indebtedness. It is also to be inferred from the record that the warrants were in the hands of various people, residents in the state, from whom they had been purchased by the company for a fair and adequate consideration, or had been received by it at par in payment of freight or passenger services over its lines of road. Assuming that the warrants were invalid as having been issued in payment for services rendered, or stores received for use in aid of the Rebellion, yet this contract between the state and the company had no connection with the purpose for which they were issued, nor was the consideration of the contract based in the remotest degree with reference to that purpose. The warrants were issued to other persons having not the slightest relation to the company, and in payment of an indebtedness for purposes to which the company was an entire stranger. The purpose of the company was undoubtedly pursuant to the offers of the state made in the acts mentioned, to use the warrants in payment of what might be due for principal or interest on the bonds of the company held by the state. *There is no proof that the company [95] received the warrants for any other purpose. No inference could properly, as we think, be drawn from the evidence that there was any intent, design, or wish on its part to aid the Rebellion by the acquisition of these war-

rants, and, so far as can be seen, it was a transaction in the way of the business of the company, entered into for the simple purpose of paying an indebtedness which it owed the state, and which, by these acts, the state permitted to be paid in this way. Even though portions of the warrants had been procured at less than par, of which fact there is no affirmative evidence, still the transaction on the part of the company did not thereby become one in aid of the Rebellion, and upon this point we do not see that the prices which may have been paid for the warrants were material in the inquiry. The contract between the state and the company did not in any way aid the former in issuing them, nor did it aid the purpose for which the state may have desired to issue them.

Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear; and it will not be inferred simply because the performance of the contract might possibly result in a remote, incidental, and unintentional aid to an illegal transaction.

It is somewhat difficult to see how the offer to receive these warrants, and their reception pursuant to the offer, can be said to be illegal as based upon a consideration which looked to aiding the Rebellion by its performance.

It has been held that a contract between parties resident within the lines of insurrectionary states, stipulating for payment in Confederate notes issued in furtherance of a scheme to overturn the authority of the United States within the territory dominated by the Confederate States, was not to be regarded for that reason only as invalid. Contracts thus made, not designed to aid an insurrectionary government, it was held, could not therefore, without manifest injustice to the parties, be treated as invalid. *Thorington v. Smith*, 8 Wall. 1, 19 L. ed. 361; *Delmas v. Merchants' Ins. Co.* 14 Wall. 661, 20 L. ed. 757.

[196] The receipt of these warrants, like the contract to receive payment in Confederate notes, was not for that reason only *unlawful, although the state was the party that received them. The company was not an agent of the state in putting them in circulation, nor is there any proof that in fact it circulated any of them. The company did not take them for the purpose of giving currency to them, but in order to consummate a transaction which, when consummated, was simply a business one on the part of the company, and if by any possibility it could "indirectly or remotely promote the ends of the *de facto* government organized to effect a dissolution of the Union, it was without blame, except when proved to have been entered into *with actual intent* to further invasion or insurrection." *Thorington v. Smith*, 8 Wall. 1, 12, 19 L. ed. 361, 364; *Baldy v. Hunter*, 171 U. S. 388, 394, 43 L. ed. 208, 210, 18 Sup. Ct. Rep. 890.

A specimen of the contract condemned under the rule is to be found in *Sprott v. United States*, 20 Wall. 459, 22 L. ed. 371, where the plaintiff sought to recover from
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the defendant the value of certain cotton which he had purchased from and paid the price in money to the Confederate government, and which the Union forces took from its possession in the last days of the existence of that government. The court held that in the transaction the plaintiff gave aid and assistance to the Rebellion in the most efficient manner he possibly could; that he could not have aided that cause more acceptably if he had entered its service and become a blockade runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. The plaintiff asked the court to in effect carry out his void contract with the Confederate government. That is very different from holding that these warrants were so far void that they could not form the basis of payment of debts by their holders, who had not received them from the state, but had taken them in the course of business from other parties, and who then offered them in payment of their debts due the state.

This whole subject has recently been gone over in *Baldy v. Hunter*, 171 U. S. 388, 43 L. ed. 208, 18 Sup. Ct. Rep. 890, where many other cases are commented upon, and the principle of that and the other decisions of this court therein referred to would seem to hold this contract not unlawful.

But suppose these warrants were issued in aid of the Rebellion *and were therefore void, [97] and that the subsequent offer of the state to receive them in payment of the debt of the company, under the provisions of the legislative acts already referred to, was, while unexecuted, also void on that ground, still, their actual receipt and the acquittance given were not, for that reason, void as between these parties.

A contract in aid of the Rebellion has been held illegal because it belonged to that class of contracts which are *mala in se*, whose consideration is immoral and founded upon a criminal purpose. If a state were a party to such a contract it would not be void on the technical ground that it was *ultra vires* as beyond the contract-making power of the state, but because of the illegal nature of its consideration. The contract would be void for the same reason that it would be void as between individuals, not because they had no capacity to make it, but because, being founded upon an illegal consideration, no court would recognize its validity or enforce its provisions. A state as a sovereignty, has power generally to make contracts, unless there be some constitutional inhibition as to certain classes of contracts, and if the consideration of a particular contract is bad or immoral, the contract is illegal because of the character of its consideration, and not because the contract would be beyond the general scope and power of the state. Hence, as between the parties to it, the state might, if it chose, perform all its requirements, and if the acts of its officers were performed in obedience to legislative authority, their performance in executing the contract would be the act of the state. If, on the other hand, the Constitution of the state had pro-

hibited its officers from ever receiving anything but gold in payment of this debt of the company, a delivery of something else in assumed payment of the debt, though received as such by its officers under the authority of the legislature, would be no payment. That would be a case where the payment would be absolutely void because beyond the capacity of the state to authorize and equally beyond its capacity to ratify. It would be *ultra vires* in the strict sense of the term. In such event, it would be true that the act of the officer would be his individual act, and in no sense would he represent or bind the state [98] by his action. Such *an attempted payment might therefore be regarded by any subsequent officer of the state as wholly void and ineffectual for any purpose.

The distinction between the two cases is obvious. In the one the contract is void because of the illegality of the consideration, not because of the legal incapacity of either party to make the contract, while in the other there is an entire lack of power to make it under any circumstances. When, therefore, the officers of the state pursuant to its statutes received the warrants as payment, they acted for the state in carrying out an offer upon its part which the state had the legal capacity to make and to carry out, and which it in this manner did carry out. The state in such case had the same power to carry out its contract (so far as the parties to it are concerned) as individuals would have had to carry out the same kind of a contract, and when the warrants were received by the officers acting for the state in payment of the interest, and the bonds of the state were issued to the school fund, and acquittance given to the company, the transaction was finished and completed, in the case of the state, just as it would have been in like circumstances in the case of the individual, and by such action (as between the parties) the state is bound; the acts of its officers are its own acts, and it must be judged in the same way as an individual would be judged. In other words, the contract having been fully executed by the company and the state, neither party having chosen to refuse to perform its terms, neither party as between themselves can thereafter act as if the contract had not been performed, nor can the state pass any act which shall impair the obligation which springs from its performance. After the complete execution of the transaction it must be that each party thereupon and at once became possessed of certain legal rights arising from its performance. Neither party could undo what had been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so, or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the state which repudiated or permitted the repudiation [99] of the payments would impair the obligation of the contract which the law raises from the transaction itself.

That a contract will be implied under such circumstances is stated in *Planters' Bank v. Union Bank*, 16 Wall. 483, 500, 21 L. ed. 473, 480. There the court said: "Some of the authorities show that, though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished the money or thing which was the price of it may be a legal consideration between the parties for a promise, *express or implied*, and the court will not unravel the transaction to discover its origin."

So in this case. The illegal object was fully executed and accomplished, and upon its accomplishment and by reason of the whole transaction there arose an implied contract that the settlement should be conclusive upon all parties to it. This principle calls for no aid from the court in the enforcement of a void contract. The parties have already fully complied with all its terms, and by reason thereof the implied contract has arisen.

The state cannot now be permitted to repudiate or set aside the acts of its former officers, done in pursuance of the direction of the legislature of the state, and effectually and forever closed long before the present proceeding was commenced. As between the parties to those transactions this cannot be done.

The action of the present officers of the state in bringing this proceeding has been undoubtedly prompted by the best motives and from a desire to promote the true interests of their state, but we nevertheless are unable to see how the proceeding can be successful without overturning those principles of law which must guide and control our judgment.

We are then brought to the question whether the subsequent legislation of the state has in any manner impaired the obligation of the contracts made by the state at the times when these various payments were made.

We have shown, in the treatment of the motion to dismiss, how the judgment of the court below gave effect to the subsequent *act [100] of 1870. In giving such effect, was the obligation of the contract between the parties impaired thereby?

If the state had passed no act the question of contract could not have been raised in this court, the payments might have been repudiated, and the court have held them illegal, and we would have no jurisdiction to review its judgment. But the state has passed a statute, and said that if the company would pay interest and a certain proportion semi-annually upon the aggregate amount of the loan as it stood May 1, 1870, no further exaction would be made. The court has construed this to mean that if the company will pay such proportion semiannually on the amount of the loan, to be ascertained by striking out the payments in warrants, then no default will be incurred, but if not, then it will have made default, and the act of 1870 provides in such case for proceedings to collect the amount due. We say the court

below has so construed the act, and we say so notwithstanding it has not mentioned it in any such connection. It has said so, however, by implication necessarily arising from the judgment it has given, when taken in connection with the provision of the act which permits proceedings only to be taken on a default, which does not exist in this case if the company be credited with these warrants as payments. By permitting the proceedings the court has necessarily construed the act as meaning that there is a default when payments are not made on the basis of the invalidity of the payments in warrants. The obligation of the contract which we hold existed between the state and the company, growing out of the transactions mentioned, has therefore, by this construction of the act by the state court, been materially impaired.

It is alleged on the part of the state that the acceptance of the treasury warrants in payment of money loaned from the school fund was a violation of the Constitution of the state of Texas, as being an illegal diversion of that fund. Upon that point we agree with the court below, which held that there was no such diversion for the reasons given by that court.

[101] We have examined the various objections of the defendant in error which it has made because of the alleged failure of the *plaintiffs in error to properly bring the Federal question before the court, but we think they are not well taken.

We are of opinion that *the judgment of the Court of Civil Appeals should be reversed*, and the case remanded to that court, with directions to remand the case to the District Court, with directions to reverse its judgment, and for further proceedings not inconsistent with the opinion of this court, and it is so ordered.

Mr. Justice **Brown** concurring:

I concur in the conclusion of the court, but from so much of the opinion as holds that the treasury warrants in question were not bills of credit within the meaning of the Constitution of the United States I am constrained to dissent.

It is admitted that these warrants fulfil all the conditions of bills of credit, except, as it is said, they were not intended to circulate as money. I am unable to concur in this view of the intent of the legislature. By the act of February 14, 1860, authorizing interest-bearing warrants on the treasury, it was expressly provided that these warrants should not circulate as money, but might be assigned. This act was repealed, however, in 1862, by another act providing that warrants should be drawn for legal claims against the state, and payment made if there were money in the treasury; but if not, the comptroller was authorized to issue warrants payable to the party entitled to payment, or bearer, which warrants should be of such proportions of the claim as were required by the holder, one tenth of the whole amount of which might be issued in warrants of \$1 each, and the residue in warrants

of \$5 or more each. There was an omission in this act, which appears to me extremely significant, of the proviso of the former act that such warrants should not circulate as money. By another act, approved the following day, it was provided that treasury warrants of the state, not bearing interest, should be receivable "as money" in the payment of taxes, office fees (including fees for patents), and land dues payable in the general land office of Texas, and all other dues to be collected for the state, with *certain[102] specified exceptions. By another act of December 16, 1863, the comptroller was authorized to receive from the railroad companies indebted to the special school fund all interest on their bonds that might be or might thereafter become due in state treasury warrants. This act was amended May 28, 1864, by providing that the act of 1863 should not apply to railroad companies which refused to receive these bonds or treasury warrants at par for freight or passage, at the prices or rates established by law.

The railway companies were thus compelled to receive these warrants as money from their patrons, in order to be able to avail themselves of them in payment of interest upon their bonds. In addition to this the warrants were in the form of bank notes, printed upon peculiar paper, such as is ordinarily used by banks for their circulating notes, and contained a brief and unconditional promise of the state to pay the amount to a party named, or bearer, and were declared on their face to be receivable for public dues.

If these facts be not decisive of an intention that these warrants should circulate as money, it is difficult to say what additional facts were needed to manifest that intent. Indeed, the opinion of the court seems to me to practically eliminate from the Constitution the provision that the states shall not emit bills of credit, as well as to overrule the opinion of this court in *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903. In that case the legislature of the state of Missouri authorized the officers of the state treasury to issue certificates, of denominations not exceeding \$10 nor less than 50 cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan offices in the state of Missouri, in discharge of taxes or debts due to the state, for the sum of ———dollars, with interest for the same, at the rate of 2 per cent per annum from this date." These certificates were receivable at the treasury in payment of taxes or moneys due to the state or to any municipality, and by all officers, civil and military, in the discharge of salaries and fees of office. If simple certificates of the state, containing no promise to pay, are bills of credit, much more, it seems to me, should these obligations of the state of *Texas issued in denomina-[103] tions of \$1 and upwards, in the size, shape, and color of bank notes, and receivable in discharge of all taxes and debts due the state, to which a forced circulation was given as between railways and their patrons, be held to be obnoxious to the same provision of the

Constitution. As was said by Chief Justice Marshall in that case: "The denominations of the bills, from \$10 to 50 cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one tenth of them from circulation. Had they been termed 'bills of credit,' instead of 'certificates,' nothing would have been wanting to bring them within the prohibitory words of the Constitution."

But I fully concur with the court upon the second point, that the state, having issued these warrants for a valuable consideration, having put them in circulation, having expressly authorized the railroad companies to pay them in discharge of their interest upon their bonds, and having received them without objection at the time, it is too late now to claim that they did not operate as payment. Though the warrants may have been issued without authority, it was competent for the state to recognize them, and to refuse now to admit them as payment upon these bonds appears to me a plain violation of the public faith. Upon the theory of the court of civil appeals, I see nothing to prevent the state, unless there be a statute of limitations operative against it, from bringing suit against everybody who paid these warrants to the state for taxes or for dues, and recovering the amount a second time.

GALVESTON, HARRISBURG, & SAN ANTONIO
RAILWAY COMPANY *et al.*, *Plffs. in Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 103, 104.)

[No. 82.]

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

See same case below, 40 S. W. 1099.

[104] * (Note)—This involves precisely the same questions that have just been determined in the foregoing case, and the same judgment will therefore be entered.

UNITED STATES, *Appt.*,

v.

CLARENCE P. ELDER, Smith Simpson,
and Thomas B. Catron *et al.*

(See S. C. Reporter's ed. 104-124.)

Private land claims—Mexican grant—compliance with preliminary requisites—public record—construction of alleged grant.

1. To vest an applicant under the colonization regulations of 1828 with title in fee, either absolute and perfect or conditional and im-

perfect, to public lands in New Mexico under a Mexican grant, substantial compliance with the preliminary requisites to a grant was essential; and it was necessary that the grant should be evidenced by an act of the governor clearly and unequivocally conveying the land intended to be granted, and that a public record in some form should be made of the grant.

2. A grant of the title to land by the governor of New Mexico was not made by an indorsement on a petition, directing the prefect of the district to ascertain whether the land applied for had an owner and to cause delivery of the land referred to, as this is reasonably interpreted to be a mere license to occupy the land for cultivation, or to give temporary possession pending further action in the matter.

[No. 35.]

Argued October 13, 16, 1899. Decided March 26, 1900.

APPEAL from a decree of the Court of Private Land Claims confirming title to an alleged Mexican grant. *Reversed.*

Statement by Mr. Justice **White**:

The alleged Mexican grant which forms the subject of this controversy relates to a tract of land situate in the county of *Taos, [105] New Mexico, embraced in what is designated as the Cebolla grant. The asserted grant was presented in 1872 for confirmation to the surveyor general of New Mexico, under the act of July 2, 1854, by John T. Graham and William Blackmore, who averred that they possessed a perfect title to the land covered by the grant, by reason of mesne conveyances from the original grantees. This claim so presented was favorably reported to Congress, but it does not appear that any action was taken thereon. Upon a survey made by the direction of the General Land Office in November, 1877, the area embraced in the alleged grant was declared to consist of 17,159.57 acres. The controversy now here for review was commenced by proceedings instituted in the court of private land claims to obtain a confirmation of this alleged grant. The petition to that end was filed on February 18, 1893, on behalf of the present appellants, who asserted that they were the owners of the Cebolla tract by purchase from the heirs and assigns of the original grantees. The alleged grant was asserted to have been made on December 31, 1845, by Manuel Armijo, governor of New Mexico, and the papers claimed to evidence such grant, as translated, are reproduced in the margin.†

†Seal Fourth.	[SEAL]	Two reales.
Years one thousand eight hundred and forty-two and one thousand eight hundred and forty-three.		
Habilitated for the years one thousand eight hundred and forty-four and one thousand eight hundred and forty-five.		
Administrator Agustin Duran.		

Governor Manuel Armijo.
To his excellency Manuel Armijo, Governor of this Department of New Mexico:

I, Carlos Santistevan, for myself and in the name of five other associates, all residents of

[106] *It was averred in the petition with respect to the survey above referred to, that it was not made in accordance with the boundaries *set forth in the grant, but was "of a different portion of land, a part or all of which is included in the said grant." The *court of [107] [108]

the town of Dolores, in the district of Taos, before your excellency in due legal form, represent and state that finding without any land with title in fee to cultivate for the support of ourselves and our needy families, and having found a vacant tract very suitable tract for cultivation, irrigable from certain water, said to be from the Lama, quite sufficient for its irrigation, at the place called by that name up to another place, the Cebolla, which places are between the settlements of the Rio Colorado and San Cristoval, pertaining to the said district of Dolores de Taos, I ask and pray, from the well-known and distinguished liberality of your excellency, that in the name of the high powers of our Mexican Republic, you be pleased to make us a grant of the said tract; for the same is of very convenient size, and has ample water to be cultivated, and to afford sufficient support for the petitioners and their families, and would not injure any third party with respect to property or pasturage, or in any other way, but would rather result in the great welfare and increase of population and of agriculture; and, besides relieving the necessity of the petitioners, it will also strengthen that locality or frontier which guards the said population of the Rio Colorado, from which the said tract is distant but about one league, and from the settlement of San Cristoval somewhat more.

Therefore I earnestly pray that your excellency be pleased to accede to this our petition. I declare and protest, etc.

City of Santa Fé, December 31, 1845. At the disposition of your excellency.

Carlos Santistevan.

Santa Fe, December 31, 1845.

To the prefect of the district, that he ascertain whether the land applied for has an owner, and cause the corresponding justice to deliver the land referred to by the petitioner.

Armijo.

Juan Bautista Vigil y Alarid, Secretary.

Rio Arriba, January 3, 1846.

The justice of the peace to whom it corresponds to do so will investigate whether the tract the petitioners apply for is vacant, and whether any injury to a third party would result from the granting thereof; and, none resulting, he will proceed to grant them of the land an abundance of what each can cultivate, under the condition that they inclose the same with a regular fence, in order to prevent damages, and that they do not obstruct the roads, pastures, and watering places, and with notice that they shall keep arms sufficient for their defense.

D. Lucero.

In this, the third precinct, Dolores, of the district of Taos, on the twentieth day of the month of March, one thousand eight hundred and forty-six, I, Juan Lorenzo Martinez, justice of the peace, by authority of law, for the said precinct, in pursuance of a decree of January 3, eighteen hundred and forty-six, by his honor Diego Lucero, prefect of the second district of the north, issued to me as the proper justice, that I investigate whether the land applied for by the five petitioners is vacant, and I, meeting no impediment, proceeded to the tract and, finding the same uncultivated and unoccupied, took the petitioners by the hand, and leading them very slowly and in full legal form, in virtue of holding competent authority, I placed them in possession of the land they pray for, for cultivation, they being without land in fee, doing so in

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the name of God and of the high authority of our wise Mexican laws, which are sufficient to grant the public domain, to the end that idleness be banished and agriculture be encouraged. Wherefore they, at the instant they received their liberal donation and were favored in this manner, shouted with joy, saying huzza for the renowned sovereignty of the Mexican nation. And in this joy they plucked up grass and cast stones, as being lawful proprietors of the land which they wished to irrigate with the water of the valley of the Lama, as relying upon that small water source they had applied for the donation; and I therefore designate to them for limits: On the north, the boundaries of the Rio Colorado grant; on the south, to where the dividing line of San Cristoval is reached; on the east, the mountain, and on the west, the edge of the bluff of the Rio del Norte, leaving the pastures, roads, and watering places free, eastwardly, from where they cannot irrigate; they not to prevent pasturing in virtue of being the possessors; and they are also obligated to inclose with a regular fence, so that they may not have to claim damages, and shall keep arms sufficient for their protection.

And to the end that this grant may in all time subsist, I authenticate the same under the authority conferred upon me, with my attending witnesses, for the lack of a notary public, there being none in this department; and it is done on this common paper, there being none of the proper stamp, the new settlers binding themselves to supply the same of the proper stamp whenever they can opportunely procure it; to all of which I certify.

J. Lorenzo Martinez.

Attending: Juan José Cordova.

Attending: José Concepcion Medina.

NOTE.—The persons placed in possession, with their full names, are those following in this list of names, made that they, for the sake of peace and good neighborhood, may in proportion to the tract divide among themselves the land I delivered them without measuring, owing to the very inclement day and the much thicket which impeded the cord; and they are in this list: Juan Carlos Santistevan, José Manuel Garcia, Julian Santistevan, Carlos Ortlvis, Tomas Ortlvis.

Valid.

[RUBRIC.]

Attending: Juan José Cordova.

Attending: José Concepcion Medina.

Tomas Ortlvis being of those placed in possession in this grant, at the foot of which this note is appended, he transfers to his brother Carlos Ortlvis, all his rights in this grant; and he signed this before me, Lorenzo Martin, alcalde, and the said Tomas signed this with me this 7th April, 1850. Lor'o Martin, Alcalde.

Tomas Ortlvis. X

Attending: Rafael Sisneros.

Attending: Mateo Romero. X

Carlos Ortlvis being of those placed in possession under this grant, at the foot of which this note is appended, he transfers to the citizen José Gonzales his rights in the grant; and he signed this before two witnesses present; and he transferred his rights for the price of two dry cows, one cow with a calf, and one yoke of oxen; which he signed with the witnesses this 29th of September, 1850.

Carlos Ortlvis. X

Witness: José Miguel Pacheco.

Witness: José Bltor Valdes. X

private land claims entered a decree (Murray, J., dissenting) defining the boundaries of the tract covered by the claim as allowed, and confirming title thereto in "the heirs and assigns of said five original grantees and to their heirs and assigns." The United States thereupon appealed to this court.

Mr. Matthew G. Reynolds argued the cause and, with Solicitor General John K. Richards and Mr. William H. Pope filed a brief for appellant.

Mr. T. B. Catron argued the cause and filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

[108] * Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is contended that the court below erred in confirming the alleged grant—

1. Because the documents relied upon, assuming them to be genuine, do not show that a grant was made, for the reason that on their face they do not purport to be a grant by the governor of New Mexico;

2. Even if the papers can, on their face, be construed as importing a grant by the governor, the claimants were not entitled to confirmation, because there was no archive evidence of the alleged grant and no inscription of the same in the records of the former government;

3. That the governor of New Mexico was without authority to make a grant of public lands at the time the papers relied upon purport to have been executed; and—

4. That even if it be conceded that the governor, at the time in question, had power to make a grant, and that the papers are held to be a manifestation of his purpose to do so,

[109] yet, because *of a failure to show compliance with essential conditions exacted by the Mexican law, the claimants have not established such a case as entitles them to a decree of confirmation.

The matters embraced in the two last propositions involve legal questions of serious moment, which have been elaborately discussed at bar, but are unnecessary to be considered, if at all, until the subjects covered by the first two contentions are disposed of.

Before approaching a consideration of the two first questions, which logically come under one head, we premise by stating that in order to justify the confirmation of a claim, under the act of March 3, 1891, it is essential that the claimants establish, by a preponderance of the proof, the validity of their asserted title. *United States v. Ortiz*, 176 U. S. 422, ante, 529, 20 Sup. Ct. Rep. 466.

To ascertain whether the papers relied upon constitute a grant of title to land, and to determine whether the existence of archive evidence of a grant is an essential prerequisite to the confirmation of the alleged title, it is necessary to briefly recapitulate the provisions of the Mexican colonization law of 1824 and the regulations of 1828 thereunder, and to review previous adjudications on the subject of the form required by Mexican law

to manifest that the power to grant had been exercised. It is necessary to do this, since it is undoubted that although it be conceded that the governor of the territory of New Mexico possessed power in 1845 and 1846 to make a grant of public lands situated within that territory, nevertheless the right to exercise such power as well as the documents by which it was essential to manifest the calling into play of the power, was derived from and was dependent upon the colonization law and the regulations thereunder just mentioned.

The law of 1824 was enacted to provide for the colonization of vacant public lands, and the regulations were adopted for the purpose of executing the powers which the law conferred. Certain articles or sections of the regulations of 1828, to which we shall hereafter have occasion to refer, are printed in the margin.†

*In brief, the regulations of 1828, adopted [110] to carry into effect the law of 1824, required every applicant for a grant of land to present a petition to the executive head of the territory, alleging *the existence of certain facts. That official was directed to obtain information as to whether or not the necessary conditions authorizing the making of a grant existed; and upon the receipt of such information the application was to be granted or rejected in strict conformity to law. As respected grants to heads of families or private persons, the "proceedings" culminating in a grant were required to be forwarded to the legislative body of the territory for its approval, until which approval grants were not to be definitively valid, while grants to contractors for the colonization of many families required the approval of the supreme government, to whom the proceedings were to be sent for its action.

Concerning the fourth article or section of the regulations this court said, in *Arguello v. United States*, 18 How. 539, 543, 15 L. ed. 478, 480:

"By the fourth section the governor, be-

†Excerpts from the Regulations of November 21, 1828 (Reynolds' Span. & Mex. Land Laws pp. 141 *et seq.*):

"1. The political chiefs of the territories are authorized, under the law of the General Congress of the 18th of August, 1824, and under the conditions that will hereafter be stated, to grant the public lands of their respective territories to the contractors, families, or private persons, Mexicans or foreigners, who may apply for them for the purpose of cultivating them or living upon them.

"2. Every applicant for land, whether contractor, head of family, or private person, shall apply to the political chief of the respective territory with an application in which is given his name, country, profession, the number, nature, religion, and other circumstances of the families or persons whom he desires to colonize, and shall also mark as distinctly as possible and describe on a map the land he applies for.

"3. The political chief shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th of August are found in the application, both as regards the land and the applicant, either that this latter be attended to

ing thus informed, may 'accede or not' to the prayer of the petition. This was done in two ways—sometimes he expressed his consent by merely writing the word 'concedo' at the bottom of the expediente; at other times it was expressed with more formality, as in the present case. But it seldom specified the boundaries, extent, or conditions of the grant. It is intended merely to show that the governor has 'acceded' to the request of the applicant, and as an order for a patent or definitive title in due form to be drawn out for execution. It is not itself such a document as is required by the eighth section, which directs that 'the definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the parties interested.'"

[112] That the mere approval by the governor indorsed on a petition presented to him for a grant, before a reference to ascertain the existence of the prerequisites to a grant, or indeed the action of the governor antecedent to the actual execution by him of a formal grant which was required by law, was not the equivalent *of the grant, was clearly decided. The court, referring to a mere approval of a claim for land, said:

"The document of the 26th has none of the characteristics of a definitive grant. It shows only that the governor assents that the petitioner shall have a grant of a tract of land called 'Las Pulgas.' It describes no boundary, and ascertains no quantity. It contemplates a 'corresponding patent,' and does not purport itself to be such document."

In *Hornsby v. United States*, 10 Wall. 224, 19 L. ed. 900, the court considered the requirement of article 5 of the regulations. It was declared to have been the duty of the governor, and not of the grantee, to submit to the legislative body of a territory of the Republic of Mexico, for its approbation, grants issued by the governor; that by a grant, regular in form and of which archive evidence existed, a title of some kind passed to the applicant, and that, as respected such a grant, under the powers conferred on the court by the California act, a failure to obtain juridical possession or the approval of

simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant.

"4. In view of all of which the political chief shall grant, or not, said application in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited.

"5. The grants made to private persons or families shall not be held to be definitely valid without the previous consent of the territorial deputation, for which purpose the respective proceedings shall be forwarded to it.

"8. The grant asked for being definitely made, a document signed by the political chief shall be issued to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the laws, in virtue of which the possession shall be given.

"9. The corresponding entries of all the applications presented and grants made shall be

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the departmental assembly, prior to the treaty of cession, did not operate to forfeit the title of the grantee or prevent a confirmation of a claim based on such grant. Whether this rule applies under the act of March 3, 1891, is one of the questions embraced in the propositions which we have postponed considering and as to which therefore we presently intimate no opinion whatever.

The "proceedings" which by article 5 of the regulations were to be forwarded to the legislative body were termed an expediente. What was embraced in the expediente is thus stated in *United States v. Moorehead*, 1 Black, 227, 245, 17 L. ed. 76, 78.

"When complete, an expediente usually consists of the petition, with the diseña annexed; a marginal decree, approving the petition; the order of reference to the proper officer for information; the report of that officer in conformity to the order, the decree of concession and the copy or a duplicate of the grant. These several papers—that is, the petition with the diseña annexed, the order of reference, the informe, the decree of concession and the copy of the grant, appended together in the order mentioned—constitute a complete expediente within the meaning of the Mexican law."

*And in *United States v. Larkin*, 18 How. [113] 561, 15 L. ed. 487, this court, speaking of the final order or decree by a governor exhibiting favorable action upon an application, it was expressly declared that a "concession and direction constitute a part of the evidence of the title, or, according to the Mexican vocabulary, a part of the 'expediente.'"

In *Fuentes v. United States*, 22 How. 443, 16 L. ed. 376, the nature and importance of an expediente was commented upon. In that case confirmation was sought of a purported grant without the production of an expediente. The court said (p. 453, L. ed. p. 379):

"The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the act of Mexico of the 18th of August, 1824, or with the regulations

made in a book intended for the purpose, with the maps of the lands that shall be granted, and a detailed report shall be forwarded to the supreme government every quarter.

"10. No stipulation shall be admitted for a new settlement, unless the contractor obligates himself to furnish at least twelve families as settlers.

"11. The political chief shall set a reasonable time for the settler, within which he must necessarily cultivate or occupy the land in the terms and with the number of families which he has stipulated, in the intelligence that if he does not do so the grant of the land should be void, but the political chief may, nevertheless, revalidate it in proportion to the part in which the party in interest had complied.

"12. Every new settler, after he has cultivated or occupied the land under his stipulation, shall be careful to so show to the municipal authority, in order to consolidate and secure his right to the property to enable him to freely dispose thereof, after the proper record has been made."

of November 28, 1828. It is deficient in every particular—unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant—supposing it to be such—to the departmental assembly or territorial legislature, for its acquiescence; nor was an expediente on file in relation to it, according to the usage in such cases.

"All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the departmental assembly for its action upon the grant. The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed, particularly in a case where the archives do not show any record of such a grant."

That the proceedings evidenced by the expediente may be examined in passing upon the claim of a grant in fee was expressly adjudicated in *De Haro v. United States*, 5 Wall. 599, 18 L. ed. 681.

[114] *Speaking of the execution of a grant in duplicate, it was said in *United States v. Osio*, 23 How. 273, 279, 16 L. ed. 457, 459.

"Grants under the colonization laws were usually issued in duplicates,—one copy being designed for the party to whom it was made, and the other to remain in the archives to be transmitted with the expediente to the departmental assembly for its approval. They were in all respects the same, except that the copy left in the office, sometimes called the duplicate copy, was not always signed by the governor and secretary, and did not usually contain the order directing a note of the grant to be entered in the office where land adjudications were required to be recorded."

As shown in the excerpt of article 9 of the regulations of 1828, it was required that a record should be made of the applications presented and grants made. Concerning this provision, this court in the case last cited said (p. 279, L. ed. p. 459):

"Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued."

Again, referring to article 9, in *United States v. Bolton*, 23 How. 341, 16 L. ed. 569, this court said (p. 350, L. ed. p. 572):

"Sec 11" (9?) "directs that a proper rec-

ord shall be kept of all the petitions presented and grants made, with maps of the lands granted.

"This record is the evidence of grant. It being made, the governor (§ 8) shall sign a document and give it to the party interested to serve as a title, wherein it must be stated that said grant (to wit, *the record*) is made in exact conformity with the provisions of the laws. In virtue of this document issued to the party, possession of the lands shall be given; but the document is not sufficient of itself to prove that the governor has officially parted with a portion of the public domain and vested the land in an individual owner. This must be established before the board of commissioners by record evidence, *as found in the archives, or which had been [115] there and has been lost."

As instructive upon the point now under consideration we quote from the opinion delivered in *Pico v. United States*, 2 Wall. 279, 17 L. ed. 856:

"The regulations of 1828, which were adopted to carry into effect the colonization law of 1824, prescribed with great particularity the manner in which portions of the public domain of Mexico might be granted to private parties for the purposes of residence and cultivation. It is unnecessary to state the several proceedings designated, as they have been the subjects of frequent consideration in previous opinions of this court. All of them, from the petition of the colonist or settler to the concession of the governor, were required to be in writing, and when the concession was made, to be forwarded to the departmental assembly for its consideration. The action of that body was entered with other proceedings upon its journals, and these records, together with the documents transmitted to it, were preserved among the archives of the government in the custody of the secretary of state of the department. The approval of the assembly was essential to the definitive validity of the concession, and when obtained a formal grant was issued by the governor to the petitioner. The regulations contemplated an approval to precede the issue of the formal grant, so when the grantee received this document the concession should be considered final. For a long time after the adoption of the regulations this course of proceeding was followed; but afterwards, and for some years previous to the conquest, a different practice prevailed, and the formal title papers were issued without waiting for the action of the assembly, a clause being inserted to the effect that the grant was subject to the approval of that body. Of the petitions presented and grants issued, whether before or after the approval of the assembly, a record was required to be kept in suitable books provided for that purpose.

"As will be perceived from this statement, it was an essential part of the system of Mexico to preserve full record evidence of all grants of the public domain, and of the various *proceedings by which they were obtained. [116] When, therefore, a claim to land in California is asserted under an alleged grant from

the Mexican government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises."

In *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221, there was considered the validity of an alleged grant claimed to have been made in the early part of 1846. The grant was attempted to be established by the introduction in evidence, from private hands, of an expediente, embracing documents exhibiting the proceedings had preliminary to the making of the alleged grant, including an order of the governor, based upon the report of a prefect, that a title issue, and parol proof of the execution of a formal grant. In the course of the opinion affirming the decree of the district court rejecting the grant, the court reiterated former declarations, saying (p. 440, L. ed. p. 223):

"The colonization regulations of 1828 constitute the 'laws and usages' by which the validity of a Mexican title is to be determined. It is not important to restate the nature and extent of those regulations, for they have been so often commented on that they are familiar to the profession. The Mexican nation attached a great deal of form to the disposition of its lands, and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is, that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy what portions of the public lands had been alienated. *The record was the grant*, and without it the title was not divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession; but this 'titulo' did not divest the title, unless record was made in conformity with law."

[117] *The solemnity of juridical possession as connected with the investiture of a private person with a complete and perfect title to public lands of Mexico has been commented upon in various decisions of this court. *Malarin v. United States*, 1 Wall. 289, 17 L. ed. 595; *Graham v. United States*, 4 Wall. 259, 18 L. ed. 333; *Van Reynegan v. Bolton*, 95 U. S. 33, 24 L. ed. 351; *United States v. Pico*, 5 Wall. 536, 18 L. ed. 695; and *More v. Steinbach*, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

In *Malarin v. United States*, discussing the claim of the execution of an alleged grant of public lands in the territory of California in 1840, the court said (p. 289, L. ed. p. 595):

"When the grant to Pacheco was issued there still remained another proceeding to be taken for the investiture of the title.
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Under the civil, as at the common, law, a formal tradition or livery of seisin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurement and segregation in such cases, therefore, preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance, in these matters, of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issuance of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measurers and counters be appointed. On the day designated the proprietors appeared, and two measurers and two counters were appointed and sworn for the faithful discharge of their duties. A line provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the center of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact 'by pulling up grass and making demonstrations as owner of the land.' Of the various steps thus taken, from the *appointment[118] of the day to the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the 'book of possessions.'"

It appears from the adjudications of this court that the formal grants made to land in the territory of California enumerated conditions attached to the grant, in seeming compliance with the spirit if not the letter of the Mexican colonization law, and with the exactions of the regulations adopted to execute the same. It certainly cannot be questioned that, under Spanish dominion, the public lands were not granted in the first instance, in fee, to settlers or colonists, freed from conditions. As said by this court in *Chaves v. United States*, 168 U. S. 188, 42 L. ed. 430, 18 Sup. Ct. Rep. 76, speaking of the Spanish law in force in 1788:

"Lots and lands were distributed to those who were intending to settle, and it was provided that 'when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same and freely to dispose of them at their will as their own property.' But confirmation by the audiencia, or the governor if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title."

The constituents of the preliminary papers leading up to a grant and of the grant

itself, and the distinction between them, to grant an absolute title to land, and operated which attention had been so often directed by this court was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Ainsa v. United States*, 161 U. S. 219, 40 L. ed. 677, 16 Sup. Ct. Rep. 548, as follows:

"An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of [or?] final title paper [s] is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the *Toma de Razon*, which identifies the grantee, date of the grant, and property granted."

[119] It is manifest, from the foregoing review of the decisions under the California act, that it was held that in order to vest an applicant under the regulations of 1828 with title in fee, either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential, it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record, in some form, was required to be made of such grant.

As a corollary from the foregoing, it of course follows that the action of the legislative body could not lawfully be invoked for the approval of a grant, unless the expediente evidenced action by the governor, unambiguous in terms as well as regular in character.

Although it be assumed that there was a settled practice in New Mexico prior to the treaty of cession, to evidence a grant of land by a decree of the governor entered upon the reports made to him, without the execution of an independent and formal grant, such assumption would not avail in this case. For, undoubtedly, it would be essential in a paper of the character referred to that it should indicate the land to which the grant referred and the persons to whom it was made, and, further, that there should be a record thereof. It is patent that the regulations contemplated that the original "proceedings" or expediente which were to be forwarded to the departmental assembly, if evidencing the fact that a grant had actually been made, should remain in the custody of the public officials, and that such "proceedings" to be complete should exhibit the action taken by the governor after the ascertainment of the prerequisites required by law.

Inspecting, then, the alleged granting papers on the assumption of their genuineness, we proceed to determine whether or not they justify the contention that thereby a valid grant of any kind was made. In doing so let us consider, first, the form of the alleged granting papers, and, second, their substance.

The only ground for contending that there was a grant by the governor must rest on the inference that the indorsement by the official named, on the petition of Santistevan, manifested the purpose of the governor to

grant an absolute title to land, and operated to constitute a formal deed of grant. The indorsement thus referred to is as follows:

Santa Fé, December 31, 1845.

*To the prefect of the district, that he ascertain whether the land applied for has an owner, and cause the corresponding justice to deliver the land referred to by the petitioner. Armijo. [120]

Juan Bautista Vigil y Alarid, Secretary.

But, under all the authorities to which we have referred, the mere indorsement by a Mexican governor of action on the petition, before any of the prerequisite steps mentioned in the regulations of 1828 had been taken to determine whether as to the land and the applicants the power to grant might be exercised, was treated as a mere reference by the governor to ascertain the preliminary facts required to justify an approval of an application, and not as having force and effect as an actual grant of title to the land petitioned for. Under the decisions referred to, it cannot be doubted that the regular practice was deemed to be the execution of a formal deed of grant, following a decree acceding to the application, after reports made as to the results of the investigation directed to be had as required by law.

Whilst, as we have said, it may have been the practice in New Mexico for the governor not to make an independent, formal grant, but, after the receipt of reports from subordinate officials, to indorse a decree of concession or grant upon the papers evidencing the "proceedings" in the matter, such practice would not justify the conclusion that the mere approval indorsed on a petition, amounting but to a direction to take the necessary steps for the ascertainment of needed information, should be treated as dispensing with any manifestation by the governor of his intention to grant a title to land after the requisite information had been communicated to him. It is manifest that the prefect to whom the indorsement by the governor on the petition was addressed did not consider it as a grant of title to the tract of land in question, since he directed the justice of the peace, if the land was vacant and third parties would not be injured thereby, to "proceed to grant them of the land an abundance of *what each can cultivate*, under the condition that they inclose the same with a regular fence, in order to prevent damage, and that they do not obstruct the roads, pastures, and watering places, and with notice [121] that they should keep arms sufficient for their defense."

Now, it is undoubted that the documents executed by the prefect and the justice of the peace fairly import that those officials assumed authority to grant something as respected the land in question, either title or a right of possession for purposes of cultivation, but it is beyond controversy that the officials referred to did not, in 1845, possess power to grant the title to public lands. *Hays v. United States*, 175 U. S. 248, ante, 150, 20 Sup. Ct. Rep. 80; *Crespin v. United* 177 U. S.

States, 168 U. S. 215, 42 L. ed. 440, 18 Sup. Ct. Rep. 53; *United States v. Bergere*, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4. If, however, the subordinate officials referred to presumed to act on behalf of the governor in making a grant of title, the failure of the latter to subsequently ratify their action rendered their acts nugatory. *United States v. Bergere*, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4.

As a grant of title by the governor was a prerequisite to the conferring of juridical possession, of necessity the delivery thereof must have conformed to such precedent grant, and the mere act of possession cannot in any view have the force and effect of a grant. The document evidencing possession certainly formed no part of the "proceedings" or expediente which was required to be transmitted to the legislative body for its decision, approving or disapproving action taken by the governor antecedent to the giving of possession.

Passing, however, from the mere question of form and considering the substance of things, can the papers relied upon be treated as constituting a grant of title to the land in question? Certainly, the adjudications of this court upon the regulations of 1828, from the beginning, have established the doctrine that a grant of Mexican land could not be confirmed unless there had been at least a reasonable compliance with the requirements of those regulations. Now, the Mexican law under which, if at all, a grant of this land could have been made, required the governor to be informed both as to the capacity of the individual under the law to receive the grant, and as to whether the land petitioned for was in a condition for grant. And whilst exacting that the governor should thus have the means of information in order to enable him to form a judgment, the law pointed out the officials to whom he should refer the petition for examination and report on these subjects.

[122] *Now, in the case before us, that the governor at the inception of the proceedings was not sufficiently informed, either as to the land or the applicants, to take final action upon the petition, is patent on the face of the documents. Thus, the petition does not designate who were the "five" associates of Santistevan, and the governor in his indorsement requires the prefect to ascertain the condition of the land. Further, though the prefect was not informed, either by the petition or the indorsement of the governor, as to who were the petitioners to whom delivery of the land was to be made, he remained ignorant on the subject, and directed the justice of the peace to ascertain the condition of the land, and to grant to the "petitioners" (asserted in the petition of Santistevan to be six in number) an abundance of what each could cultivate of the land, under certain prescribed conditions. We find, however, the justice of the peace assuming to grant to "five petitioners" jointly, either a title to, or the right of possession of, all the land within described boundaries.

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Regarded as a grant of title, the documents relied upon import, contrary to the letter and spirit of the regulations, that it was a matter of no consequence to what particular individuals a grant was to be made, and that Santistevan might designate, at his pleasure, the persons to be placed with himself in possession. But, by article 3 of the regulations, the determination whether the conditions required by the colonization law existed, "both as regards the land and the applicant," was imposed upon the executive head of the territory. And as already shown, the grant could not have been created by the mere conferring of juridical possession since the authority to give possession was necessarily derived from and must have conformed to a precedent grant.

It is manifest that the indorsement of Governor Armijo, considered by itself or in conjunction with the petition, failed to identify the petitioners, and did not, in terms, purport to grant title to land. As Santistevan petitioned that the grant be made by the governor "in the name of the high powers of our Mexican Republic," it is not permissible to infer that the governor intended to delegate to subordinate officials the power to decide whether an absolute or any title to the land petitioned for should *be granted, or to determine what portion thereof should be granted. The reasonable interpretation of the act of the governor would appear to be that he intended either to license the occupation of land within the prescribed limits for cultivation, or that he desired an examination and report to be made, with a delivery of temporary possession, pending further action on his part.

When it is borne in mind that the application of Santistevan purports to have been made at a time when hostilities were impending between Mexico and the United States, and the territory of New Mexico was undoubtedly in a disturbed condition, its citizens in all probability preoccupied with preparations for an impending clash of arms, the inference from the documents we have been considering is not unwarranted that but a mere temporary possession or license was intended by the prefect and justice of the peace to be conferred upon the applicants. Such an hypothesis would account for the long delay following the direction of the prefect to the justice of the peace, bearing date January 3, 1846, and the delivery of possession on the 20th of March following. And it is to be remarked that such a possession as could have been had of the land in question under then existing circumstances, during the short time intervening the asserted delivery of possession and the conquest of the country by the American forces, would have been insufficient to have constituted even an equity in favor of the alleged grantees, which this court could recognize were it clothed with the broad powers conferred by the California act. *Peralta v. United States*, 3 Wall. 434, 441, 18 L. ed. 221, 224. It may be added that the record fails to satisfactorily establish any occupancy or culti-

vation prior to the conquest, and but trifling cultivation thereafter, and the latter by a portion only of the alleged grantees.

To summarize. In the documents presented as establishing title in the alleged original grantees, there is an entire disregard of the requirements of the regulations of 1828, and the proceedings do not warrant the finding that the acts of the prefect and of the justice of the peace were ever reported to or received the approval of the governor, or that the latter official ever made a grant of title. The major portion of the documents claimed [124]*to constitute title, if regular, properly constituted part and parcel of an expediente belonging to the archives. They, however, bear no indorsement to indicate that they had ever been among public archives prior to their production in 1872 from private custody for filing in the office of the surveyor general of New Mexico. So, also, no evidence was introduced tending to show that any sort of official record had ever been made of a grant of title to the land in controversy, while the tenor of the act of possession forbids the inference that any formal grant was ever executed by the governor. The case is therefore without the principle of various decisions of this court where, with respect to a formal grant, introduced in evidence, *complying with the requirements of the regulations*, out whose authenticity was disputed, the case was remanded to the lower court to permit the introduction of evidence, if such could be produced, to establish that archive evidence of the grant once existed. One of the prerequisites for the introduction of secondary evidence of title is proof that a 'grant was obtained and made in the manner the law required.' *United States v. Castro*, 14 How. 350, 16 L. ed. 660.

Unless it be assumed that the Mexican government was indifferent as to the disposition of its lands, and that anybody and everybody possessed power to convey them, as a matter of course, to whoever chose to ask for them, proceedings such as those we have reviewed cannot be treated as having had the effect of divesting the Republic of Mexico of title to a portion of its public lands.

Sustaining, as we do, the first two contentions urged by the government, it becomes unnecessary to consider or pass upon the others which were pressed upon our attention. As a consequence of the foregoing reasons, it results that the claim should have been rejected by the court of private land claims, and that because it erroneously confirmed the alleged grant, *the decree made below should be reversed*, and the cause remanded with instructions to reject the claim and dismiss the petition.

And it is so ordered.

Mr. Justice **Brewer** and Mr. Justice **Brown** concur in the result.

Mr. Justice **Shiras** and Mr. Justice **McKenna** dissent.
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*JAMESTOWN & NORTHERN RAILROAD [125]
COMPANY, *Piff. in Err.*,

v.

THEODORE J. JONES.

(See S. C. Reporter's ed. 125-132.)

Land grant to railroads—road built without filing map.

A definite location of the right of way of a railroad, which will entitle it to the benefits of the act of Congress of March 3, 1875, granting lands to railroads, is made by the actual construction of the road, although a profile map of the road has not been filed.

[No. 142.]

Argued February 1, 1900. Decided March 26, 1900.

IN ERROR to the Supreme Court of the State of Dakota to review a judgment affirming a dismissal of an action to establish a railroad right of way under a land grant. *Reversed.*

See same case below, 7 N. D. 619, 76 N. W. 227.

Statement by Mr. Justice **McKenna**:

This suit was brought by plaintiff in error to have itself adjudged the owner of a right of way over the northwest quarter of section 8, in township 141, of range 64, in the county of Stutsman, state of North Dakota.

Its title rests upon the act of Congress of March 3, 1875, entitled, "An Act Granting to Railroads the Right of Way through the Public Lands of the United States."

The plaintiff was organized September 17, 1881, under the laws of the territory of Dakota. After its organization it surveyed a line of route for its railroad from a point near Jamestown in a northwesterly direction through the county of Stutsman and over the land in controversy. The survey was finished the 30th of October, 1881. A map representing the survey was made by a resolution of the board of directors, and was adopted as the definite route of the railroad.

In 1882 the road was constructed upon the line surveyed, and since that time trains have been continuously run over it by the plaintiff.

On the 26th of January, 1883, the plaintiff filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same. On the 13th of March, 1883, plaintiff's map of definite location was filed and approved by the Secretary of the Interior. There was some uncertainty in the evidence whether such map was ever filed in the office of the register of the local land office, but it probably was.

*On the 12th of February, 1881, the land [126] then being public land of the United States, duly surveyed, one Sherman Jones filed a declaratory statement upon it, alleging set-

NOTE.—As to land grant to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

tlement the 8th of February, 1881. On the 13th of March, 1883, it had not been canceled or vacated.

On the 26th of May, 1882, one William S. King filed a declaratory statement on the land, which on the 13th of March, 1883, had not been canceled.

In addition to the above the trial court found the following facts:

"On the 7th day of March, A. D. 1883, one Ella Sharp filed in said land office an application to be allowed to enter said tract under the homestead law, together with the affidavit required by law. Said application was received and entered at said land office and continued in force until, on the 21st day of November, 1892, it was canceled at said land office by relinquishment.

"On the 23d day of February, A. D. 1883, the defendant, T. J. Jones, was a citizen of the United States and over the age of twenty-one years. On that day, intending to purchase said tract under the pre-emption laws, he built a house thereon; on the 3d day of March of said year he commenced living in said house, and from that day continuously to the present has resided on said land and has cultivated and improved the same. On June 5, 1883, he filed in said land office at Fargo a declaratory statement under the pre-emption law, alleging settlement on said land on March 3, 1883. He afterward applied to said land office to be allowed to make proof under his declaratory statement, but owing to the existence of said prior homestead entry of Ella Sharp said application was refused. In November, 1892, he secured from said Ella Sharp a relinquishment of her homestead entry, and on the 21st day of November, 1892, the same date said entry was canceled by relinquishment, he made application to said land office to be allowed to change his pre-emption entry upon said tract into a homestead entry. Said application was received at said land office, the entry allowed and numbered 20,234, and a receiver's receipt bearing the same number issued to said defendant. Afterward, on the 21st day

[127] of January, A. D. 1893, he made final proof for said land under the homestead law, and on February 18, 1893, a final receiver's receipt, numbered 7,233, was issued to him by said land office at Fargo. On the 26th day of May, 1893, a patent in due form, whereby the United States conveyed and granted said land to said defendant, was issued to and received by him. There was not in said receiver's receipt or final certificate, or in said patent for said tract a reservation of any vested or accrued right, claim, or interest to said land on the part of the plaintiff or of any person or corporation under the act of Congress of March 3, 1875. At the time defendant settled upon said land plaintiff was and ever since has been engaged in operating a line of railroad thereover.

"The plaintiff has not at any time instituted proceedings or resorted to any process whatever under state or Federal laws to condemn a right of way across said land, or to divest defendant of his title or any

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possessory right that he might have to said land.

"Plaintiff has taken for its use as a right of way upon said land a strip 100 feet wide, being 50 feet on each side of the central line of its railroad tract and extending diagonally across said land from a point about the middle of its south boundary to a point near its northwest corner. Said strip includes about 6 acres of said land. The land not taken is divided into two unequal parts and its value for farming purposes decreased. Trains of cars are drawn by plaintiff over and across said land every day, and the crop on defendant's land is injured by smoke from said railroad, and his buildings and crops subjected to increased hazard of destruction by fire. By the taking of said strip for a right of way and the construction and operation of a railroad thereon the said land is depreciated in value in the sum of \$300.

"Defendant has not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage inflicted thereby."

As conclusions of law the court found that no right of way accrued until the 13th of March, 1883, the date of the filing of the profile *map of the road; that prior to that time [128] the land had ceased to be public land by reason of the pre-emption and homestead entries which had been filed upon it; that the defendant, T. J. Jones, was the owner in fee of said land without reservation of any kind, and that his title related back to February 23, 1883, the date of his settlement thereon.

Judgment was entered dismissing plaintiff's cause of action, awarding the defendant \$300 and costs taxed at \$24.65, and that "upon the payment to the defendant of the sum of \$300 and the costs of this action there shall vest in the plaintiff, Jamestown & Northern Railroad Company, and its successors and assigns, the full legal title to that portion of the northeast quarter of section 8, township 141, range 64, used by it as a right of way, to wit, 50 feet on each side of the center line of said railroad, as the same has been heretofore constructed and is now located and operated through said land by said plaintiff."

Upon appeal to the supreme court of the state the judgment was affirmed (7 N. D. 619, 76 N. W. 227), and this writ of error was then sued out.

Mr. A. B. Browne argued the cause and, with Messrs. C. W. Bunn and James B. Kerr, filed a brief for plaintiff in error, the contentions of which sufficiently appear in the opinion.

No counsel for defendant in error.

*Mr. Justice McKenna delivered the [128] opinion of the court:

In the summer of 1882 the plaintiff in error constructed its railroad across the land in controversy, and the finding of the court is that "at the time defendant settled upon said land plaintiff was and ever since has

been engaged in operating a line of railroad thereover."

The defendant nevertheless was awarded \$300 damages, and the plaintiff adjudged to have acquired no rights whatever by the construction of its road.

The act of 1875, upon which plaintiff relies, is as follows:

[129] "That the right of way through the public lands of the *United States is hereby granted to any railway company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of 100 feet on each side of the central line of said road;

"Also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad;

"Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each 10 miles of its road.

"Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes, Approved July 1, 1862,' approved July 1, 1864.

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location [130] of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

"Sec. 5. That this act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved for sale. . . ."

There is some uncertainty in the act. Its first section is expressed in words of present grant, but there is no definite grantee. We said in *Hall v. Russell*, 101 U. S. 509, 25 L. ed. 831: "There cannot be a grant unless

there is a grantee, and consequently there cannot be a present grant unless there is a present grantee." And it was further said that in all cases where a grant was given a present effect, a state or some other corporation having all of the qualifications specified in the act had been designated as a grantee. In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named. In *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, we said: "The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in presenti* of lands to be thereafter identified. *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438."

This case establishes that a railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. It was also so held by Mr. Secretary Vilas in *Dakota C. R. Co. v. Downey*, 8 Land Dec. 115.

But what constitutes a definite location of the right of way? Upon the answer to that question the present controversy hinges. The state courts decided, as we have seen, that the right of way only became definitely located by the filing of a profile map of the road. The contention of the plaintiff in error is that the right of way may be definitely located by the actual construction of the road. And this was the ruling of the Interior Department in *Dakota C. R. Co. v. Downey*, 8 Land Dec. 115, and the ruling has been subsequently adhered to. *St. Paul, M. & *M. R. Co. v. Maloney*, 24 Land [131] Dec. 460; *Montana C. R. Co.* 25 Land Dec. 250; *St. Paul & M. R. Co.* 26 Land Dec. 83.

The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or in advance of construction by filing a map as provided in section 4. Actual construction of the road is certainly unmistakable evidence and notice of appropriation.

Secretary Vilas said in *Dakota C. R. Co. v. Downey*:

"As to the roadway the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. . . . This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with. The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the 4th section of the act; and the regulations of the department have been made to apply to such cases, and authorize such construction.

"It seems to me that the 4th section of the act was written for another purpose and for another case. It relates to a case of a railroad company which desires to secure the present grant, and give to it fixity of loca-

tion, *before* its road shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided—namely, the privilege of giving fixity of location to the subject of the grant *before* construction of the road.

"It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the 1st section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right of way.

[132] "The 4th section is designed to provide a mode by which fixity of location can be secured to a grantee, *in anticipation* *of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to the 'central line of said road,' which only means—without the 4th section—a *constructed* road."

This decision and the subsequent decisions of the Interior Department were concerned with cases of construction on unsurveyed land, but we think the power applies also to surveyed lands. The only difference which the act of Congress makes between surveyed and unsurveyed land is the provision in § 4 for filing the profile of the road.

It follows from these views that the grant to plaintiff in error by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error was subject thereto.

This conclusion does not conflict with the doctrine announced in *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336, and in *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566, that the title to lands passing under railroad land grants is considered as established at the date of the filing of the map of definite location. The same question is not here presented. Different considerations apply to the grant of lands than to the grant of the right of way.

The judgment of the Supreme Court of North Dakota is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[133]*JAMES BRISTOL, as Executor of the Last Will and Testament of Sophia M. Bristol, Deceased, *Plff. in Err.*,

v.

WASHINGTON COUNTY, State of Minnesota.

(See S. C. Reporter's ed. 133-149.)

Claim against decedent's estate for personal

taxes—where decedent was a nonresident—due process of law—statute of limitations.

1. Investments by a nonresident of the state are subject to taxation under the laws of the state, when made by a resident agent who is employed to invest and reinvest moneys, at whose office the loans are made payable, and who retains the mortgages securing them, and to whom the notes taken for the loans are returned from time to time whenever required for the purpose of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes are sent out of the state to the principal and the agent has no authority to execute satisfactions of mortgages.
2. An allowance of a claim for personal-property taxes against the estate of a decedent under Minn. Stat. 1894, § 4529, preferring claims for taxes to ordinary debts, § 1623, making them a lien on personal property, and other provisions for enforcing delinquent taxes by distraint of goods and chattels, by proceedings by attachment and publication giving appropriate notice and opportunity to contest, is not without due process of law, although the decedent was a nonresident of the state.
3. Proceedings to enforce collection of personal-property taxes from property of a decedent are within Minn. Stat. 1894, § 5136, providing that actions "upon a liability created by statute shall be barred by the lapse of six years."

[No. 109.]

Argued January 22, 1900. Decided April 9, 1900.

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment against the estate of a deceased nonresident for personal-property taxes. *Reversed.*

Statement by Mr. Chief Justice **Fuller**:

This is an appeal from a judgment of the circuit court for the district of Minnesota, allowing a claim in favor of Washington county, Minnesota, against the estate of Sophia M. Bristol, deceased.

Sophia M. Bristol died testate, naming James Bristol as her executor, and her will was duly admitted to probate in Wyoming county, state of New York, where said James and Sophia M. resided. Thereafter Mr. Bristol applied to the probate court of the county of Ramsey, state of Minnesota, for the admission of the will to probate there and the issue of letters testamentary to him. This was done, and subsequently the county of Washington exhibited its claim against said estate, whereupon Bristol filed his petition in the probate court for the removal of the action instituted by the filing of the claim into the circuit court of the United States, and it was removed accordingly. A replacer was awarded by stipulation, and a formal complaint and answer filed. The matter was

NOTE.—As to situs for taxation of notes and mortgages—see note to *Boyd v. Selma* (Ala.) 16 L. R. A. 729.

As to situs of debts evidenced by notes or mortgages held by agent residing in different 177 U. S.

state from principal—see note to *New Orleans v. Stempel*, 44 L. ed. U. S. 174.

As to what constitutes due process of law—see notes to *Pearson v. Yewdall*, 24 L. ed. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

heard by the circuit court, a jury being waived according to law, and the court made the following findings:

[134] "I. That Cyrus Jefferson was the father of said Sophia M. Bristol, deceased, and died in November, 1883. For fourteen years just prior to his death he was a citizen and resident of the state of New York, and during said time loaned and invested *large sums of money to various persons residing in Minnesota, upon their notes, payable to his order at said Stillwater, secured by mortgages on real estate in said Washington and adjoining counties in the state of Minnesota; all said loans and investments were made, and the notes and mortgages taken, by and through William M. McCluer, the agent of said Cyrus Jefferson, who resided at the city of Stillwater, in said Washington county, during all the time hereinafter mentioned, and who, with full authority from said Cyrus Jefferson, made all such loans, and took and retained all notes and securities, and collected and reloaned both the principal and interest of said loans at said city of Stillwater, in Washington county, Minnesota, and kept the same permanently invested in that way, as nearly as practicable, save as to such moneys as said Jefferson drew from time to time to pay his debts and living expenses.

"II. Prior to May 1, 1883, said William M. McCluer, at said Stillwater, by the direction of said Jefferson, but otherwise with the same power and under the same authority and in the same manner, loaned of said moneys of said Cyrus Jefferson to persons in Washington county sums aggregating eighteen thousand dollars (\$18,000), taking notes and mortgages therefor in the name of and payable to said Sophia M. Bristol at said Stillwater, and retained the same as her agent, and handled and collected and reinvested the same in the same manner as he had those of Cyrus Jefferson.

"III. After the death of said Cyrus Jefferson and on December 18, 1883, all the other notes and mortgages held by said McCluer as agent for said Cyrus Jefferson were transferred, assigned, and passed to said Sophia M. Bristol as her share of the estate of her said father. She thereupon employed said William M. McCluer and Charles M. McCluer, both of whom then at all times herein mentioned resided at said Stillwater, as her agents at said city of Stillwater in and about said loaning business. She gave to them all the authority before that time exercised by said William M. McCluer for her father, Cyrus Jefferson, as aforesaid, and also gave to them a written power of attorney empowering [135] them or either of them *to satisfy and discharge or to sell and assign any and all mortgages then or thereafter in her name in the states of Minnesota or Wisconsin; all of said notes and mortgages of said Sophia M. Bristol, including those received by her as her share of her father's estate, as well as those taken in her name by said William M. McCluer prior to the death of her father, as aforesaid, were still left by her in the hands of her agents in Stillwater, Minnesota, and

said agents continued as before to make collections of both principal and interest due on said notes and mortgages, to satisfy and discharge mortgages, and to make new loans and investments upon like securities with the moneys so collected by them for said Sophia M. Bristol, and kept all of her moneys received or collected by them prior to transmittal or reinvestment of the same, and while in their hands, deposited in bank in said Stillwater as their money, and having all notes and mortgages received by them for such loans made payable at their own office in said city of Stillwater, said mortgages being upon lands in Washington and adjoining counties in Minnesota.

"IV. In March, 1885, all of such notes then in the hands of said agents were delivered to said Sophia M. Bristol, and thereafter all new notes as taken by said agents in said business were sent to Sophia M. Bristol and kept by her at her home in New York, but were payable as before at the office of said agents in Stillwater, Minnesota; all mortgages securing such notes were retained by said agents, and said notes were returned to said agents at Stillwater by said Sophia M. Bristol from time to time whenever required by them for the purpose of renewal, payment, collection, or foreclosure of securities; that the said Wm. M. McCluer and Charles M. McCluer continued as agents for said Sophia M. Bristol, collecting money becoming due upon said notes and making loans in her name, sometimes under the direction of James Bristol, her husband, but generally upon their own judgment; that they remitted money to Sophia M. Bristol when she called for the same, and what was not received by her was invested in new loans, as aforesaid.

"That said Sophia M. Bristol did receive from the proceeds *of said collections at various times large sums of money through said agents, and all moneys collected were always subject to be sent to her or paid out in any way she should order. [136]

"V. In the month of August, 1890, said William M. McCluer died, and thereafter said Charles M. McCluer continued to act as sole agent for said Sophia M. Bristol at said city of Stillwater, Minnesota, with the same power as before exercised by him and said William M. McCluer, except that in November, 1890, Sophia M. Bristol revoked said power of attorney which authorized said agent to satisfy mortgages of record, and thereafter executed satisfactions of mortgages herself.

"VI. Said loaning business was so carried on by said Sophia M. Bristol by and through her said agents at the city of Stillwater, Minnesota, in the manner aforesaid until her death, in the month of August, 1894.

"VII. Said Sophia M. Bristol had no taxable property in said Washington county during any of the years hereinbefore or hereinafter mentioned other than the loans and indebtedness mentioned, which were secured by mortgages upon lands in Minnesota, and which were under the charge and management of her said agents, who, during all said

years and during all the time within which the taxes hereinafter mentioned were assessed and levied, resided and had their office and transacted said loaning business at the said city of Stillwater, in said county and state.

"VIII. That the moneys originally sent by said Jefferson to said William M. McCluer and invested and reinvested by said McCluer, and afterwards by said Sophia M. Bristol kept and retained in the hands of said William M. McCluer and Charles M. McCluer as her agents, were so sent, retained, and kept in the hands of said agents in the city of Stillwater, Washington county, Minnesota, in and during each of the years when the taxes hereinafter mentioned were assessed and levied against said Sophia M. Bristol, as hereinafter specifically set forth, as and for a permanent investment and business under the full control of said agents, and said property and said loans acquired and had a situs in said city of Stillwater, Washington county, Minnesota, for the purpose of taxation.

[137] "IX. That the claimant herein, Washington county, is, and for more than thirty years last past has been, a municipal corporation, to wit, an organized county created and existing under and pursuant to the laws of the state of Minnesota.

"X. That in and during each of the years from 1883 to 1894, inclusive, certain personal-property taxes were duly assessed and levied against said Sophia M. Bristol by the proper taxing officers of said city of Stillwater and said Washington county on the personal property of said Sophia M. Bristol, deceased, consisting of the 'credits other than that of bank, banker, broker, or stock jobber,' and that said assessments were each in fact based upon credits due said Sophia M. Bristol on promissory notes of various persons residing in Washington county and other counties in Minnesota, payable to her order, secured by mortgages on real estate situate in Washington county and other counties in the state of Minnesota.

"Said notes were all made payable at the office of William M. McCluer or Charles M. McCluer, at the city of Stillwater. The assessed valuation of said personal property upon which said taxes were so assessed and levied for each of said years, the rate of the tax assessed upon property in the said city of Stillwater, in said county, that being the district where said property was assessed, in the number of mills levied on each dollar of property at the assessed valuation for each of said years, and the amount of said taxes so assessed and levied against said Sophia M. Bristol, deceased, for each of said years, are as set forth in the following schedule thereof, to wit: [Here followed schedule as described. The valuations ran from \$17,900 in 1883 to \$184,900 in 1884; \$196,672 in 1888; \$181,292 in 1889, and \$179,900 in 1890, 1, 2, 3, and 4.]

"That the said Sophia M. Bristol failed and neglected to pay said taxes on the 1st day of March in each of the years following that in which said taxes were respectively

levied, as hereinbefore set forth, or at any time thereafter, and that by reason of such failure said Sophia M. Bristol became, and was, and is liable to pay a penalty amounting to 5 per cent on the amount of said taxes for the years 1883 to 1894, and 10 per cent on the amount of said taxes for each year thereafter, and that the *amount of said penalty for each of said years is as follows—that is to say: [Here the penalties claimed for each year were set forth.] [138]

"XI. Said Sophia M. Bristol never resided in Washington county, nor in the state of Minnesota, at any time, nor was she within the state of Minnesota from March 1, 1883, until her death, in August, 1894, except temporarily, and that the whole period of time she spent in the state of Minnesota from March 1, 1883, until her death did not exceed one year.

"XII. On or about the 19th day of October, 1894, the will of said Sophia M. Bristol was duly admitted to probate in and by the probate court of Ramsey county, in the state of Minnesota, and such proceedings were had in the matter of said estate that James Bristol, the executor named in said will, was duly appointed by said court as the executor of said last will and testament and of said estate, and the said James Bristol thereupon duly qualified as such executor, and entered upon the discharge of his duties as such, and thereafter and on the 18th day of April, 1895, and within the time required by the order duly made by said probate court for filing claims against the estate of said Sophia M. Bristol, deceased, said claimant, Washington county, duly made and filed its verified claim in due form for all of the said taxes and the said penalties, together with interest upon the amount of said taxes and penalties for each year from and after the 1st day of March, in the year after the year in which said taxes were levied, as aforesaid.

"XIII. That the said Sophia M. Bristol was, and for more than fifteen years next prior to her death had been, a resident and citizen of the state of New York, and said James Bristol, the executor above named, is now, and for more than fifteen years last past always has been, a resident and citizen of the state of New York.

"XIV. The court further finds that all of the taxes hereinbefore mentioned were fairly and equally assessed on a fair valuation of the personal property of said Sophia M. Bristol, deceased, for each of the years hereinbefore mentioned, and that no part of said taxes has ever been paid."

As conclusions of law the court found that Washington county *was entitled to judgment [139] for the amount of the taxes and penalties, together with costs and disbursements, and that "said claim of said amount is a just and valid claim against the estate of Sophia M. Bristol, deceased," and entered judgment as follows: "It is therefore considered, ordered, and adjudged—That the county of Washington, the claimant in this case, do have and recover of and from the estate of Sophia M. Bristol, deceased, the sum of six-

ty-four thousand six hundred eighty-four dollars and seventy-eight cents (\$64,684.78), so found to be due by the court, and that said sum of sixty-four thousand six hundred eighty-four dollars and seventy-eight cents (\$64,684.78) is a just and valid claim against the estate of Sophia M. Bristol, deceased, in favor of said Washington county, besides the costs and disbursements herein to be taxed."

Messrs. C. W. Bunn and Emerson Hadley argued the cause and filed a brief for plaintiff in error:

The power of taxation is necessarily limited to subjects within the jurisdiction of the state.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Northern C. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 646, 38 L. ed. 852, 14 Sup. Ct. Rep. 952; *State Tax on Foreignheld Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Dewey v. Des Moines*, 173 U. S. 203, 43 L. ed. 668, 19 Sup. Ct. Rep. 379; Cooley, Taxation, pp. 15, 42, 65.

The courts of a state can obtain no jurisdiction over indebtedness due to a nonresident, except to the extent of some tangible property in that state seized by process.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

The courts of some states have directly refused to follow the doctrine that where notes or evidences of debt are held by an agent for collection and reinvestment, the situs for taxation is with the agent.

State ex rel. Dwinnell v. Gaylord, 73 Wis. 316, 41 N. W. 521; *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546.

The court of appeals of New York and the supreme court of Alabama have refused to apply the doctrine where the principal and agent both reside in the state.

Boardman v. Tompkins County Supers. 85 N. Y. 360; *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 So. 393.

Where the evidences of debt are in the possession of the creditor and under his control at his domicile, their situs for the purpose of taxation cannot be at any other place.

State Tax on Foreign-held Bonds, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179.

The statute of limitations of six years on an action to enforce a liability created by statute applies to proceedings to enforce taxes in Minnesota against the property taxed.

Redwood County v. Winona & St. P. Land Co. 40 Minn. 512, 41 N. W. 465; *Mower County v. Crane*, 51 Minn. 201, 53 N. W. 629; *Pine County v. Lambert*, 57 Minn. 203, 58 N. W. 990; *State ex rel. Slingerland v. Norton*, 59 Minn. 424, 61 N. W. 458.

Messrs. Moses E. Clapp and George H. Sullivan argued the cause and, with **Messrs. N. H. Clapp and L. L. Manwaring** filed a brief for defendant in error:

Property of the character involved in this

suit may be given by its owner a situs in a state other than that of the owner's domicile.

Catlin v. Hull, 21 Vt. 152; *Tazewell County Supers. v. Davenport*, 40 Ill. 197; *Redmond v. Rutherford Comrs.* 87 N. C. 122; *People v. Home Ins. Co.* 29 Cal. 533; *Goldgart v. People ex rel. Goar*, 106 Ill. 25; *Hutchinson v. Oskaloosa Bd. of Equalization*, 66 Iowa, 35, 23 N. W. 249; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823; *Walker v. Jack*, 60 U. S. App. 124, 88 Fed. Rep. 576, 31 C. C. A. 462; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392.

The supreme court of Minnesota, under the statutes involved in this case, and as to the same fund, but for different years, held the property was taxable; and this we understand would be decisive,—especially as to the scope and effect of the statute when the same is under consideration by this court.

State Railroad Tax Cases, 92 U. S. 575, sub nom. *Taylor v. Secor*, 23 L. ed. 669; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

The notes are but evidence of the debt. Nor are they sole evidence. If destroyed, the debt could still be established and enforced. It is the right, the credit, the debt, which is the property to be taxed.

Dundee Mortg. Trust & Invest. Co. v. Multnomah County School Dist. No. 1, 19 Fed. Rep. 359; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Tazewell County Supers. v. Davenport*, 40 Ill. 197; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; *Hutchinson v. Oskaloosa Bd. of Equalization*, 66 Iowa, 35, 23 N. W. 249; *Jones v. Seward County Comrs.* 10 Neb. 154, 4 N. W. 946; *Mitchell v. Leavenworth County Comrs.* 91 U. S. 206, 23 L. ed. 302.

The situs of the debt is not to be determined alone by the place where the evidence of the debt happens to be.

Wyman v. Halstead, 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; *Johnson v. Oregon City*, 2 Or. 327.

The judgment in this proceeding is not a personal judgment either in form or effect.

Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337.

*Mr. Chief Justice **Fuller** delivered the opinion of the court:

The judgment amounted in effect to the allowance of the claim payable in due course

of administration out of assets of the estate within the jurisdiction of the probate court. This was so notwithstanding the domicile of the testatrix and of her executor was in the state of New York; that that was the place of principal administration; and that the person charged therewith was the same. *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Johnson v. Powers*, 139 U. S. 156, 159, 35 L. ed. 112, 113, 11 Sup. Ct. Rep. 525.

Our jurisdiction by direct appeal is invoked on the ground that the application of the Constitution of the United States was involved, and that a law of the state was "claimed to be in contravention of the Constitution of the United States."

[140] The objections of the executor to the allowance of the claim, *and his answer, put forward the deprivation of property without due process of law, the abridgment of privileges and immunities of citizens of the United States, and the denial of the equal protection of the laws, as the violations of constitutional safeguards relied on. Of these the first only is pressed upon our attention and needs to be considered, and that raises the question whether the laws of the state of Minnesota, as expounded by the supreme court of that state, in authorizing this judgment, amounted to the taking of property without due process of law.

In the course of the administration of the estate of Cyrus Jefferson, deceased, in the probate court of the county of Washington, Minnesota, a claim was presented in March, 1884, against the estate for unpaid taxes for the years 1882 and 1883, on credits secured by mortgages, amounting to about \$122,000, and the claim was allowed. The executors appealed to the district court, where the order of the probate court was affirmed. The case was then carried by the executors to the supreme court of Minnesota, which, on May 26, 1886, affirmed the judgment. *Re Jefferson*, 35 Minn. 215, 28 N. W. 256. It was objected "that taxes are not debts which can be proved against the estates of deceased persons;" but the court overruled the objection, saying: "It is not material whether a personal tax is a debt, in the sense that an action against the person may be maintained to recover it. It is at least a claim against the property which survives the death of the person against whom it is levied, and remains a claim against his estate. The statute regards it as a debt to be paid out of the estate. In prescribing the order of preference in which debts shall be paid, where the estate is not sufficient to pay all, it provides (Gen. Stat. 1878, chap. 53, § 38) that, after paying the necessary expenses of the funeral, last sickness, and administration, the executor or administrator shall 'pay the debts against the estate in the following order:

. . . Second, public rates and taxes.' This, we think, is conclusive that, for the purpose of proof and payment out of the estate, a personal tax is a debt." The court further held that a tax list or tax duplicate, duly certified by the county auditor, as required by statute, was prima facie evidence [141] of the *due levy of the taxes in it. The main

question in the case was whether credits due to a resident of another state, from residents within Minnesota, for moneys loaned and invested by, and which credits were managed and controlled by, an agent of the creditor, resident within Minnesota, could be taxed in Minnesota under existing statutes, and the court held that they could. The court, after referring to the provisions of the statute that all personal property in the state was subject to taxation, and that all moneys and credits should be listed by the owner or his agent, where one or the other resided, said: "It is to be taken, therefore, as the intent of the statute, that credits, to whomsoever owing, are taxable here if they can be regarded as personal property in this state; that is, situated in this state. To justify the imposition of tax by any state, it must have jurisdiction over the person taxed, or over the property taxed. As Jefferson was not a resident of this state, there was no jurisdiction over him. But if the property on account of which these taxes were unpaid was within the state, the state had jurisdiction to impose them as it might impose a tax upon tangible personal property permanently situated here, and to enforce the taxes against the property. The authorities which we cite, in support of the proposition that the credits taxed had a situs here, fully sustain this.

For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." After citing *Catlin v. Hull*, 21 Vt. 152; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576; *Wilcox v. Ellis*, 14 Kan. [142] 588, 19 Am. Rep. 107; *Tazewell County Supers. v. Davenport*, 40 Ill. 197, and many other cases, the opinion continued thus: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this state, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this state. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York

never operated on it. If credits can ever have an actual situs other than the domicile of the owner, can ever be regarded as property within any other state, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

It was thus ruled that the tax list of personal property was prima facie evidence of the due levy of the taxes; that such taxes could be proved against decedents' estates; and that credits secured by mortgages, the result of the business of investing and reinvesting moneys in the state, were subject to taxation as having their situs there.

Admonished as to the law of the state in these particulars, Mrs. Bristol, Mr. Jefferson's daughter, continued the business of investing and reinvesting in the same way and through the same agency until her own death in August, 1894. The state statute required every person being a resident of the state to list his personal property, including moneys, credits, etc., for taxation and "moneys and other personal property invested, loaned, or otherwise controlled by him as the agent or attorney or on account of any other person or persons; and in cases of failure to obtain a statement of personal property from any cause, it was made the duty of the assessor to ascertain its amount and value and assess the same at such amount as he believed to be the true value thereof. Stat. 1894, §§ 1515, 1546; Stat. 1878, chap. 11, §§ 7, 38.

[143] No question arises here in respect of the regular listing of these investments for taxation from 1883 until and including 1894, nor in respect of the valuation thereof.

Mrs. Bristol had invested some \$18,000 of her own money, belonging to her prior to her father's death, in the same way and by the same agency, and invested and reinvested in the same manner that money and moneys derived from notes and mortgages held by the agent for Mr. Jefferson, which passed to her on his death. And these investments were taxable and were taxed year by year during all this period according to the statutes of the state and the decision of the supreme court from which we have quoted.

It is insisted, however, that this is not so, because in 1885, which was after the presentation of the claim against the father's estate in the probate court, though before the decision by the supreme court, the notes then in the hands of the agents were delivered to Mrs. Bristol, and thereafter all new notes taken in the business were sent to her and kept by her in her home in New York. But these notes were payable as before at the office of the agents in Minnesota; the mortgages securing the notes were retained by the agents, and the notes were returned to the agents from time to time, whenever required by them, for the purpose of renewal, collection, or foreclosure of securities; the agents continued to collect the money due on the notes, and to make loans in the name of Mrs. Bristol, sometimes under her husband's direction, but generally on their own judgment; and they remitted money to Mrs.

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Bristol whenever she called for the same, while what was not received by her was invested in new loans. It also appeared that Mrs. Bristol had given the agents a power of attorney empowering them to satisfy or discharge, or to sell and assign, any and all mortgages in her name in the states of Minnesota and Wisconsin, but that she revoked this instrument after the death of one of the agents, and about November, 1890, thereafter executing satisfactions of mortgages herself.

Nevertheless the business of loaning money through the agency in Minnesota was continued during all these years just as it had been carried on before, and we agree with the circuit court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decision to which we have referred. And we are unable to perceive that any rights secured by the Federal Constitution were infringed by the statutes as thus interpreted so far as the situs of these loans and mortgages was concerned.

In *New Orleans v. Stempel*, 175 U. S. 309, ante, 174, 20 Sup. Ct. Rep. 110, certain taxes were levied on money on deposit, and also on money loaned on interest, credits, and bills receivable, and it was held by this court that the statutes of Louisiana, as interpreted by the courts of that state, in authorizing such assessment, did not violate the Constitution of the United States. There the money, notes, and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

Persons are not permitted to avail themselves for their own benefit of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design.

In *New Orleans v. Stempel* it was remarked: "With reference to the decisions of this court, it may be said that there has never been any denial of the power of a state to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the situs of personal property from the domicile of the owner. . . . In *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189, the ruling was that although shares of stock in national banks were in a certain sense intangible and incorporeal personal property, the law might separate them from the persons of their owners for purposes of taxation, and give them a situs of their own. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, where the question of the separation of per-

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sonal property from the person of the owner for purposes of taxation was discussed at length. As also the case of *Savings & Loan Soc. v. Multnomah *County*, 169 U. S. 421, 427, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392, in which a statute of Oregon taxing the interest of a mortgagee in real estate was adjudged valid, although the owner of the mortgage was a nonresident." In the latter case the subject was much considered, and Mr. Justice Gray, delivering the opinion of the court, said: "The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestioned. *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607. Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. ed. 189, 193; *State Railroad Tax Cases*, 92 U. S. 575, 607, *sub. nom. Taylor v. Secor*, 23 L. ed. 663, 671; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 27, 35 L. ed. 613, 616, 618, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Accepting the views of the state court in relation to the state statutes and proceedings thereunder, and concluding that the Constitution of the United States did not operate to prohibit the exercise of the power to tax these investments, it follows that the circuit court did not err in sustaining the validity of the taxation. But it is further contended that, as Mrs. Bristol was a nonresident, the power to tax could be exercised only as against the very property taxed: that these assessments did not constitute judgments *in personam*; and that judgment against her estate could not, therefore, be rendered upon them. The state statute provided that claims for taxes should be preferred to ordinary debts (Stat. 1894, § 4529), and, as has been seen, the supreme court has decided that, "for the purpose of proof and payment out of the estate, a personal tax is a debt." The court, for that purpose, so treated taxes, but not as being debts in the usual acceptation of the term. The obligation to contribute to the support of government in return for the protection and advantages afforded by government is not dependent on contract, but on the exercise of the public will as demanded by the public welfare.

By the laws of Minnesota, moneys, credits, and other personal property were required to be listed, either by the owner or his agent; provisions were made for notice; for [146] action by the assessor *in case of failure to list; for a board of review, meeting at a specified time; for the delivery of lists (in tax books) to the county treasurers, who were duly authorized to receive and collect the taxes named therein; that personal property taxes unpaid on the 1st of March next after they became due should be deemed de-

linquent; for the filing of delinquent lists in the appropriate office; for issue of warrant; for the distraint of goods and chattels; for personal judgment on service of citation; and for proceeding against nonresidents by attachment and publication of notice. Gen. Stat. 1894, chap. 11; Gen. Stat. 1878, chap. 11.

By § 1623, Gen. Stat. 1894 (Gen. Stat. 1878, chap. 11, § 105), it was provided that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer."

Thus, it appears that on the return of the delinquent tax list the amount of the tax could be collected by distraint of goods and chattels, or by proceedings by attachment and publication, judgment in which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the nonresident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained, the defendant would not be cut off from any competent defense, as the delinquent list would not necessarily be held conclusive. In this case no defense on the merits appears to have been relied on except the want of situs.

Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, cited by plaintiff in error, is not to the contrary. What was ruled there was that a citizen of one state cannot be east in a personal judgment in another state on an assessment levied there on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction.

This brings us to consider the plea of the statute of limitations interposed as to the taxes for the years 1883 to 1888 inclusive.

Mrs. Bristol died in August, 1894; the will was admitted to *probate by the probate [147] court of Ramsey county, October 19, 1894; Washington county filed its claim for taxes in that court April 18, 1895; the statute of limitations provided that actions "upon a liability created by statute" should be barred by the lapse of six years. Stat. 1894, § 5136. This statute applied to actions brought in the name of or for the benefit of the state. § 5142. The right to proceed to enforce these taxes commenced the 1st of April of the year following that for which they were levied. If this had been a personal action brought against Mrs. Bristol in her lifetime, the plea of the statute was open to be defeated by the fact of her nonresidence (§ 5145), but treating the filing of the delinquent lists as proceedings *in rem*, it is contended that the statute applied.

In *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, the statute of limitations of six years was held to apply to proceedings to enforce the collection of taxes against real estate, and to the same effect are *Mower Coun-*

ty v. Crane, 51 Minn. 201, 53 N. W. 629; *Pine County v. Lambert*, 57 Minn. 203, 58 N. W. 990; *State ex rel. Slingerland v. Norton*, 59 Minn. 424, 61 N. W. 458. In the first cited case it appeared that certain lands, having been taxed, were in 1883 assessed and a tax levied for each year for fifteen years prior to that time. On an application for judgment against the land it was objected that the statute of limitations had run as to all taxes where the application for judgment could have been made six years or more prior to the time it was made, if the land had been taxed at the time it should have been taxed under the statute, and the court sustained the objection. It was held that by statute in Minnesota the statute of limitations ran against the state the same as against an individual; that a tax was a liability created by statute; that although statutes of limitation may in terms be applicable only to actions, they are to be construed liberally and applied to all proceedings that are analogous in their nature to actions "so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies. Upon this principle they are held to apply to all claims which may be the subject of actions, however presented; also that they furnish a rule for cases analogous in their subject-matter, but

[148] for which a remedy unknown to the common law has been provided. They have also been applied by analogy to proceedings in admiralty, to claims in bankruptcy, or in probate court, although not within the strict letter of the statute. . . . A tax being a liability created by statute, and the filing of the delinquent list being, as the statute declares, and as we have held, the institution of an action against the land for the recovery of the tax appearing against it in the list; and, inasmuch as the nature of the right sought to be enforced, and not the mode of procedure, is the test,—we are unable to see why it should make any difference whether the action is *in rem* or *in personam*,—against the property instead of against its owner. We have therefore come to the conclusion that these proceedings are, within the meaning of the statute, 'an action upon a liability created by statute,' and are barred as to all taxes for the enforcement of which such proceedings might have been instituted more than six years before the commencement of the present proceedings, had such taxes been assessed in the proper year."

The estate of Mrs. Bristol is liable to respond to this claim because these taxes were lawfully levied in respect of her property situated in Minnesota when the levies were made; and the statute gave a lien for them against all her personal property within the jurisdiction. Collection could have been enforced by distraint, or by attachment, and in either case could only have been made out of the property sequestered. In the pending proceeding, then, which seeks to subject assets of the estate within the jurisdiction to payment of the claim, it seems to us the ruling of the supreme court is applicable. In

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other words, the filing of the delinquent lists had reference to property, and a personal judgment could not have been taken thereon without service of citation.

Hence, in a subsequent proceeding to enforce collection from property of the decedent, the rule which was applied to proceedings to obtain judgment against real estate would appear to be applicable in principle. If the county of Redwood had lost its right to enforce the assessments (supposing they had been made when they should have been), by lapse of time, the county *of Washington[149] may well be held subject to a similar deprivation in respect of the allowance of a portion of its claim.

The judgment is reversed, and the cause remanded with a direction to exclude the taxes for the years 1883 to 1888, inclusive, and to render judgment for the taxes, penalties, and interest after the latter year.

Mr. Justice White concurred on the ground of *stare decisis* only.

On May 1, 1900, this judgment was amended as to the interest only, so as to read, "with interest on the aggregate sum thereof from June 29, 1898, the date of the judgment below."

UNION REFRIGERATOR TRANSIT COMPANY, *Plff. in Err.*,

v.

STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes therein.

(See S. C. Reporter's ed. 149-155.)

Tax on refrigerator cars—as affecting interstate commerce—presumption in favor of assessment.

1. The state may tax the average number of refrigerator cars used by railroads within the state, but owned by a foreign corporation which has no office or place of business within the state, and employed as vehicles of transportation in the interchange of interstate commerce.
2. The presumption is that an assessment of refrigerator cars owned by a foreign corporation and used in interstate commerce was correct and regular, and was made upon the average number used in the state during the year, where there was no objection that too many cars were assessed, or that they were assessed too much or in an improper manner, but the only objection was that they could not be taxed at all.

Note.—As to state taxes as affecting commerce—see notes to *Rothermel v. Meyerle* (Pa.) 9 L. R. A. 366; *American Fertilizing Co. v. North Carolina Bd. of Agr.* (C. C. E. D. N. C.) 11 L. R. A. 179, and *Bangor v. Smith* (Me.) 13 L. R. A. 686.

As to taxation by state as interference with commerce—see note to *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

As to regulation and taxation of interstate commerce by state—see notes to *Orleans Bd. of Assessors v. Pullman's Palace Car Co.* 8 C. A. 492, and *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 21.

177 U. S.

[No. 207.]

Argued March 21, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Utah to review a decision affirming a judgment dismissing an action to recover money paid for taxes on refrigerator cars. *Affirmed.*

See same case below, 18 Utah, 378, 48 L. R. A. 790, 55 Pac. 639.

Statement by Mr. Chief Justice **Fuller**:
[149] *The Union Refrigerator Transit Company filed its bill in the district court in and for Salt Lake county, state of Utah, against Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, alleging: "That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the state of Kentucky; that its principal office and place of business is in the city of Louisville, in said state, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said times the sole property of the plaintiff, and are not and were not during any of the said time allotted,
[150] *leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them in shipping.

The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are, and were during the said times, engaged, was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said states to points in others of the said states; that plaintiff has not now and has not had any office or place of business within the state of Utah, and that all freight transported in plaintiff's cars in or through the state of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a state of the United States outside of the state of Utah, to a point or points within the state of Utah or from a point or points within the state of Utah to a point or points without the state of Utah, or between points neither of which was within the state of Utah; and that said cars were within the said state of Utah at no regular intervals nor in any regular number, and when in said state of Utah were only within it in transit,
177 U. S. U. S., Book 44.

except to load or unload freight shipped from within out of said state or coming into said state from without the same, or in the transportation of freight entirely through or across said state, and at such times the said cars were only transiently present for the said purposes, and not otherwise.

And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any situs, within the said state of Utah, nor has this plaintiff, nor has it heretofore at any time had, other property of any description whatsoever located within the state of Utah.

And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said state for any purpose whatsoever.

*That, notwithstanding the aforesaid facts **[151]** the state board of equalization of the state of Utah unlawfully and wrongfully on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars of the aggregate assessment of \$2,600, for all purposes of county and state taxation for the year 1897, and thereafter wrongfully and unlawfully apportioned the said assessment to the several counties in the said state of Utah through which lines of railway pass and over which the said cars might pass or be transported; that, among the counties to which said apportionment was made was the county of Salt Lake, and there was by the said board apportioned to said county of Salt Lake of the said assessment the sum of \$210.

That the taxes levied upon the said property so assessed and apportioned to Salt Lake county for state, state school, county, city, and city school taxes amounted to the sum of \$5.76; that the said tax was and is by reason of the aforesaid facts illegal and void."

Plaintiff then averred the payment of the tax, under written protest, claiming the tax to be illegal, in order to avoid the seizure and sale of its property, and to prevent incurring the penalties provided by law, and prayed judgment for the sum of \$5.76 and interest, and for costs. Defendant filed a general demurrer to the complaint, which was sustained, and, plaintiff electing not to amend but to stand on its complaint, judgment of dismissal, with costs, was entered. The cause was then taken to the supreme court of Utah and the judgment affirmed. 18 Utah, 378, 48 L. R. A. 790, 55 Pac. 639. Thereupon this writ of error was allowed by the chief justice of that court.

Mr. Percy Werner argued the cause and, with **Mr. Parley L. Williams**, filed a brief for plaintiff in error:

The cars of plaintiff in error, under the admitted facts set forth in the complaint, acquired no situs in the state of Utah for the purposes of taxation.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599;

State ex rel. Armour Pkg. Co. v. Stephens, 146 Mo. 662, 48 S. W. 929; *Central R. Co. v. State Bd. of Assessors*, 49 N. J. L. 11, 7 Atl. 306; *Bain v. Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149, 11 S. E. 311; *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377.

A tax upon vehicles which are employed exclusively in connection with interstate commerce, imposed by the authorities of a state where such vehicles have no situs, is invalid and void as violative of the interstate commerce clause of the Federal Constitution.

Fargo v. Michigan, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Brown v. Maryland*, 12 Wheat. 449, 6 L. ed. 689; *State, Detmold, Prosecutor, v. Engle*, 34 N. J. L. 425; *State ex rel. Armour Pkg. Co. v. Stephens*, 146 Mo. 662, 48 S. W. 929.

Mr. **Joseph L. Rawlins** argued the cause and, with Mr. **Charles S. Varian**, filed a brief for defendant in error:

A tax may be levied upon the movable personal property of a nonresident corporation, brought into and employed within the state; and where the specific and individual items of property so employed are constantly changing according to the exigencies of business the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and employed.

American Refrigerator Transit Co. v. Hall, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 599; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 3 Inters. Com. Rep. 595, 35 L. ed. 613, 11 Sup. Ct. Rep. 876; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206.

[151] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

[152] The Constitution of the state of Utah provided that: "All *property in the state, not exempt under the laws of the United States or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law;" and that: "All corporations or persons in this state, or doing business herein, shall be subject to taxation for state, county, school, municipal, or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." Const. art. 13, §§ 2, 10.

Some question was raised in the supreme court of Utah as to the proper construction and scope of the state statutes in respect of taxation, but the court held that by those laws all property owned or used by railway, car, telephone, telegraph, and other companies, within the territorial limits of the

state, was subjected to taxation according to its value, regardless of the domicile of its owner.

The contention on this writ of error is that the taxation of the ten cars of plaintiff in error was forbidden by the Constitution of the United States because they had no situs for that purpose in the state of Utah, and the tax imposed a burden on interstate commerce.

In *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599, quotations were made from the opinions in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 30, 35 L. ed. 619, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, and the conclusion of the court was thus expressed: "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such *cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation valid."

The case before us involves the taxation by the state of Utah of certain cars belonging to a corporation of Kentucky; the case cited involved the taxation by the state of Colorado of certain cars belonging to a corporation of Illinois; and if this case comes within the rule laid down in that case, nothing further need be said.

In that case the facts were stipulated; and it appeared that the American Refrigerator Transit Company was a corporation duly organized and existing by virtue of the laws of the state of Illinois, with its principal office in the city of East St. Louis in said state; that it was engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars were the sole and exclusive property of the plaintiff, and that the plaintiff furnished the same to be run indiscriminately over any lines of railroad over which shippers on said railroads might desire to route them in shipping, and furnished the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of

the shipper; and plaintiff had not and never had had any contract of any kind whatsoever by which its cars were leased or allotted to or by which it agreed to furnish its cars to any railroad company operating within the state of Colorado; that it had and had had during said times no office or place of business nor other property than its cars within the state of Colorado, and that all the freight transported in plaintiff's cars in or through the state of Colorado, including the cars assessed, was transported in such cars either from a point or points of the United States outside of the state of Colorado to a point in the state of Colorado, or from a point in the state of Colorado to a point outside of said state, or between points wholly outside of said state of Colorado, and said cars never were run in said state in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the state [154] of Colorado, except as engaged in *such business aforesaid, and then only transiently present in said state for such purposes.

All these matters were set up, *mutatis mutandis*, in the complaint in this case, in substantially the same language employed in setting forth the facts in that case. But it was also there stipulated: "That the average number of cars of the plaintiff used in the course of the business aforesaid within the state of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such state of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said state for the purposes of taxation."

The complaint in this case contained no averment as to the average number of cars of plaintiff in error used in the state of Utah, but it did show that the company was doing business in Utah in the year for which the tax in question was levied, and that it was running its cars into and through the state, using, employing, and caring for them there for profit, in the same manner as the cars in that case, and it was not alleged that the assessment by the state board of equalization was unreasonable, or unjust, or in excess of the valuation of other like property for taxation, or that the method of apportionment was erroneous. The presumption is that the action of the taxing officers was correct and regular, and that the number of cars assessed by the state board of equalization was the average number used and employed by plaintiff in error in the state of Utah during 1897.

The objection is not that too many cars were assessed, or that they were assessed too much, or in an improper manner, even if we could consider such questions, but simply that they could not be taxed at all. And 177 U. S.

this objection was considered and overruled in the case to which we have referred.

Judgment affirmed.

*Mr. Justice White did not hear the argument, and took no part in the consideration and disposition of this case.

CLARENCE MURPHY, *Plff. in Err.*,

v.

COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 155-163.)

Criminal law—former jeopardy—new sentence after reversal—effect of serving part of invalid sentence.

A sentence of conviction imposed under authority of Mass. Acts 1851, chap. 87; Pub. Stat. chap. 187, § 13, after the reversal of a former judgment, on the application of the convict, because it was imposed under a statute that was passed after the offense was committed and was therefore unconstitutional so far as it related to that offense, does not violate the constitutional provision against double jeopardy, or abridge the privileges and immunities of the accused as a citizen, or deprive him of his liberty without due process of law, although he had partly served the invalid sentence before it was reversed, including one day's solitary confinement, to which each of the sentences condemned him.

[No. 480.]

*Argued February 28 and March 1, 1900.
Decided April 9, 1900.*

IN ERROR to the Superior Court of the State of Massachusetts in a criminal case. *Affirmed.*

See same case below, 54 N. E. 860.

Statement by Mr. Chief Justice Fuller:

Plaintiff in error, a citizen of the commonwealth of Massachusetts and of the United States, was tried in the superior court of Massachusetts on an indictment which charged him in sixty-four counts with the embezzlement of different sums of money on different days between July 19, 1892, and November 29, 1893, contrary to the provisions of § 40 of chapter 203 of the Public Statutes of Massachusetts; was found guilty, and on May 29, 1896, was sentenced under chapter 504 of the Statutes of 1895 to imprisonment in the state's prison of the commonwealth at Boston for the term of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and

NOTE.—As to former jeopardy as a defense; when jeopardy attaches—see notes to *Com. v. Fitzpatrick* (Pa.) 1 L. R. A. 451, and *Altenburg v. Com.* (Pa.) 4 L. R. A. 543.

As to when a person is in jeopardy; when jury may be discharged without a verdict; former acquittal or conviction—see notes to *Ex parte Lange*, 21 L. ed. U. S. 872; *United States v. Perez*, 6 L. ed. U. S. 165.

As to correction of sentence and resentence—see note to *Ex parte Cross*, 36 L. ed. U. S. 969.

the residue at hard labor, and on that day, in execution of said sentence, was committed to that prison. He remained in solitary confinement for one day and in the prison continuously from May 29, 1896, to January 7, 1899.

[156] *On June 8, 1898, he sued a writ of error out of the supreme judicial court of Massachusetts, and on January 6, 1899, that court reversed the sentence of the superior court on the ground that the statute of 1895, chap. 504, was unconstitutional so far as it related to past offenses, and remanded the case to the superior court under Public Statutes, chap. 187, § 13, to be resented according to the law as it was when the offenses were committed, and before the statute under which he had been sentenced took effect. 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505.

January 7, 1899, he was brought before the superior court pursuant to that direction, and resented according to the provisions of Public Statutes, chap. 203, § 20, and Public Statutes, chap. 215, § 23, the sentence being to the state's prison for nine years, ten months, and twenty-one days, the first day thereof to be in solitary confinement and the residue at hard labor. Before imposing this sentence the court stated to Murphy's attorney that as Murphy had already suffered one term of solitary confinement for the offenses for which he was now to be sentenced, it would prefer not to sentence to solitary confinement, and that it would not do so, if a written waiver by the prisoner of the provision therefor were filed; but the attorney did not feel justified in filing such a waiver. Murphy duly excepted to the sentence last imposed, and requested that all his rights be reserved. Exceptions having been allowed, the case was carried on error to the supreme judicial court, which overruled them. 54 N. E. 860. This writ of error was then sued out.

Mr. Ezra Ripley Thayer argued the cause and, with Messrs. Louis D. Brandeis and Edward F. McClennen, filed a brief for plaintiff in error:

A prisoner is put in double jeopardy when, after a sentence by a court having jurisdiction of the person and the offense, and after the execution of a substantial part of that sentence, the court attempts to reverse its previous decision and impose a new and larger sentence as distinguished from a correction or modification of the old.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547; *State v. Warren*, 92 N. C. 825; *Com. v. Loud*, 3 Met. 323, 37 Am. Dec. 139; *Feeley's Case*, 12 Cush. 598; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11; *People v. Meservey*, 76 Mich. 223, 42 N. W. 1133; *People v. Kelley*, 79 Mich. 320, 44 N. W. 615; *State v. Cannon*, 11 Or. 312, 2 Pac. 191; *Shepherd v. People*, 25 N. Y. 406; *Re Jones*, 35 Neb. 499, 53

N. W. 468; *United States v. Chouteau*, 102 U. S. 603, 26 L. ed. 246.

The opinion in *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323, lends no color to the proposition that the court can impose a new sentence as distinguished from correcting the old one, but expressly recognizes that where the attempt goes beyond such a correction of an erroneous sentence the power of the court ceases.

This distinction is carefully taken in *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

The second sentence was a new sentence, and not a correction of the old.

Bump v. Com. 8 Met. 533.

The original sentence was valid under the law of Massachusetts as it then existed.

Com. v. Brown, 167 Mass. 144, 45 N. E. 1; *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 415; *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285.

A sentence which puts a person a second time in jeopardy deprives him of his liberty without due process of law.

Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Mr. Hosea M. Knowlton argued the cause and, with Mr. Arthur W. De Goosh, filed a brief for defendant in error:

An appellate court has the right, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law.

Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; *Roberts v. State*, 30 Fla. 82, 11 So. 536; *Beale v. Com.* 25 Pa. 11; *Henderson v. People*, 165 Ill. 607, 46 N. E. 711; *Lowrey v. Hogue*, 85 Cal. 601, 24 Pac. 995; *Brooks v. Com.* 4 Leigh. 669; *Oliver v. State*, 5 How. (Miss.) 14; *Lynn v. State*, 84 Md. 67, 35 Atl. 21; *Re Harris*, 68 Vt. 243, 35 Atl. 55; *Papworth v. Fitzgerald*, 106 Ga. 378, 32 S. E. 363; *Herrington v. State*, 87 Ala. 1, 5 So. 831; *State v. Taylor*, 124 N. C. 803, 32 S. E. 548; *State v. Williams*, 40 S. C. 373, 19 S. E. 5; *Hatcock v. State*, 88 Ga. 91, 13 S. E. 959; *Graham v. State*, 79 Wis. 651, 48 N. W. 863; s. c. *Re Graham*, 138 U. S. 461, sub nom. *Graham v. Weeks*, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118; *United States v. Harman*, 68 Fed. Rep. 472.

This right is expressly given in Massachusetts by statute.

Mass. Pub. Stat. chap. 187, § 13; *Jacquins v. Com.* 9 Cush. 279; *Com. v. Haynes*, 107 Mass. 194.

Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80.

The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

It is well settled that the 14th Amendment does not pretend to secure to all persons in the United States the benefit of the same laws and the same remedies, but only that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 989.

The term jeopardy "has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction."

McKee v. People, 32 N. Y. 239; *State v. Lee*, 65 Conn. 265, 27 L. R. A. 498, 30 Atl. 1110.

Consistent with the principle that when a controversy is finally determined it shall not be reopened, statutes authorizing retrials and resentences have been in force from time immemorial. Even the right of the government to a new trial after a verdict of not guilty has been upheld.

State v. Lee, 65 Conn. 265, 27 L. R. A. 498, 30 Atl. 1110; *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609.

The privilege of error was that of plaintiff in error alone. It was his right to have accepted the original sentence, and, having served it, to end his jeopardy, and thereupon to have been exempt from further proceedings.

Com. v. Loud, 3 Met. 328, 37 Am. Dec. 139.

[156] *Mr. Chief Justice **Fuller** delivered the opinion of the court:.

The specification of errors in the brief of counsel is as follows: "The contention of the plaintiff in error is that the sentence under which he is now held puts him twice in jeopardy, *and that such double jeopardy abridges his privileges and immunities as a citizen of the United States, and deprives him of his liberty without due process of law."

[157]

Laying out of view the suggestion that the immunity from double jeopardy or double punishment of a citizen of Massachusetts, in Massachusetts, is an immunity possessed by him as a citizen of the United States as contradistinguished from a citizen of Massachusetts, we inquire whether any law of Massachusetts abridges such an immunity, and 177 U. S.

whether that or any other action of that commonwealth deprives plaintiff in error of his liberty without due process of law. If there be no such law, and if he is suffering no such deprivation, we need not be curious in explanation of the particular ground of our exercise of jurisdiction.

The statutes of Massachusetts have provided since 1851 that "when a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." Acts 1851, chap. 87; Pub. Stat. chap. 187, § 13.

In this case it was on account of error in the sentence as originally imposed that that sentence was set aside. All the proceedings prior thereto stood unimpugned, and the superior court merely rendered the judgment which should have been rendered before. And this was done under the statute by direction of the supreme judicial court, whose interposition had been invoked by plaintiff in error.

The legal effect of the statute was to make it a condition of the bringing of writs of error in criminal cases that, if the error was one in the award of punishment only, that error should be corrected, and, as remarked by Chief Justice Shaw, this did not disturb the fundamental principles of right. *Jacquins v. Com.* 9 Cush. 279. Indeed, in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law. *Reynolds v. United States*, 98 U. S. 145, 168, 25 L. ed. 244, 251; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; *Henderson v. *People*, 165 Ill. 607, [158] 46 N. E. 711; *Beale v. Com.* 25 Pa. 11. And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the state to the accused upon such conditions as the state deems proper. *McKane v. Durs-ton*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Kohl v. Lehlback*, 160 U. S. 297, 40 L. ed. 433, 16 Sup. Ct. Rep. 304.

As this statute was reasonable, was intended for the benefit of the accused, as well as of the community, and was entirely within the admitted powers of the state, we are unable to see that it is in itself open to attack as being unconstitutional; and as this plaintiff in error set the proceedings in question in motion, and they conformed to the statute, we do not perceive how they can be regarded as otherwise than valid.

In prosecuting his former writ of error, plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the

jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.

United States v. Ball, 163 U. S. 662, *sub nom. Ball v. United States*, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192, illustrates the rule. There Millard F. Ball, John C. Ball, and Robert E. Boutwell had been indicted, in the circuit court of the United States for the eastern district of Texas, for the murder of one Box, and on trial Millard F. Ball had been acquitted and discharged, and John C. Ball and Boutwell convicted and sentenced to death. The condemned having brought the case here on error, it was held that the indictment was fatally defective, and the judgment was reversed and the cause remanded with a direction to quash the indictment. *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761. The mandate went down, the indictment was dismissed, and a new indictment was returned against all three defendants. To this Millard F. Ball filed a plea of former jeopardy and former acquittal, and John C. Ball and Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon the former indictment and of the dismissal of that indictment. Both these pleas were overruled, defendants pleaded not guilty, were convicted, and sentenced to death.

[159] *On their writ of error this court held that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. Mr. Justice Gray, delivering the opinion, said:

"An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com. v. Peters*, 12 Met. 387; 2 Hawk. P. C. chap. 35, § 3; 1 Bishop, Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause, and of the party, its judgment is not void, but only voidable by writ of error, and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of habeas corpus. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609."

The judgment was reversed as to Millard F. Ball, and judgment rendered for him upon his plea of former acquittal.

But as to John C. Ball and Boutwell it was ruled that the circuit court rightly overruled their plea of former jeopardy, and it was said:

"Their plea of former conviction cannot be sustained, because upon a writ of error, sued out by themselves, the judgment and sen-

tence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 114 U. S. 488, 29 L. ed. 183, 5 Sup. Ct. Rep. 972, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Reg. v. Drury*, 3 Cox, *C. C. 544, 3 Car. & K. 193; *Com. v. Gould*, 12 Gray, 171."

Tested by these rulings, plaintiff in error's original sentence was not void, but voidable, and if the sentence had been complied with he could not have been punished again for the same offense. *Com. v. Loud*, 3 Met. 328, 37 Am. Dec. 139. But as the original sentence was set aside at his own instance, he could not allege that he had been in legal jeopardy by reason thereof.

In *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, Lange had been found guilty of an offense which was punishable by imprisonment or fine, but the circuit court sentenced him to imprisonment and fine. He paid the fine, and thereafter the circuit court vacated the former judgment, and sentenced him again to imprisonment only. It was held that it was a fundamental principle that no man could be twice punished by judicial judgments for the same offense, and that when a judgment had been executed by full satisfaction of one of the alternative penalties of the law, the court could not change the judgment so as to impose another. The present case does not fall within that decision, for here an erroneous judgment was vacated on the application of the accused; the original sentence had not been fully satisfied; and the second sentence was rendered in pursuance of the applicable statute.

We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered. And as the decision which he sought and obtained involved the determination that he had been improperly sentenced under chapter 504 of the Statutes of 1895, providing for so-called indeterminate sentences, but should have been sentenced under antecedent statutes, which differed from that, it followed that the second sentence must be a new sentence to the extent of those differences, and might turn out to be for a longer period of imprisonment.

Chapter 504 of the Statutes of 1895 provided for the establishment by the court of a maximum and minimum term of imprisonment, and for a permit to the convict to be at liberty after the expiration of the minimum term, some changes being made in this

regard by chapter 371 of the Statutes of 1898. Section 20 of chapter 222 of the Public Statutes, in force when the offenses charged were committed, provided for certain deductions to be made for good behavior. These and other statutes bearing on the subject are fully set forth and examined in *Murphy v. Com.* 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154. And it is insisted that, under the present sentence, even if the prisoner received the maximum deduction, he cannot be released as soon as he might have been released under the original sentence, and that, moreover, he cannot receive as large deductions under this sentence as he might have received if it had been pronounced in the first instance.

But we agree with the supreme judicial court in the opinion that even if this were so, it would make no difference in principle so far as the validity of the second sentence was concerned.

In *Jacquins' Case*, 9 Cush. 279, the supreme judicial court, in lieu of the prior sentences, sentenced the defendant to certain years of imprisonment, "the term to be computed from the time when the first sentence commenced its operation."

In the case at bar the accused was originally sentenced to imprisonment for the term of not less than ten nor more than fifteen years. This being set aside, and the superior court, being manifestly of opinion that imprisonment for twelve years and six months was the punishment demanded under the circumstances, deducted from twelve years and six months two years, seven months, and nine days, which he had already served, and sentenced him to nine years, ten months, and twenty-one days. As the original sentence had been vacated on the application of the accused, it is clear that if the second sentence were productive of any injustice the remedy was to be obtained in another quarter and did not rest with the court.

The superior court, being obliged to render a specific sentence, deducted the time Murphy had served, notwithstanding the case really occupied the same posture as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of his delay in doing so he [162] had served a *portion of the erroneous sentence could not entitle him to assert that he was being twice punished. Perhaps the court was the more moved to do this because six months after Murphy had been sent to the state prison the supreme judicial court indicated in *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1, that the indeterminate sentence act might be applicable to convictions for offenses committed prior to its passage, although the question was not definitely presented and disposed of, and then to the contrary, until raised on Murphy's writ of error. 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154. But, however that may be, the plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence reversed or vacated on the prisoner's own application.

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And so as to the infliction of one day's solitary confinement. The Massachusetts statutes provide that where the punishment of imprisonment in the state prison is awarded, solitary confinement not exceeding twenty days at a time shall form part thereof. This requirement was complied with here by the infliction of one day. This was part of the sentence, but not in itself a distinct and separate punishment, and when the sentence was vacated the second sentence necessarily contained some solitary confinement as part of the imprisonment. Apparently this might have been dispensed with by the consent of the convict, but this he refused to give.

In *People ex rel. Trezza v. Brush*, 128 N. Y. 529, 536, 28 N. E. 533, Trezza had been sentenced to death, and prosecuted an appeal to the court of appeals of New York, pending which he was taken to the state prison and detained in close confinement. He applied for the writ of habeas corpus on the ground that he had been once punished, which was denied. The court of appeals held that by the statute an appeal from a conviction in a capital case stayed the judgment of death only, and not that part of the judgment which provided for the custody of the defendant between his removal to the state prison and his execution; and Andrews, J., speaking for the court, said: "It not infrequently happens that the execution of a sentence to imprisonment continues notwithstanding an appeal. The convict, if he obtains a reversal of the judgment, and is again convicted on a second trial, may be sentenced to a new term of imprisonment, *and the court is not bound to regulate the [163] second sentence in view of the fact that the convict has already suffered imprisonment under the first sentence. The resentence in the present case was rendered necessary by reason of the fact that Trezza, by his own act in his own interest, had by his appeal prevented the execution of the death penalty at the time fixed by the first sentence."

Trezza also applied to the circuit court of the United States for the southern district of New York for a writ of habeas corpus, which the court refused to grant, and its order was affirmed by this court on appeal. 142 U. S. 160, 35 L. ed. 974, 12 Sup. Ct. Rep. 158.

In *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156, McElvaine had been sentenced to death, and the judgment was reversed and a new trial granted. He was again convicted and sentenced, and the judgment affirmed on appeal. 125 N. Y. 596, 26 N. E. 929. McElvaine presented his petition for habeas corpus to the circuit court, which was denied, and the case brought to this court. The order was affirmed, and we said, among other things, that "so far as the confinement had taken place under the first sentence and warrant, that resulted from the voluntary act of the petitioner in prosecuting an appeal."

In *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77, it was reiterated that "the state has full control over the procedure in its courts, both in civil and criminal

nal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." We find no such denial or conflict in this case. As we have said, plaintiff in error must be deemed to have sought a correction of the original erroneous judgment, and held to abide the consequences. He seems to have then supposed that it might be decided that the prior statutes were repealed by the act of 1895, and that as he could not be sentenced under that act he might be discharged altogether. In this it turned out that he was mistaken, as the supreme judicial court adjudged that the prior statutes were still in force so far as he was concerned, and we concur with that court in holding that his present contention is equally unavailing to effect his release.

Judgment affirmed.

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*PAUL J. PETIT, *Plff. in Err.*,

v.

STATE OF MINNESOTA.

(See S. C Reporter's ed. 164-168.)

*Constitutional law—as to Sunday labor—
class legislation as to barbers.*

The proviso that keeping a barber shop open

NOTE.—As to Sunday labor—see *Quarles v. State* (Ark.) 14 L. R. A. 192, and note.

As to constitutionality of Sunday laws—see *Judefind v. State* (Md.) 22 L. R. A. 721, and note.

Constitutionality of statutes making it unlawful for barbers to carry on their business on Sunday.

A barber is deprived of property without due process of law by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business. *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108.

Nor does the police power justify the enactment of such a statute. *Ibid.*

A statute prohibiting barbers from carrying on business after noon on Sunday or on a legal holiday, and applying to no other class of laborers, is unconstitutional as special, unjust, and unreasonable, and as working an invasion of individual liberty, since it is based upon no distinction which justifies singling out that class of laborers. *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

So, a city ordinance making it unlawful for barbers to pursue their calling on Sunday, without applying to other kinds of employment, is unconstitutional as class legislation. *Tacoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255.

And a statute prohibiting barbers only, from keeping open a bath room on Sunday is unconstitutional class legislation. *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401.

The contrary view prevails in New York, where a statute prohibiting barbers from carrying on their trade on Sunday is held to be a constitutional exercise of the police power to promote the public health. *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541.

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on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity, which follows the exception as to works of necessity or charity, in Minn. Gen. Stat. 1894, § 6513, prohibiting Sunday labor, does not make a purely arbitrary classification in conflict with the Federal Constitution, but is within the limits of the legislative police power.

[No. 194.]

Argued March 16, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming a decision in favor of a Sunday law. *Affirmed.*

See same case below, 74 Minn. 376, 77 N. W. 225.

The facts are stated in the opinion.

Mr. Joseph W. Molyneaux argued the cause and Mr. Albert E. Clarke filed a brief for plaintiff in error:

Any legislation which is not general in its scope, and which affects only one class or body of citizens, is in conflict with the spirit of this government and the 14th Amendment of the Constitution of the United States, unless such class or body of citizens are classified upon some apparent, natural reason, some reasons suggested by necessity, by such a difference in the situation and circum-

And the exception contained in this statute, which permits barbers in Saratoga Springs and New York city to pursue their business during certain hours on Sunday does not deny to barbers in other places the equal protection of the laws since it affects all within the same localities alike. *Ibid.*; *People ex rel. Hobach v. Kings County Sheriff*, 13 Misc. 587, 35 N. Y. Supp. 19.

This statute is not a city law, but is a general law applicable to the whole state except New York and Saratoga Springs. *People ex rel. Hobach v. Sheriff*, 13 Misc. 587, 35 N. Y. Supp. 19.

An act prohibiting barbering on Sunday is not unconstitutional as class legislation, where a general law prohibits all business on Sunday. *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769.

And a statute which provides more severe penalties for carrying on the business of barbering on Sunday than those imposed for the conduct of other legitimate business on that day is not unconstitutional as class legislation. *Ibid.*

Nor are the equal privileges or immunities of citizens violated by prohibiting the business of a barber on Sunday under greater penalties than those imposed upon other business, or because an exception is made as to those who conscientiously observe the seventh day of the week as the Sabbath; nor is such a statute invalid as class legislation. *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094.

A statute prohibiting all labor on Sunday except works of necessity or charity is not obnoxious to the objection of being class legislation because it declares that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while, as to all other kinds of labor or business, it leaves that question to be determined as one of fact. *State v. Petit*, 74 Minn. 376, 77 N. W. 225.

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stances of the subjects placed in a different class as suggests the necessity or propriety of different legislation with respect to them.

Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Tacoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; U. S. Const. 14th Amend.; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frerer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Cooley, Const. Lim. p.* 393; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354.

Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end; it cannot invade the rights of person and property under the guise of police regulation when it is not such in fact.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71.

The barber is deprived of property without due process of law by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business; and such a statute is unconstitutional as special, unjust, and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

The law herein contested is unconstitutional.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Tacoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, 46

Pac. 225; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784.

Mr. **W. B. Douglas** argued the cause and, with Mr. **C. W. Somerby**, filed a brief for defendant in error:

The legislature is the sole judge of the policy and expediency of the laws and of the classes selected as subject to, or exempted from, their operation.

State v. Wellott, 54 Mo. App. 310; *State v. Ohmer*, 34 Mo. App. 115; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541; *Lindenmuller v. People*, 33 Barb. 548; *Quarles v. State* (Ark.) 14 L. R. A. 192 and note; *Judefind v. State*, 78 Md. 510, 22 L. R. A. 721, 28 Atl. 405; *Bohl v. State*, 3 Tex. App. 683; *Tiedeman, Police Powers*, 184; *Cooley, Const. Law*, 6th ed. 153, 154; *Parker v. State*, 16 Lea. 476, 1 S. W. 202; *Ex parte Andrews*, 18 Cal. 679; *Bosworth v. Swansey*, 10 Met. 363, 43 Am. Dec. 441; *Com. v. Harrison*, 11 Gray, 308; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; *Com. v. Hyneman*, 101 Mass. 30; *Bucher v. Fitchburg R. Co.* 131 Mass. 156, 41 Am. Rep. 216; *Day v. Highland Street R. Co.* 135 Mass. 113, 44 Am. Rep. 447; *Mueller v. State*, 76 Ind. 310, 40 Am. Rep. 245; *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577; *Bloom v. Richards*, 2 Ohio St. 387; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768, 1 S. W. 769; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Frolickstein v. Mobile*, 40 Ala. 725; *State v. Baltimore & O. R. Co.* 24 W. Va. 783, 49 Am. Rep. 290; *Shipley v. State*, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; *Swann v. Swann*, 21 Fed. Rep. 299; *State v. Ludwig*, 21 Minn. 202; *Lieberman v. State*, 26 Neb. 464, 42 N. W. 419.

The exemption, from the operation of the Sunday laws, of such persons as conscientiously observe the seventh day of the week as the Sabbath, does not grant immunities to one class which, upon the same terms, shall not apply to all and is constitutional and valid.

Johns v. State, 78 Ind. 332, 41 Am. Rep. 577; *Lieberman v. State*, 26 Neb. 464, 42 N. W. 419.

The validity of Sunday laws has been uniformly recognized by this court. Such laws are a legitimate exercise of the police power of the state.

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *United States v. Ball*, 163 U. S. 671, 41 L. ed. 303, 16 Sup. Ct. Rep. 1192; *Stone v. United States*, 167 U. S. 195, 42 L. ed. 133, 17 Sup. Ct. Rep. 778; *United States v. Gates*, 148 U. S. 134, 37 L. ed. 396, 13 Sup. Ct. Rep. 570; *Monroe Cattle Co. v. Becker*, 147 U. S. 56, 37 L. ed. 76, 13 Sup. Ct. Rep. 217; *Ball v. United States*, 140 U. S. 131, 35 L. ed. 383, 11 Sup. Ct. Rep. 761; *Street v. United States*, 133 U. S. 306, 33 L. ed. 634, 10 Sup. Ct. Rep. 309; *Gumbel v. Pitkin*, 124 U. S. 146, 31 L. ed. 378, 8 Sup. Ct. Rep. 379; *Gibbs & S. Mfg. Co. v. Brucker*, 111 U. S. 597, 28 L. ed. 534, 4 Sup. Ct. Rep. 572; *Pence v. Iangdon*, 99 U. S. 578, 25 L. ed. 420; *Powhatan S. B. Co. v. Appomattox R. Co.* 24 How. 247, 16 L. ed. 682; *Philadelphia, W. &*

B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433.

Sunday laws forbidding in general terms all manner of work or labor on Sunday, except works of necessity and charity, apply to the ordinary trade or vocation of a barber; and such usual trade or vocation is not a work of necessity or charity within the meaning of the statutory exceptions.

State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555; *Com. v. Waldman*, 140 Pa. 89, 11 L. R. A. 563, 21 Atl. 248; *Com. v. Williams*, 1 Pearson (Pa.) 61; *Phillips v. Innes*, 4 Clark & F. 234; *Com. v. Dextra*, 143 Mass. 28, 8 N. E. 756; *People ex rel. Hobach v. Kings County Sheriff*, 13 Misc. 587, 35 N. Y. Supp. 19; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094. See also 15 Central Law Journal, 145.

The statute does not conflict with the 14th Amendment to the United States Constitution, since this amendment does not prohibit legislation which is limited either in the object to which it is directed, or in the territory within which it is to operate; nor can the statute be said to be class legislation; nor does it operate to deprive plaintiff in error of property without due process of law.

Hayes v. Missouri, 120 U. S. 69, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connelly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Dent v. West Virginia*, 129 U. S. 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273.

ting hair and shaving beards shall not be deemed a work of necessity or charity."

We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the state. The subject was fully considered in *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086, and it is unnecessary to go over the ground again. It was there said: "The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor within the limits of the state, works of necessity and charity excepted, should cease." And these observations of Mr. Justice Field, then a member of the supreme court of California, in *Ex parte Newman*, 9 Cal. 502, whose opinion was approved in *Ex parte Andrews*, 18 Cal. 678, in reference to a statute of California relating to that day, were quoted: "Its requirement is a cessation from labor. In its enactment the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted." Well-nigh innumerable decisions of the state courts have sustained the validity of such laws.

But it is contended that by reason of the proviso this act must be held unconstitutional, because thereby restricted in its operation on the particular class of craftsmen to which Petit belonged, as contradistinguished from other classes of labor. The proviso was added in 1887 to § 225 of the Penal Code of Minnesota of 1885 (Laws Minn. 1887, chap. 54).

By the original statute all labor was prohibited, excepting the works of necessity or charity, which included whatever was needful during the day for the good order, health, or comfort of the community. As the supreme court said, if keeping a barber shop open on Sunday for the purposes of shaving and hair cutting was not a work of necessity or charity, within the meaning of the statute as it originally read, the amendment did not change the law. And it would be going very far to hold that because out of abundant caution the legislature may have sought to obviate any misconstruction as to what should be considered needful during that day for the comfort of the community, as respected work generally so desirable as tonsorial labor, by declaring the meaning of the statute as it stood, therefore the law was transferred to the category of class legislation. The legislature had the

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[164] *Mr. Chief Justice Fuller delivered the opinion of the court:

Petit was tried and convicted of keeping open a barber shop on Sunday, for the purpose of cutting hair and shaving beards, contrary to § 6513 of the General Statutes of Minnesota for 1894, and the judgment was affirmed by the supreme court of Minnesota. 74 Minn. 376, 77 N. W. 225. This writ of error was then allowed.

Section 6513 read as follows: "All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health, or comfort of the community: *Provided, however*, That keeping open a barber shop on Sunday for the purpose of cut-

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right to define its own language, and the statute thus interpreted could not reasonably be held to have made any discrimination.

The question is not whether the bare fact of shaving some particular individual under exceptional circumstances might not be upheld, but whether the public exercise of the occupation of shaving and hair cutting could be justified as a work of necessity or charity.

In *Phillips v. Innes*, 4 Clark & F. 234, the House of Lords held that shaving on Sunday was not a work of necessity or mercy or charity. The act, 29 Car. II., chap. 7, prohibited work on the Lord's Day, "works of necessity and charity only excepted;" and by the Scotch statute of 1579, chap. 70, it was enacted, among other things, that "no handy-labouring or working be used on the Sunday;" and the same prohibition was enacted by the statute of 1690, chap. 7, which added to the private and public exercise of worship "the duties of necessity or mercy." The case came to the House of Lords from the court of session, and Lord Chancellor Cottenham said: "This work is not a work of necessity, nor is it a work of mercy; it is one of mere convenience; and if your Lordships were to act upon this case as a precedent for other cases, founded upon no more than convenience, your Lordships would, I apprehend, be laying down a rule by which the law of Scotland prohibiting persons from carrying on their ordinary business on Sundays would be repealed or rendered useless."

[167] Lord Wynford concurred, saying: "It was not necessary that *people should be shaved on Sunday in a public shop; it was not an act of mercy, it was clearly an act of handicraft."

Lord Brougham was of the same opinion, and observed that "he whose object was gain did not come within the exception."

In *Com. v. Waldman*, 140 Pa. 89, 98, 11 L. R. A. 563, 564, 21 Atl. 248, the supreme court of Pennsylvania said: "We are now asked to say that shaving is a work of 'necessity,' and therefore within the exceptions of the act of 1794. It is, perhaps, as much a necessity as washing the face, taking a bath, or performing any other act of personal cleanliness. A man may shave himself, or have his servant or valet shave him, on the Lord's Day, without a violation of the act of 1794. But the keeping open of his place of business on that day by a barber, and the following his worldly employment of shaving his customers, is quite another matter; and, while we concede that it may be a great convenience to many persons, we are not prepared to say, as a question of law, that it is a work of necessity within the meaning of the act of 1794."

In *State v. Frederick*, 45 Ark. 347, the court ruled that: "The courts will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary
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calling, and not within the exceptions of the statute."

On the other hand, the supreme judicial court of Massachusetts held in *Stone v. Graves*, 145 Mass. 353, 13 N. E. 906, that it could not be ruled, as matter of law, that the work of shaving an aged and infirm person in his own house on the Lord's Day was not a work of necessity.

And in *Ungericht v. State*, 119 Ind. 379, 21 N. E. 1082, it was held by the supreme court of Indiana that it must be left to the jury, as a question of fact, to determine, under proper instructions from the court, what particular labor, under the circumstances, would constitute a work of necessity.

We think that the keeping open by barbers of their shops on Sunday for the general pursuit of their ordinary calling was, as matter of law, not within the exceptions of the statute as it read before the amendment.

But even if the question whether keeping open a barber shop *on Sunday for cutting[168] hair and shaving beards, under some circumstances, was a work of necessity or charity, was a question of fact under the original act, which was foreclosed as such by the amendment, the result is the same.

Assuming that the proviso did have this effect, the supreme court was of opinion that the classification was not purely arbitrary. The court pointed out that the law did not forbid a man shaving himself or getting someone else to shave him, but the keeping open a barber shop for that purpose on Sunday; that the object mainly was to protect the employees by insuring them a day of rest; and said: "Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more, and during later, hours than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employees would ordinarily be deprived of rest during half of that day.

In view of all these facts we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

We recognize the force of the distinctions suggested and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the states in these matters, by holding that the classification was so palpably arbitrary as to bring the law into conflict with the Federal Constitution. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

Judgment affirmed.

[169]*CRYSTAL SPRINGS LAND & WATER COMPANY and S. G. Murphy, *Appts.*,
v.
CITY OF LOS ANGELES.
(See S. C. Reporter's ed. 169.)

Federal question—rights based on Mexican grant.

A suit to establish water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of the treaty with Mexico, is held to involve no Federal question for the purpose of giving jurisdiction to the Federal courts.

[No. 41.]

Submitted March 15, 1900. Decided April 9, 1900.

A PPEAL from a decree of the Circuit Court of the United States for the Southern District of California dismissing a bill for want of jurisdiction. *Affirmed.*

See same case below, 82 Fed. Rep. 114.

Messrs. Stephen M. White and John Garber submitted the cause for appellants.

Mr. S. O. Houghton submitted the cause for appellee. *Messrs. Walter F. Haas and Lee & Scott* were with him on the brief.

Per Curiam: Bill to quiet title to certain waters, water rights, and works connected therewith. Bill dismissed for want of jurisdiction, and question of jurisdiction certified. Reported below, 82 Fed. Rep. 114, 76 Fed. Rep. 148.

Decree affirmed on authority of (1) *Phillips v. Mound City Land & Water Asso.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 657; *California Powder Works v. Davis*, 151 U. S. 389, 395, 38 L. ed. 206, 208, 14 Sup. Ct. Rep. 350; *New Orleans v. DeArmas*, 9 Pet. 224, 9 L. ed. 109; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; (2) *Robinson v. Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 330, ante, 486, 20 Sup. Ct. Rep. 402; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905.

[170]*ELLEN J. O. PHINNEY, Gerald C. Tobey, Horace P. Tobey, *et al.*, *Plffs. in Err.*,
v.

TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL.

(See S. C. Reporter's ed. 170.)

Writ of error to state court—right to raise Federal question.

A stranger to a contract cannot raise the question.
NOTE.—As to jurisdiction of cases involving Federal questions—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 7 and *Bailey v. Mosher*, 11 C. C. A. 308.

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tion of its impairment for the purpose of creating a Federal question to give jurisdiction on writ of error from the Supreme Court of the United States to a state court.

[No. 392.]

Submitted March 19, 1900. Decided April 9, 1900.

IN ERROR to the Court of Appeals for the State of Maryland to review decrees of affirmance sustaining a statute changing the name of a corporation, which is alleged to be in impairment of the obligation of a contract. *Dismissed.*

See same case below, 88 Md. 633, 42 Atl. 58.

Mr. E. J. D. Cross submitted the cause for plaintiff in error. *Mr. Abner McKinley* was with him on the brief.

Mr. William Pinkney Whyte submitted the cause for defendant in error. *Messrs. George R. Willis and Francis T. Homer* were with him on the brief.

Per Curiam: Cause reported in state court, 88 Md. 633, 42 Atl. 58. Writ of error dismissed on the authority of *Williams v. Eggleston*, 170 U. S. 304, 309, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435.

AUGUST J. HENKEL, *Plff. in Err.*,
v.

CITY OF CINCINNATI.

(See S. C. Reporter's ed. 170, 171.)

Writ of error to state court—certificate of chief justice.

The certificate of the chief justice of the supreme court of a state, stating that a question as to a violation of the Federal Constitution was submitted to the court and decided, cannot confer jurisdiction upon the Supreme Court of the United States on writ of error to the state court.

[No. 206.]

Argued March 20, 21, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment affirming a decision dismissing a bill for injunction to restrain collection of a special assessment. *Dismissed.*

See same case below, 58 Ohio St. 726, 51 N. E. 1098.

Mr. L. Benton Tussing argued the cause, and *Messrs. Donaldson & Tussing* and *Dolle & Dolle* filed a brief for plaintiff in error.

Messrs. Wade H. Ellis and Ellis G. Kinhead argued the cause and filed a brief for defendant in error.

***Per Curiam:** Bill for injunction to restrain collection of a special assessment filed [171]
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in court of common pleas, Hamilton county, Ohio, and on hearing dismissed. Carried by appeal to circuit court of Hamilton county, heard there, and again dismissed. Appealed to supreme court of Ohio, and the judgment of the circuit court affirmed June 14, 1898, it being ordered "that a special mandate be sent to the circuit court of Hamilton county to carry this judgment into execution." June 21, "mandate issued," and "original papers sent to clerk." Opinion, 58 Ohio St. 726, 51 N. E. 1098: "Judgment affirmed on authority of *Cleveland v. Wick*, 18 Ohio St. 304."

January 6, 1899, the chief justice of the supreme court of Ohio made and signed a certificate that the question whether the assessment was in violation of the Fourteenth Amendment was submitted to the court, and that the court decided that it was not.

The record does not show that any Federal question was raised prior to judgment, but it appears in the petition for writ of error from this court, and accompanying assignment of errors. The certificate of the chief justice could not confer jurisdiction. *Paramelee v. Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Powell v. Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 69, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939.

The writ of error is dismissed on the authority of *Saynard v. Denny*, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, ante, 299, 20 Sup. Ct. Rep. 205,

[172]*CAMDEN & SUBURBAN RAILWAY COMPANY, Plff. in Err.,
v.

DAVID S. STETSON.

(See S. C. Reporter's ed. 172-177.)

Federal courts—power to order surgical examination of party.

The power of a circuit court of the United States to order a surgical examination of the plaintiff in an action for damages for a personal injury, in accordance with the provi-

NOTE.—As to right to physical examination before trial—see *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466, and note.

As to examination of party before trial—see note to *O'Connell v. Reed*, 5 C. C. A. 602.

As to state laws as rules of decision in Federal courts—see notes to *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71, and *Hill v. Hite*, 29 C. C. A. 553.

As to pleadings, practice, and procedure to conform "as near as may be"—see note to *Re Secretary of the Treasury* (C. C. S. D. N. Y.) 11 L. R. A. 275.

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sions of a statute of the state in which the court is sitting, there being no law of Congress in conflict therewith, is conferred by U. S. Rev. Stat. § 721, providing that the laws of the states shall be rules of decision in trials at common law in courts of the United States, in cases in which they apply.

[No. 174.]

Argued March 6, 1900. Decided April 9, 1900.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit presenting questions as to the right of a Federal court to order a physical examination of plaintiff. Answered in the affirmative.

Statement by Mr. Justice Peckham:

This case comes here upon a certificate from the circuit court of appeals for the third circuit, under the act of 1891, chapter 517, section 6 (26 Stat. at L. 826). The action was brought in the circuit court of the United States for the district of New Jersey by the plaintiff against the railway company, to recover damages for an alleged injury to his person caused by the neglect of the defendant while the plaintiff was a passenger on one of defendant's cars. At the time that he brought suit plaintiff was a citizen of the state of Pennsylvania, the railway company being a corporation of the state of New Jersey. The alleged neglect and injury occurred on the 13th day of July, 1896, in the city of Camden, in the state of New Jersey, and at that time the plaintiff was a citizen of that state.

On the 12th of May, 1896, the legislature of New Jersey passed and the governor approved an act which reads as follows:

"1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination, to testify in the said cause *as to the nature, extent, and prob- [173] able duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore."

When the case was called for trial on March 31, 1898, and after a jury had been impaneled, but before the case was opened to the jury, the defendant's counsel asked in open court that the plaintiff should submit himself to examination by a competent surgeon. The plaintiff would not consent, and the court held that it had no power to order the plaintiff to subject himself to examination by physicians against his will, and it therefore refused to make the order asked for by counsel for the defendant, who was thereupon allowed an exception to the rul-

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ing. The trial proceeded and resulted in a verdict and judgment for the plaintiff. The defendant brought the case by writ of error before the circuit court of appeals, and that court, desiring the instruction of this court upon the matter, made the foregoing statement and ordered the following questions to be certified here:

"1. Is the above-recited statute of the state of New Jersey, the act of May 12, 1896, applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey?"

"2. Is said statute applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey, where the injury occurred in the state of New Jersey, and both the plaintiff and the defendant at the time of the injury were citizens of that state?"

"3. Had the circuit court the legal right or power to order a surgical examination of the plaintiff?"

Messrs. **E. A. Armstrong** and **D. J. Pancoast** argued the cause and filed briefs for plaintiff in error.

Mr. **Howard Carrow** argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[174] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

An answer to the third question, "Had the circuit court the legal right or power to order a surgical examination of the plaintiff?"—will be all that is necessary for the action of the court below.

It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000. In that case there was no statute of the state in which the United States court was held which authorized the order. There is no intimation in the opinion that a statute of a state directly authorizing such examination would be a violation of the Federal Constitution, or invalid for any other reason.

In this case we have such a statute, and by section 721 of the Revised Statutes of the United States it is provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply."

Does not this statute of the state apply in trials at common law in the United States courts sitting in the state where the statute exists?

The case before us is a common-law action; it is one to recover damages for a tort, which is an action of that nature. It was being tried in the state which enacted the statute, and the court was asked to apply

such statute to the trial of an action at common law.

Neither the Constitution, treaties, nor statutes of the United States otherwise require or provide. The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes "within the principle of the decisions of this court holding a law of the state of such a nature binding upon Federal courts sitting within the state. *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871; *Nichols v. Levy*, 5 Wall. 433, 18 L. ed. 596; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. ed. 509, 511; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724. [175]

It was held in *United States v. Reid*, 12 How. 361, 13 L. ed. 1023, that the provision of the law of Congress did not extend to criminal offenses against the United States, for that would be to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. It was said, however, that the section was intended to confer upon the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states.

We are not aware of any reason why this law of the state does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made.

Counsel for plaintiff refers in his argument to the opinion in the *Botsford Case*, where it is stated (at page 250, 35 L. ed. 739, 11 Sup. Ct. Rep. 1002), that the question is one which is not governed by the law or practice of the state in which the trial is had, but that it depends upon the power of the national courts under the Constitution and laws of the United States, and he argues therefrom that the state statute is immaterial, and can furnish no foundation for the exercise of the power by the Federal court. We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of *Botsford*. But we say there is a law of the United States which does apply the laws of the state where the United States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that state. In the *Botsford Case* there was no state law, and consequently no foundation for the application of the law of the United States.

*In *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. [176] 177 U. S.

1117, 5 Sup. Ct. Rep. 724, the statute of the state of New York, in relation to the examination of parties before trial, was held to be in conflict with the act of Congress providing for the examination of witnesses in courts of the United States, and was therefore inapplicable in those courts; but the statute in this case is not in conflict with any statute of the United States. It does not conflict with § 861 of the Revised Statutes, providing for the oral examination of witnesses in open court. On the contrary, whatever information may be obtained by the surgeon who examines the plaintiff under the statute in question can be availed of only by the defendant's producing the witness and examining him in open court, or by deposition, if he come within the exception mentioned in § 863 and the following sections.

The validity of this statute has been affirmed by the supreme court of New Jersey in *McGovern v. Hope*, 42 Atl. 830, to appear in 63 N. J. L. The opinion of the court was delivered by Mr. Justice Depue, and the court held that the act was within the power of the legislature, and was not an infringement upon the constitutional rights of the party.

The validity of a statute of this nature has also been upheld in *Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the state of New York, but the validity of a statute providing for the examination of the person of a plaintiff in an action to recover for injuries is upheld and declared not to be in violation of the constitutional rights of the party.

The citizenship of the plaintiff at the time of the injury is not material so long as the court below has jurisdiction of the case and the parties at the time of the commencement of the action.

In those states in which it has been held that the court has inherent power to order the examination of a plaintiff in this class of action without the aid of a statute, all has been said that could be urged in favor of such power on grounds connected with public policy and the due and proper administration of justice by the courts. This court has taken another view of the subject, in the decision of *Botsford's Case*, above cited. But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power, under the statute and by virtue of § 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff, and we therefore answer the third question of the court below in the affirmative and it will be so certified.

Mr. Justice Harlan dissented.
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OLIVER O. FORSYTH, Administrator of the Estate of Jacob Forsyth, Deceased,
Plff. in Err.,

v.

HENRY F. T. VEHMEYER.

(See S. C. Reporter's ed. 177-182.)

Federal question—allegation and proof of fraud—effect of bankruptcy discharge on debt created by fraud.

1. The decision by a state court that an allegation of false and fraudulent representations implies a knowledge of their falsity, and that, if an express allegation of the *scienter* were necessary, the omission would be cured by the verdict, does not involve any Federal question for review by the Supreme Court of the United States.
2. Obtaining advances of money by false and fraudulent representations that the borrower has a certain quantity of wood cut, piled, and ready for shipment, and a sale of which has already been contracted at a certain price, creates a debt by means of fraud involving moral turpitude and intentional wrong, that is exempt from the effect of a discharge in bankruptcy under the bankrupt act of 1867.

[No. 180.]

Submitted March 13, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a decision to the effect that a certain debt was exempt from a discharge in bankruptcy. *Affirmed.*

See same case below, 176 Ill. 359, 52 N. E. 55.

The facts are stated in the opinion.

Mr. Edward Roby submitted the cause for plaintiff in error.

Mr. M. W. Robinson submitted the cause for defendant in error. Mr. John S. Miller was with him on the brief.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Peckham delivered the opinion of the court: [177]

The defendant in error brought this action against one Jacob Forsyth, in the superior court of Cook county, in the state of Illinois, in April term, 1891, upon a judgment in his favor which he had theretofore recovered against the said Jacob Forsyth. The defendant has died since the commencement of this action, and the plaintiff in error has been appointed administrator upon his estate. The judgment sued upon was entered at the June term of the superior court of Cook county, in the state of Illinois, held in Chicago in 1871, and the judgment record [178]

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kiple v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

was destroyed by the great fire in that city on October 9, 1871.

To the declaration in the action upon this judgment the defendant pleaded (1) *nil debet*; (2) *nul tiel record*; (3) a discharge in bankruptcy (meaning under the bankrupt act of 1867).

Plaintiff replied to the third plea, that the debt mentioned in the judgment was created by fraud, and therefore was not discharged under the bankrupt act.

Upon the trial the plaintiff, in order to prove the original judgment and its character, called as a witness the attorney who procured it, who testified that the declaration was in substance as follows: The plaintiff complains of the defendant in an action in trespass on the case, for that on the 10th day of August, 1868, in order to induce the plaintiff to advance to the defendant a large amount of money, to wit, the sum of \$1,200, the defendant falsely and fraudulently represented unto the plaintiff that the defendant had a large amount of birch cordwood, to wit, the amount of 200 cords, cut and piled up near the Pittsburgh & Fort Wayne railroad in the county of Lake, state of Indiana, ready to be shipped to Chicago; that one Eldridge had contracted to purchase the wood at \$6 per cord in the city of Chicago, when shipped, and that if the plaintiff would advance to the defendant at the rate of \$5 per cord, for the 200 cords of wood, the defendant would immediately ship the cordwood to the city of Chicago; that the plaintiff, relying upon those representations as being true, advanced to the defendant the sum of \$1,200; that the defendant shipped only the sum of 40 cords of wood to Eldridge, upon which the plaintiff received the sum of \$6 per cord; that the representations of the defendant were false and fraudulent; that he did not have and never did have in the county of Lake and state of Indiana 200 cords of birch

[179] *wood piled up ready for shipment to the city of Chicago to sell to Eldridge, but that he only had in the county of Lake, or anywhere else, the sum of 40 cords of birch wood, which was shipped by the defendant to Eldridge; that the plaintiff was damaged to the extent of the amount that was alleged in the declaration, and therefore he brings this action for fraud and deceit against the defendant.

To this declaration the undisputed evidence shows that the defendant pleaded not guilty, and there was no other issue in the case. The verdict was "that the jury found the defendant guilty and assessed the plaintiff's damages at \$833.35." Judgment was duly entered upon the verdict, and it is this judgment which is sued upon in this action.

The present action was tried before the court, and upon the trial the defendant read in evidence a duly certified copy of his discharge in bankruptcy on December 30, 1880. The court found the issues in favor of the plaintiff, and ordered judgment in his favor, which was duly entered. Upon appeal to the appellate court the judgment was affirmed, and upon a further appeal to the supreme court that court also affirmed it, and the case is now here on writ of error to the supreme court of Illinois.

Unless the judgment sued upon was recovered on a debt created by fraud, the defendant's discharge in bankruptcy was a bar to the maintenance of this action.

The bankrupt act of 1867, § 33 (14 Stat. at L. 517, 533, chap. 176; also Rev. Stat. § 5117), provided "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act," etc.

The plaintiff in error contends that the original judgment was not recovered in an action for fraud and deceit, and, even if it were, the fraud proved is not that kind of fraud which is debarred from a discharge in bankruptcy. He gave some evidence tending to show that the action was in the nature of one in assumpsit, but the finding of the court in plaintiff's favor must be held to be a finding that the action was for fraud.

The declaration proved alleges a false and fraudulent representation *by means of which [180] the plaintiff below was induced to advance money to the defendant to his damage in a named amount. The defendant pleaded not guilty, and if the cause of action had been one in assumpsit, the plea at common law would have been nonassumpsit, instead of not guilty. 3 Ch. Pl. 10th Am. 3d Lond. ed. pp. 908, 1030.

The declaration did not, it is true, contain the allegation that the representations of the defendant were false to his knowledge. It simply said that the representations of the defendant were false and fraudulent.

The opinion of the appellate court, in this case, which was adopted by the supreme court of the state, held that "the declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. . . . But even though an express allegation of the *scienter* were necessary, its omission would be cured by the verdict." [75 Ill. App. 322.] We understand by this opinion that the court held the first action was for fraud and deceit, and that the plaintiff was bound to have proved the fraud as alleged in the declaration in order to maintain the action. This decision involves no Federal question.

Where the state court has decided that the action was for fraud and deceit, and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the fact of fraud. Judgment being entered after a trial upon such pleadings and upon a verdict of guilty, the question of fraud was not open for a second litigation upon the trial of this action. The defendant below in this action had full opportunity given him to prove what in fact was the declaration in and the character of the first action, and the findings of the court below in favor of the plaintiff must be regarded as a finding against the defendant upon the issue as to the character of that action. The evidence offered by him and rejected by the

[181] court was not admissible on the issue because it was not pertinent. The existence of the fraud must therefore be assumed in the further progress of the case. The only matter left for this court to decide is whether a debt created by means of a fraud, such as is set forth in the declaration, is exempt from the effect of a discharge in bankruptcy.

The proper construction of the section of the act relating to such a discharge has been frequently before this court, and we regard the law upon the subject as quite well settled. There are many cases where it has been claimed that the discharge was not operative, if the fraud proved was only constructive, and involved no moral turpitude or intentional wrong. Such cases are illustrated by that of *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576. In that case the pledgee of stocks held as security for a liability incurred by him for the pledgeor had thereafter hypothecated the stocks to secure a debt due from himself to another, and having failed to return to his pledgeor such stocks when his liability for the pledgeor had ceased, it was held that he was not thereby guilty of a fraudulent creation of his debt to the pledgeor, and that it had not been incurred in a fiduciary capacity, so as to bar his discharge under the 33d section of the bankrupt act. Many of the cases bearing upon the subject are cited by Mr. Justice Bradley, who delivered the opinion of the court, and it is unnecessary to comment upon them here. He referred to the case of *Neal v. Clark*, 95 U. S. 704, 24 L. ed. 586, where Mr. Justice Harlan, in delivering the opinion of the court, said: "Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section [33] means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

The *Hennequin Case* was held to be governed by the principle announced in the case of *Neal v. Clark*, and the discharge was held effective.

[182] *In *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038, the rule as to the kind of fraud intended to be exempted from discharge by the bankrupt act was again adverted to, and it was again said that it was positive fraud or fraud in fact, involving moral turpitude or intentional wrong; not implied fraud which may exist without bad faith. In that case certain false and fraudulent misrepresentations of fact were made by one member of a partnership firm, by reason of which the debt was created, and it was held that it was a debt of that character which was not discharged under the

bankrupt act, and the innocent members of the firm were liable upon the debt created by the fraudulent misrepresentations of another member of the firm.

Also in *Ames v. Moir*, 138 U. S. 306, 312, 34 L. ed. 951, 954, 11 Sup. Ct. Rep. 311, 313, it was said: "If Ames made his call with the knowledge that he was insolvent, and with the purpose of getting possession of the wines and shipping them out of the state without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent,—and there was evidence that justified the jury in so finding,—he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy."

Within this rule, as maintained by the court, there can be no doubt that the defendant below was not discharged under the bankrupt act. A representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent.

The courts below were, therefore, right in denying to the defendant any benefit by reason of his discharge in bankruptcy. The judgment of the Supreme Court of the state of Illinois is right, and must therefore be affirmed.

*HARRY GUNDLING, Plff, in Err., [11

v.

CITY OF CHICAGO.

(See S. C. Reporter's ed. 183-189.)

Constitutional law—due process—ordinance as to license for sale of cigarettes—discretion of mayor.

1. An ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation and is a suitable person to be intrusted with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him any arbitrary power to grant or refuse a license, in violation of the provisions of U. S. Const. 14th Amend., either in regard to the clause requiring due process of law, or in that requiring equal protection of the laws.
2. Regulations respecting the pursuit of a lawful trade or business, being an exercise of the

NOTE.—As to what constitutes due process of law—see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865; *People v. O'Brien*, (N. Y.) 2 L. R. A. 258; *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655; *Re Gannon* (R. I.) 5 L. R. A. 359; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304.

As to limit of amount of license fees—see *State ex rel. Tol v. French* (Mont.) 30 L. R. A. 415, and note.

police power, are within the authority of the state, and form no subject for Federal interference unless they are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law.

8. The question whether or not a delegation of power has been made to the mayor of a city by the common council is not a Federal question for review on writ of error by the Supreme Court of the United States to a state court.
4. An ordinance fixing the amount of a license fee for the privilege of doing business high enough to make it partake of the character of an excise or privilege tax, as well as to provide a means for the regulation of the business, is not for that reason in violation of any provision of the Federal Constitution as an improper and illegal interference with the rights of the citizen.

[No. 209.]

Argued March 22, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment of conviction for violating an ordinance forbidding the sale of cigarettes without a license. *Affirmed.*

See same case below, 176 Ill. 340, 52 N. E. 44.

The facts are stated in the opinion.

Mr. Lee D. Mathias argued the cause, and, with **Mr. Charles H. Aldrich**, filed a brief for plaintiff in error:

The ordinance vests arbitrary and discretionary authority in the mayor, and is therefore void.

East St. Louis v. Wehrung, 50 Ill. 28; *Kinmundy v. Mahan*, 72 Ill. 462; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729; *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794; *Cairo v. Coleman*, 53 Ill. App. 680; *Re Elliott*, 11 Manitoba Rep. 358.

The practice of delegating to a common council much of the legislative power which the legislature might itself exercise is an exception to the general rule of nondelegation.

Cooley, Const. Lim. 189, 190; *Houghton v. Austin*, 47 Cal. 646.

To hear evidence and adjudge a penalty or forfeiture is purely a judicial power.

Poppen v. Holmes, 44 Ill. 360, 92 Am. Dec. 186; *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Flint & F. Pl. Road Co. v. Woodhull*, 25 Mich. 100, 12 Am. Rep. 233.

A ministerial act is one performed in a prescribed manner in obedience to the mandate of legal authority, without regard to the exercise of judgment as to the propriety of the act, on the part of the party performing.

Waldo v. Wallace, 12 Ind. 572.

In the present case, under no condition prescribed is the mayor obliged to issue the license. Under no condition pointed out in the ordinance would a mandamus lie, that writ being appropriate only to compel the performance of ministerial acts.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The ordinance is void because its provisions are beyond any reasonable necessity of police regulations.

Tiedeman, Limitations of Police Power, 274; *Cooley*, Const. Lim. 744; *Vansant v. Harlem Stage Co.* 59 Md. 330; *State North Hudson County R. Co. Prosecutor, v. Hoboken*, 41 N. J. L. 71; *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150.

It is neither necessary to the protection or, nor conducive to, the public health or welfare to restrain the business of selling cigarettes. The selling of cigarettes creates no disagreeable odors in the neighborhood in which they are sold, and in no way detracts from the happiness or comfort of the persons residing in the neighborhood.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

While it is true that the excessive use of cigarettes may be injurious, yet it is not enough to justify such an unreasonable ordinance as the one in question.

Tiedeman, Limitations of Police Power, 294.

Mr. Frederic D. McKenney argued the cause, and **Messrs. Charles M. Walker** and **Henry Schofield** filed a brief for defendant in error:

The case is not within the rule declared by this court in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, but is governed by *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

See also *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

It is not an unlawful restraint upon the fundamental right of a man to pursue a lawful calling, to require a person desirous of pursuing the calling of selling cigarettes in the city of Chicago to be possessed of such a character or reputation as has some natural relation to such calling.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Brooklyn v. Breslin*, 57 N. Y. 591; *People ex rel. Larrabee v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *St. Louis v. Knox*, 6 Mo. App. 247, Affirmed in 74 Mo. 79; *Grand Rapids v. Brady*, 105 Mich. 670, 32 L. R. A. 116, 64 N. W. 29; *Com. v. Hubley*, 172 Mass. 58, 42 L. R. A. 403, 51 N. E. 448; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *State ex rel. Minces v. Schoenig*, 72 Minn. 528, 75 N. W. 711; *Re Bickerstaff*, 70 Cal. 35, 11 Pac. 393; *People ex rel. Nechamcus v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; *State v. Gardner*, 58 Ohio St. 599,

41 L. R. A. 689, 51 N. E. 136; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *State ex rel. Winkler, v. Benzenberg*, 101 Wis. 172, 76 N. W. 345; *Player v. Vere*, T. Raym. 288; *Shaw v. Pope*, 2 Barn. & Ad. 465.

Whether a person desirous of pursuing the calling of selling cigarettes in the city of Chicago is, in point of fact, a fit person to be allowed to engage in such calling, may be left to the judgment of another person, or body of persons, other than a judge and jury, without invading any fundamental right of such person.

Ibid.

So far as appears in this record, the sum of \$100 is not an unreasonable fee to exact for a license to sell cigarettes in the city of Chicago.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Tiedeman, Limitations of Police Power*, p. 274; *Cooley, Const. Lim.* 5th ed. pp. 245, 614, notes; *Burlington v. Putnam Ins. Co.* 31 Iowa, 102.

[183] *Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error was convicted in a police court of the city of Chicago of a violation of an ordinance of that city forbidding the sale of cigarettes by any person without a license, and was fined \$50. From the judgment of conviction he appealed to the criminal court of Cook county, where it was affirmed, and thence to the supreme court of the state, where it was again affirmed, and he now brings the case here on writ of error.

Sections 1, 2, and 8 of the ordinance referred to read as follows:

"Sec. 1. The mayor of the city of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the city of Chicago, in the manner following, and not otherwise:

[184] "Any person, firm, or corporation desiring a license to sell cigarettes shall make written application for that purpose to *the commissioner of health, in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm, if a copartnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The commissioner of health shall thereupon submit to the mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license, and if the mayor shall be satisfied that the persons before mentioned are of good character and reputation, and are suitable persons to be intrusted with the sale of cigarettes, he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the city of Chicago, with at least two sureties, to be approved by the mayor, in the sum of \$500, conditioned that the licensed person, firm, or corporation shall faithfully observe
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and obey all laws of the state of Illinois and ordinances of the city of Chicago now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine, or sugar.

"Sec. 2. Every person, on compliance with the aforesaid requirements and the payment in advance to the city collector, at the rate of \$100 per annum, shall receive a license under the corporate seal, signed by the mayor and countersigned by the clerk, which shall authorize the person, firm, or corporation therein named to expose for sale, sell, or offer for sale cigarettes at the place designated in the license; provided, that no license shall be granted to sell within 200 feet of a schoolhouse.

"Sec. 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the city of Chicago, without having first procured the license provided, shall be fined not less than \$50 and not exceeding \$200 for every violation of this ordinance, and a further penalty of \$25 for each and every day the person, firm, or corporation persists in such violation after a conviction for the first offense."

*The other sections are not material to [185] this inquiry.

The plaintiff in error made no application to the health commissioner to obtain a license from the mayor in accordance with the above-mentioned ordinance. He specially set up in the courts below that the ordinance was invalid, because in violation of the Fourteenth Amendment, as depriving him of his property without due process of law. He contended in the state courts that the common council of the city of Chicago had no right to pass the ordinance in question, because no such power was given to it under the general act of the state of Illinois which incorporated the city of Chicago. The supreme court of the state, however, in construing that act, decided that it did authorize the city to pass the ordinance, and the plaintiff in error admits that this decision is conclusive upon us as the decision of a question of local law by the highest court of the state.

He makes two claims here upon which he bases the statement that the ordinance violates his rights under the Fourteenth Amendment of the Federal Constitution. Quoting from counsel's brief, these claims are: "First, that the state itself, acting through the common council of the city of Chicago, is inhibited by the Federal Constitution from making those provisions in the ordinance which delegate to the mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; second, that the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of \$100, a sum manifestly greater than the expense of issuing the license and providing for the regula

tion, thereby depriving persons of their liberty and property by an interference with their rights which is neither necessary to the protection of others nor the public health."

He contends that the ordinance vests arbitrary power in the mayor to grant or refuse a license to sell cigarettes, and that such arbitrary power is a violation of the amendment in question.

He claims also that he has been denied the equal protection of the laws, because in other kinds of business, where licenses are granted to persons engaged in any trade or occupation, no *member thereof is "singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law."

It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.

But, assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

The case principally relied upon by the plaintiff in error is that of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese, and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as

son other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

"The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above-mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and, through it, for the city to determine for itself, and that an ordinance providing, *reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and ex-

travagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

As stated in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."

Whether there is or is not a delegation of power by the common council to the mayor is not in this case a Federal question.

We have no doubt that the ordinance, so far as the objection above considered is concerned, was clearly within the power of the state to authorize, and must be obeyed accordingly.

The other objection made to the validity of the ordinance is that the amount of the license fee (\$100) is an improper and illegal interference with the rights of the citizen, and is therefore a violation of the Fourteenth Amendment.

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the state has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

[189] *The supreme court of Illinois has held that the city was authorized by the state law to impose the license fee.

In speaking of a license to do business, it was said in *Royall v. Virginia*, 116 U. S. 572, 579, 29 L. ed. 735, 737, 6 Sup. Ct. Rep. 510, 513: "The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the state which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt, and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the state, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort, and convenience."

It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily sub-

jected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

There is no error in the record, and the judgment of the Supreme Court of Illinois is affirmed.

*OHIO OIL COMPANY *Plff. in Err.*, [190]
v.

STATE OF INDIANA.

(See S. C. Reporter's ed. 190-212.)

Constitutional law—taking private property without compensation—statute against waste of oil and gas.

1. The restriction on the waste of gas and oil by owners of land, made by Ind. Acts 1893, p. 300, which provides that it shall be unlawful to permit the flow of gas or oil from a well to escape into the open air, without being confined within the well or proper pipes or other safe receptacle, for more than two days

NOTE.—*Property in petroleum oil or gas.*

The nature of property in mineral oil or gas, including the question of the right to drill through coal of another owner and the nature of the interest in oil and gas leases, has been exhaustively discussed in a note to *Williamson v. Jones* (W. Va.) 25 L. R. A. 222. From the cases there cited it may be laid down as the general rule that the property of the owner of lands, in gas and oil, is not absolute until actually within his grasp and brought to the surface, but that, subject to the limitation not to make such use or waste of the product as will be injurious to the health of others, his power as owner to reduce to possession all or every part of the deposits without violating the rights of other surface owners is absolute until the legislature shall, in the interest of the public as consumers, restrict or regulate it by statute. These principles have been upheld in the more recent cases in which the rights of the owners of land to oil and gas under the surface have been considered.

Petroleum oil is a mineral, and while it is in the earth it forms a part of the realty; but when it reaches a well and is produced on the surface it becomes personal property, and belongs to the owner of the well. *Kelley v. Ohio Oil Co.* 57 Ohio St. 317, 39 L. R. A. 765, 49 N. E. 399.

Petroleum oil is a mineral within a reservation by deed of "all mines, minerals and metals in and under the land." *Murray v. Alfred*, 100 Tenn. 100, 39 L. R. A. 249, 43 S. W. 355.

Petroleum oil in its place in the land is a part of the land itself. *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 411.

Petroleum oil as it is found in the cavities of

after gas or oil shall have been struck in the well, does not take the private property of the owners of the land without adequate compensation, and therefore without due process of law, since the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or, if he has any property right therein, it is a right in common with the coequal right of other land owners to take from the common source of supply, and therefore subject to the legislative power to prevent a destruction of the common property by one of the common owners.

2. The doctrine that a land owner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession, is settled as a rule of property in the state of Indiana.

[No. 84.]

Argued December 18, 19, 1899. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Indiana to review a decision affirming a judgment sustaining a statute prohibiting the waste of natural gas and oil. *Affirmed.*

See same case below, 150 Ind. 698, 50 N. E. 1125.

the rock is part of the realty, and embraced in the comprehensive idea which the law attaches to the word "land." *Wilson v. Youst*, 43 W. Va. 826, *sub nom.* *Wilson v. Hughes*, 39 L. R. A. 292, 28 S. E. 781.

Petroleum is to be regarded as real estate while it remains *in situ*, and consequently the interest of a lessee in an oil lease cannot be taxed as personal property. *Carter v. Tyler* County Ct. 45 W. Va. 806, 43 L. R. A. 725, 32 S. E. 216.

"Petroleum gas and oil are substances of a peculiar character . . . They belong to the owner of the land and are part of it so long as they are on it or in it or subject to his control, but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil or gas extending under his neighbor's field so that it comes into his well, it becomes his property." *Brown v. Spliman*, 155 U. S. 669, 39 L. ed. 305, 15 Sup. Ct. Rep. 247.

Whether petroleum percolates through the rock, or exists in pools and deposits, it forms a part of that tract of real estate in which it lies for the time being, but when it leaves one tract of land and enters another it becomes part of the realty of the latter so that the owner of the former loses all right to the oil while it remains away from his land. *Kelley v. Ohio Oil Co.* 57 Ohio St. 317, 39 L. R. A. 765, 49 N. E. 399.

Neither a landowner nor one acquiring oil rights in his lands has a right of action because of the drilling and operation of wells upon adjoining property, which draw the oil from his lands; but his remedy is to drill wells along and near the division line, so as to prevent the passage of such oil. *Ibid.*

And an owner of oil wells may use a gas pump in operating them, although by its powerful suction the production of his neighbor's

*Statement by Mr. Justice **White:** [190]

The title, preamble, and first section of a law enacted in 1893 by the state of Indiana (Acts 1893, p. 300) are as follows:

"An Act Concerning the Sinking, Safety, Maintenance, Use, and Operation of Natural Gas and Oil Wells, Prescribing Penalties and Declaring an Emergency.

"Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells; therefore,

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, That it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within *such well or [191] proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

wells is decreased, since the property of the owner of lands in oil and gas is not absolute, until it is actually within his grasp and brought to the surface. *Jones v. Forest Oil Co.* 194 Pa. 379, 48 L. R. A. 748, 44 Atl. 1074.

But the wasteful use of gas by burning it for illuminating purposes in flambeau lights may be restrained by statute. *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 49 N. E. 1a.

In declaring constitutional a statute making it unlawful to waste natural gas by permitting its escape into the open air for more than two days after gas or oil has been struck, the Indiana supreme court denies that in quoting in its previous decisions from *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, it has adopted as law so much of the quotation as reads: "They [the water, gas, and oil] belong to the owner of the land and are part of it so long as they are on or in it and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone." *State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809. The court held that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and that therefore, the constitutional provision in question was not an unwarranted interference with private property. But the constitutionality of such a statute may be upheld without deciding that an owner of land has no property right in gas or oil until it is reduced to possession, under the rule laid down in the principal case, that if such a right exists it is one in common with the coequal right of other landowners to take from the common source of supply, and is therefore subject to the legislative power to prevent the destruction of the common property by one of the common owners.

The remaining sections of the law in question are printed in the margin.†

[192] *The issue which this record presents, on the subject of the law just referred to, is this: Did the enforcement of the first section of the statute produce as to the persons whose obedience to its commands were coerced by injunction, a taking of private property without adequate compensation; that is, did the execution of the statute amount to a denial of due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

The controversy was thus initiated: The state of Indiana, through its attorney general, filed a complaint in the circuit court of the county of Madison in the state of Indiana, against the Ohio Oil Company, a corporation organized under the laws of the state of Ohio, but authorized to carry on its business in the state of Indiana, as it had complied with the regulations enacted by that state as to foreign corporations doing

business therein. The cause of complaint was thus stated:

"Plaintiff says that for many years heretofore there has *existed, underlying the coun-[193] ties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties of the state of Indiana, a large subterranean deposit of natural gas, occupying a reservoir of large extent, with well-defined boundaries, and utilized for fuel and light by the people of those counties and many other counties and cities of Indiana, including Indianapolis, Fort Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said state, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the state of Indiana are now, and have been for more than ten years last past, continuously supplied with gas for light and fuel; that said natural gas underlying the counties aforesaid and

†Sec. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm, or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within $\frac{1}{2}$ inch as great as the hole of such well, to extend at least 3 feet above the salt-water level, where salt water has been struck; where no salt water has been struck, such plug shall extend at least 3 feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least 4 feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least 5 feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone, and dry cement, so as to form a concrete up to a point at least 8 feet above the top of the gas or oil bearing rock or rocks, and on top of this filling shall be placed a wooden plug at least 6 feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball 8 inches in diameter shall be dropped in the well and securely rammed in to the shale by the driller or owner of the well, after which not less than 1 cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

Sec. 3. Any person or corporation violating
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any of the provisions of this act shall be liable to a penalty of \$200 for each and every such violation, and to the further penalty of \$200 for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions, in the name of the state of Indiana, for the use of the county in which such well shall be located, together with reasonable attorney's fees and costs of suit.

Sec. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate, and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of § 1 of this act, and pack and tube such well, and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this state against the owner, lessee, agent, or manager of said well, and each of them jointly and severally, to recover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by § 3 of this act.

Sec. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of § 2 of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate, and take possession of such well, and plug and fill the same in the manner provided by § 2 of this act, and may maintain a civil action in any court of competent jurisdiction of this state against the person, persons, or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by § 3 of this act.

other portions of the state is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure, and from which it escapes, when it is permitted to do so, with great force.

"The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the state and to its citizens is many millions of dollars; that since the discovery of said gas deposit in 1886 immense sums of money have come into the state and have been invested in large manufacturing interests, and other vast sums of money belonging to the people of the state of Indiana have been invested in similar enterprises, causing a great increase in the population, principally in the territory underlying which said gas is found. Many cities in and adjacent to the gas territory, including those named, are wholly dependent for fuel upon natural gas, and for that reason the people of the state of Indiana have become and are interested in the protection and continued preservation of the natural gas supply; that many millions of dollars invested in manufacturing and other properties in and near said gas territory are wholly dependent for their continued preservation and for the permanent value of their property upon said natural gas supply; that their location and establishment in said gas territory was due

[194]*to the presence of natural gas underlying the same, without which such enterprises could not operate at a profit, and that in the event the supply of gas should be exhausted in said territory many of such manufacturing enterprises, in which thousands of the citizens of Indiana find employment at remunerative wages, will be compelled to stop operation.

"That their employees will be thereby thrown out of employment, and many of them, being dependent upon their labor for support, may and will become charges upon the state and its several municipal subdivisions; that the property of said manufacturing enterprises and the vast investments depending upon them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now interested in said enterprises as aforesaid.

"That in the cities named and in all the territory known as the 'gas belt' the inhabitants have for years used practically no other fuel than natural gas; that their houses have, in many instances, been constructed with a view to the use of such fuel, and will have to be differently equipped before other kinds of fuel can be used; that the cost of natural gas as fuel to the people of the 'gas belt,' who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and that to the other inhabitants of the state using said natural gas it has become and is a source of great convenience, comfort, and increased happiness,

because of its cheapness, convenience, and cleanliness as fuel.

"That many small villages in and near the gas territory have within a few years become flourishing and opulent cities.

"That the state's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event natural gas gives out, be correspondingly curtailed.

"That the state of Indiana, relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the state house, the Central and *other hospitals for the insane,[195] the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers, and other public institutions owned and maintained by the state of Indiana and its various municipal subdivisions, together with the courthouses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

"That the supply of natural gas underlying the territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas taken from said reservoir affects and reduces correspondingly the common supply.

"That if the gas supply is husbanded and protected it will last for many years and continue to furnish the various cities named with abundant fuel, and the population, wealth, and other material interests of the state will continue to be benefited and enhanced, and the comfort, happiness, and enjoyment of the people of the state greatly increased.

"That underlying a portion of said natural gas territory and at the same levels, occupying the interstices—said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

"That on or about the 25th day of May, 1897, said defendant, the Ohio Oil Company, drilled, near the city of Alexandria, in said Madison county, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of the land owner upon whose land they are situated, which name and the description of said wells are as follows, to wit."

The complaint then enumerated five gas and oil wells which *had been opened and [196]

were being operated by the defendant for extracting oil, and averred as follows:

"That instead of securely anchoring said wells and each of them when so drilled, so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively completed and gas and oil were struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of said natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value.

"That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells, and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells the supply of natural gas upon which the citizens of said state depend, as aforesaid, will be greatly diminished; that the pressure of said gas, as found in said Trenton rock, will be greatly diminished, and that by the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

"Plaintiff therefore says that, because of the wrongful acts of defendants above described, heretofore committed and now continuing, its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted."

Averring the irreparable injury to result from allowing the wells to continue to flow, as stated, the inadequacy of the enforcement of the penalties provided in the statute to meet the evil complained of, and the fact that a multiplicity of suits would be engendered if the writ of injunction prayed for was not issued, the bill charged—

[197] *—"That the value of the gas wasted by permitting said several wells to remain open each day is of great value, and that, in addition to the value of the same, the whole gas territory or field is greatly damaged by permitting said wells to remain open, in that what is known as 'back pressure,' resulting from the confinement of said gas, is in a great measure relieved and destroyed when said gas is liberated in the manner aforesaid, and that said back pressure is necessary throughout said field in order to prevent the flow of water into said rock stratum and the consequent displacement of the gas therein contained; that, for the protection of said gas supply from the invasion of salt water, it is necessary that in the use of gas from wells drilled into said reservoir only a frac-

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tion of the entire volume of said wells should be used, to the end that the back pressure shall be maintained at as high a pressure as possible, and that any other or freer method of using said gas has a tendency to expose the same to danger of salt water, as aforesaid."

The prayer was as follows:

"And plaintiff therefore prays that a temporary order issue forthwith from this court prohibiting, restraining, and enjoining said defendant, its agents, servants, and employees, from further suffering or permitting the natural gas produced in said wells or any of them, or any part thereof, to longer escape therefrom, and that said defendant be ordered, directed, and commanded forthwith to securely confine the same either by anchoring each of said wells or by confining the gas produced therefrom in tanks, pipes, or other proper receptacles, and that failing or refusing so to do the sheriff of Madison county be ordered and directed forthwith to procure necessary materials and labor, and thereby anchor, secure, and confine the natural gas produced from said wells and each of them, and that the expense of so doing be taxed as part of the costs of this suit.

"And the plaintiff further prays that upon the final hearing of this cause said defendant company, its officers, servants, agents, and employees, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks, or other proper receptacles, and for all proper relief."

*The temporary injunction issued as prayed for. The defendant appeared and demurred to the complaint as not stating a cause of action. This was overruled. The defendant then answered as follows: [198]

"The defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

"The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

"That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life or property.

"That said well was so drilled and com-

pleted, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land owner the stipulated royalties therefor, and so operated the same with knowledge, approbation, and consent of such land owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

[199] "That in said well and in the same strata of rock whence such *oil was produced there were also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

"And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and state will be deprived of the use and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employees of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

"The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

"That in the territory where said well complained of is situated there are a number of paying oil wells, owned and operated by

various persons and corporations, and said field, when *properly developed, may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county." [200]

Referring to the law of Indiana, the context of which has already been stated, the answer contained this averment:

"This defendant further alleges that said act of the general assembly of the state of Indiana, as above set out, violates the Fourteenth Amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws."

The state demurred to the answer as not alleging facts sufficient to constitute a defense. This demurrer was sustained. The defendant refusing to answer further, a decree granting a permanent injunction was entered. An appeal having been prosecuted to the supreme court of the state of Indiana, in that court the decree of the trial court was in all respects affirmed. 150 Ind. 698, 50 N. E. 1125. This writ of error was thereupon allowed.

Messrs. M. F. Elliott and George Shirts argued the cause and, with **Messrs. Stephenson, Shirts, & Fertig** filed a brief for plaintiff in error:

Oil and gas in place are part of the realty, and belong to the owner of the land in which they are contained.

Stoughton's Appeal, 88 Pa. 198; *Funk v. Haldeman*, 53 Pa. 229; *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921; *Brown v. Beecher*, 120 Pa. 590, 15 Atl. 608; *Wettengel v. Gormley*, 160 Pa. 559, 28 Atl. 934; *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83; *Bryan, Law of Petroleum and Natural Gas*, p. 24; *Kelley v. Ohio Oil Co.* 57 Ohio St. 317, 39 L. R. A. 765, 49 N. E. 399; *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222, 19 S. E. 436; *Wilson v. Youst*, 43 W. Va. 826, *sub nom.* *Wilson v. Hughes*, 39 L. R. A. 292, 28 S. E. 781; *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922; *Barker v. Dale*, 3 Pittsb. 190, Fed. Cas. No. 988; *Brown v. Spilman*, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245.

The prohibition against depriving any person of property without due process of law extends to all acts of the state, whether through its legislative, executive, or judicial authorities.

Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

An act which deprives a person of the beneficial use of his property deprives him of his property without due process of law.

Re Furman Street, 17 Wend. 658; *Re Wall-street*, 17 Barb. 639; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040; 177 U. S.

Home Ins. Co. v. New York, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.

The police power of a state cannot invade the rights guaranteed by the Constitution of the United States.

People v. Jackson & M. Pl. Road Co. 9 Mich. 285; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 661, 29 L. ed. 520, 6 Sup. Ct. Rep. 252; *Walling v. Michigan*, 116 U. S. 447, 29 L. ed. 692, 6 Sup. Ct. Rep. 454.

The determination as to what is the proper exercise of the police power by the legislature is subject to the supervision of the courts.

Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Arensberg*, 103 N. Y. 399, 57 Am. Rep. 741, 8 N. E. 736; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976.

Under the guise of police power the legislature cannot invade the rights of persons and property; and a statute, the ostensible object of which is to secure the public welfare or safety, must appear to be adapted to that end.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Cooley*, Const. Lim. 6th ed. 306, 307, 309.

Whenever the legislature passes an act which transcends the limit of the police power, it is the duty of the judiciary to pronounce it invalid, and nullify the attempt to invade the people's rights.

People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; *Health Department of New York v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *Tiedeman*, Limitation of Police Powers, § 121d, p. 397, § 122, p. 423.

Messrs. C. C. Shirley and William L. Taylor argued the cause, and, with **Mr. Merrill Moores** filed a brief for defendant in error:

Natural gas, as a subject of property, is analogous to animals wild by nature, in that, while in its natural state and before it has been reduced to possession and control, it is the property of the state in its sovereign capacity.

Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 232, 5 L. R. A. 731, 18 Atl. 724; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 443, 31 N. E. 59; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 49 N. E. 14.

As a mineral *feræ naturæ*, the state may regulate its production and prohibit its waste, practically without limit; and in so doing the legislatures of the states are not restricted by the 14th Amendment to the Constitution of the United States, or by the constitutional guaranties in favor of private property, contained in the fundamental law of the states.

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Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 49 N. E. 14; *Westmoreland & C. Natural Gas Co. v. DeWitt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Gentile v. State*, 29 Ind. 415; *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098.

The right of legislatures of the states to regulate the use and prohibit the waste or destruction of property extends, not only to that class in which the state, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

Com. v. Alger, 7 Cush. 53; *Bancroft v. Cambridge*, 126 Mass. 438; *Com. v. Tewksbury*, 11 Met. 55; *State v. Schlemmer*, 42 La. Ann. 1166, 10 L. R. A. 135, 8 So. 307; *Cooley*, Const. Lim. *pp. 88-89; 18 Am. & Eng. Enc. Law, p. 745; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 142, 62 Am. Dec. 625; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 558, 12 L. R. A. 652, 28 N. E. 76; *State v. Peel Splint Coal Co.* 36 W. Va. 830, 17 L. R. A. 385, 15 S. E. 1000; *Health Department of New York v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Gray v. Connecticut*, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *United States v. North Bloomfield Gravel Min. Co.* 81 Fed. Rep. 243, 59 U. S. App. 377, 88 Fed. Rep. 664, 32 C. C. A. 84; *Hague v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714.

A natural-gas deposit is analogous to a surface stream or lake, any obstruction or diversion of which, even in the absence of statutory prohibition, is the subject of an action by anyone who is injured thereby.

Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa.

514, 84 Am. Dec. 511; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; 27 Am. & Eng. Enc. of Law, 424; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 186; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 566, 36 L. ed. 543, 12 Sup. Ct. Rep. 689; *United States v. North Bloomfield Gravel Min. Co.* 81 Fed. Rep. 243, 59 U. S. App. 377, 88 Fed. Rep. 664, 32 C. C. A. 84.

Extraordinary emergencies in many cases call for extraordinary remedies.

Columbian Athletic Club v. State ex rel. McMahan, 143 Ind. 102, 28 L. R. A. 727, 40 N. E. 914.

[200] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The assignments of error all in substance are resolvable into one proposition, which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim [201] becomes, *when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of anyone who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in everyone who has the right to bore from the surface and tap the reservoir involves in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to

be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to anyone. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the power in the state to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken *was [202] not property, and could not, therefore, be brought within the guaranties ordained for the protection of property.

The confusion of thought which permeates the entire argument is two fold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate; that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common-law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 60, 43 L. ed. 74, 18 Sup. Ct. Rep. 895. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in

which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs

[203]*under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character they are yet one, because they are unitedly held in the place of deposit. In *Brown v. Spilman*, 155 U. S. 665, 669, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v. Vandergrift*, 80 Pa. 142, 147; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724.

In *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, the supreme court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The court said:

"The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more *careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as

[204]177 U. S.

unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148, . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

In *Hague v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714, the question involved in the cause was the right of a land owner who had a gas well on his own land to complain of the escape of gas from a well situated on the land of another. After advertising to the rule embodied in the maxim, *Sic utere tuo ut alienum non lædas*, and after referring to the exceptional nature of the right to acquire ownership in natural gas and oil, it was decided that the complainant was not entitled to relief. The court said (157 Pa. 340, 341, 22 L. R. A. 147, 148, 27 Atl. 719, 720):

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. . . . In the disposition he may make of it [private property] he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, *subject to [205] these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute."

Again, in *Jones v. Forest Oil Co.* (January, 1900), 194 Pa. 379, 44 Atl. 1074, the same subject was once more considered. The complaint was filed by one land owner having a gas well on his land, to enjoin the owner of adjoining property from using in a gas well thereon a pump which was asserted to have such power that its operation would draw away the oil and gas from the well of the complainant to that of the defendant. Reviewing the cases to which we have just referred, and after quoting the language of Chief Justice Agnew, in *Brown v. Vandergrift*, 80 Pa. 142, 147, wherein, as we have

seen, oil and gas were by analogy classed as "minerals *feræ naturæ*," the court decided:

"From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp and brought to the surface."

Again applying the consequences of the doctrine just stated, the court declared:

"If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?"

A brief examination of the Indiana decisions on the subject of oil and natural gas, and the right to acquire ownership thereto will make it apparent that from the peculiar nature of these substances courts of that state have announced the same rule as that recognized by this court in *Brown v. Spilman*, 155 U. S. 665, 669, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, and which has been applied by the supreme court of the state of Pennsylvania. In *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778, a law of the state of Indiana which made it unlawful for any person to conduct natural gas beyond the state, and imposing penalties for so doing, was assailed as unconstitutional because repugnant to the commerce clause of the Constitution of the United States. The court held the statute to be void for the asserted

[206] cause. The "property in natural gas when reduced to actual possession was decided to be like any other property, and therefore the subject of commerce, and within the protection of the Constitution of the United States. In *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76, a law of that state which prohibited the transportation of natural gas through pipes at a greater pressure than 300 pounds per square inch, or otherwise than by its natural flow, was attacked, not only on the ground of its interference with the right of property which sprang into existence with the possession of the gas, but because also the act in question was a regulation of interstate commerce. Both contentions were decided to be without merit, substantially on the ground that the dangerous nature of the product, its susceptibility to explosion, and the consequent hazard to life and property which might arise from its movement through pipes, made the act of transmitting a fit subject for police regulation. In the course of its opinion the court said:

"The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil or rocks of the earth. It is as strikingly local as coal or petroleum; and yet no one has ever questioned the power of a state to enact laws governing mining. . . . It is so essentially local that only local regulation can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon

almost any other natural product in the world."

Again, said the court:

"The local and peculiar character of natural gas makes it almost impossible that it should be the subject of general national regulation. . . . Upon this point we affirm that natural gas is characteristically and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and peculiarities it is a proper subject for state legislation, and cannot, so far as regards local protection, be made the subject of general legislation by Congress."

In *People's Gas Co. v. Tyner*, 131 Ind. 277, 281, 16 L. R. A. 443, 31 N. E. 59, *the contro-[207] versy was this: A lotowner in a town filed a bill for an injunction to prevent a neighboring lotowner from using nitroglycerine "to shoot" a gas well on his property. The court refused the injunction. In the course of the opinion it was said:

"It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State v. Indiana & O. Oil, Gas, & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778. Water, petroleum, oil, and gas are generally classed by themselves as minerals possessing in some degree a kindred nature."

After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

"Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The case of *Brown v. Vandergrift*, 80 Pa. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals *feræ naturæ* were approved and adopted. In *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 49 N. E. 14, the constitutionality of a statute forbidding the burning of natural gas in flambeau lights was attacked because it was asserted to violate the Fourteenth Amendment to the Constitution of the United States and various provisions of the Constitution of the state of Indiana. The court held that the statute was not amenable to the assaults made upon it. In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the state to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudications, which we have cited, and those of the supreme court of the state of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein *until by the [208] actual drawing of the oil and gas to the sur-

face of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. And it was upon the opinion announced in that case that the court rested its decree in the case now under review.

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

[209] If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the "negative community;" in other words, are public things subject to the absolute control *of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is no identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of

someone else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the law-maker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute pro-

protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may divest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.

These considerations are sufficient to dispose of the case. But as there are several contentions which seem to have been considered, in argument, as resting on different premises, though such in reason is not the case, we briefly notice them separately: First. It is argued that as the gas, before being allowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used, the back pressure, on the best-known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really

go, not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the state we may not interfere.

In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority.

Affirmed.

OHIO OIL COMPANY, *Plff. in Err.*,
v.

STATE OF INDIANA for the Use of MADISON COUNTY.

(See S. C. Reporter's ed. 212, 213.)

[No. 83.]

See same case below, 150 Ind. 694, 49 N. E. 1107.

*Mr. Justice **White** delivered the opinion of the court:

The defendant below was sued for the sum of certain penalties imposed by law for allowing gas to escape into the atmospheric air from an oil and gas well. The statute by which the penalties were imposed is the one we have considered and passed on in an opinion this day delivered in *Ohio Oil Co. v. Indiana*, No. 84 of this term (177 U. S. 190, ante, 729, 20 Sup. Ct. Rep. 576). The defendant demurred to the complaint, and when the demurrer was overruled answered. The answer alleged that the statute imposing the penalties was repugnant to the Constitution of the United States, on the same grounds which we have to-day disposed of in the case referred to. From a judgment awarding the penalties, which was affirmed by the supreme court of the state of Indiana, this writ of error is prosecuted. For the reasons given in case No. 84, the judgment is affirmed.

OHIO OIL COMPANY, *Plff. in Err.*,
v.

STATE OF INDIANA for the Use of MADISON COUNTY.

(See S. C. Reporter's ed. 213.)

[No. 85.]

See same case below, 150 Ind. 698, 50 N. E. 1124.

*Mr. Justice **White** delivered the opinion of the court:

The supreme court of the state of Indiana
177 U. S.

affirmed a judgment of the trial court, awarding the sum of certain penalties incurred by violating a statute of the state of Indiana which came under our review in case No. 84 (177 U. S. 190, *ante*, 729, 20 Sup. Ct. Rep. 576), this day disposed of. The opinion in that case is conclusive of every question here arising, and for the reasons given in case No. 84, the judgment is affirmed.

[214]*ELIZABETH S. OVERBY *et al.*, Plffs. in Err.,
v.

FANNIE H. GORDON.

(See S. C. Reporter's ed. 214-229.)

Appeal—amount in dispute on will contest—adjudication of domicil in grant of administration—effect in other jurisdictions.

1. The amount of the estate which passes by a will, if that is held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the act of Congress of February 9, 1893 (27 Stat. at L. 436), requiring the matter in dispute on appeal from a judgment of the court of appeals of the District of Columbia to exceed the sum of \$5,000.
2. An adjudication of the fact of the domicil of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicil in a contest in a court outside the state, in proceedings for the administration of assets within that jurisdiction, where the adjudication was made without any contest *inter partes*, but in a proceeding *in rem* on an application under Ga. Code 1895, §§ 3393, 3394, under which the statutory notice is given by publication, and is not directed against named individuals, and does not have for its object the obtaining of specific relief against anyone, but is general, and for the purpose of warning all persons of the proposal to determine the question of appointing a legal representative.
3. A dismissal of proceedings for administration upon property in the District of Columbia, by a court of that District which has obtained jurisdiction, is not required by the act of Congress (24 Stat. at L. 431) authorizing administrators appointed in any state to maintain suit or recover claims in that District, where a party to the proceedings in the District while they are pending and undecided goes to a state and obtains letters of administration on an assertion that the decedent was domiciled in that state.

[No. 168.]

Argued March 5, 1900. Decided April 9, 1900.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming the probate of a will. *Affirmed.*

See same case below, 13 App. D. C. 392.

NOTE.—As to the amount necessary to give the United States Supreme Court jurisdiction—see note to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256.

177 U. S. U. S., Book 44.

Statement by Mr. Justice White:

The proceedings under review originated in the supreme court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, a copy of which is set out in the margin hereof, † and to obtain *a grant of let- [215] ters of administration thereon with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, state of Georgia, possessed of personal property of the value of about \$10,000 all of which, except an insignificant part thereof, was at the time in the District of Columbia. It was further averred that Haralson left surviving, as next of kin, three sisters, and four children of a deceased sister, and that all child next of kin, except the eldest sister (Elizabeth S. Overby), resided in the state of Georgia. Subsequently, on March 6, 1896, a caveat was filed, purporting in the body thereof to be on behalf of all the next of kin of the decedent other than Mrs. Gordon, but not signed by Mrs. Overby, contesting the validity of the alleged will and the claim that the deceased was at the time of his death a resident of the District of Columbia, and averring that at the time of his death Haralson was a citizen and resident of the state of Georgia.

On April 10, 1896, issues were framed upon the matters put at issue by the caveat, and were ordered to be tried by the court, sitting as a circuit court, and a jury. The questions presented for decision were as follows:

"1. Was the said deceased at the time of his death a resident of the District of Columbia?

"2. Was the said deceased at the time of his death a citizen and resident of the state of Georgia?

"3. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a resident of the District of Columbia?

"4. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a citizen and resident of the state of Georgia?

"5. At the time of his death did any con-

† Savannah, Ga., August 14, 1895.

It is my will and desire that after my death the interest on my bonds be for the sole use and benefit of my sister Mrs. Fannie Gordon, and that after her death the interest on my bonds be for the sole use and benefit of her daughter and my niece Carrie Lewis Gordon.

It is my will and desire that none of my securities be sold or the investment changed until they mature.

If Carrie Gordon should have no children at her death, these securities, with the residue of my estate, to be divided to my heirs at law.

Hugh Haralson.

Witness: Chas. A. Macatee.

[216]siderable part of "the personal estate of the said deceased lie within the District of Columbia?"

A trial of these issues, however, was not had until February, 1898. At said trial the caveators were represented by attorneys. From a bill of exceptions contained in the record before us it appears that Mrs. Gordon introduced evidence tending to show that both at the date of the testamentary paper in controversy and at the time of his death Haralson was a resident of the District of Columbia. Mrs. Gordon rested her case after the following admissions were made by counsel for caveators:

1. That at his death Haralson had on deposit in two banking institutions in the District of Columbia money and securities approximating \$9,000 in amount and value, which was the entire estate of the decedent, with the exception of about \$200 found outside of said District; and

2. That said assets within the District of Columbia had been removed therefrom by Logan Bleckley (one of the caveators), claiming to act as administrator of the estate of said decedent, under grant of letters issued in May, 1896, by a court of the state of Georgia, pursuant to proceedings initiated in said court on April 6, 1896.

It is recited in the bill of exceptions that "to sustain the issues on their part joined," the caveators offered in evidence a certified transcript of record from the De Kalb court of ordinary, De Kalb county, in the state of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb county, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal. The jury answered "Yes" to the first, third, and fifth questions submitted to them, and "No" to the second and fourth questions, thus sustaining the contentions of Mrs. Gordon. The answers were certified to the orphans' court, and thereupon an order was entered admitting the will "to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the court of appeals of the District of Columbia. That court affirmed the order of the lower court (Mr. Chief Justice Alvey dissenting), [13 App. D. C. 392], and a writ of error was then sued out from this court.

Mr. Samuel F. Phillips argued the cause and, with Mr. Frederic D. McKenney, filed a brief for plaintiff in error:

All of the next of kin but one caveator are residents of Georgia, and therefore are bound by its statutory provisions for constructive service of process. The judgment against

the caveatee in conformity with that statute and the findings must be deemed to have been rendered with jurisdiction as to her.

Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70; Wharton, Conflict of Laws, § 708; Story, Conflict of Laws, p. 809, Bigelow's note b; 2 Black, Judgments, § 836; *Biesenthall v. Williams*, 1 Duv. 329, 85 Am. Dec. 629.

The fact that the finding was made in a suit commenced pending the one in which such finding is invoked is no objection to its introduction in evidence.

1 Chitty, Pl. 689 note n; 2 Black, Judgments, § 791; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627.

The finding is not limited in its operation to the state of Georgia because the order to which this finding was incident was limited by the bounds of that state.

Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

A right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

A finding in a state probate court, upon an application for administration *inter partes*, will estop the same parties in a subsequent proceeding concerning the same general matter before a United States court.

Caujolle v. Ferrie, 13 Wall. 465, 20 L. ed. 507; *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186.

Mcssrs. Charles Cowles Tucker and Henry E. Davis argued the cause and filed a brief for defendant in error:

The interests of the several plaintiffs in error in the premises are separate, and the writ of error should be accordingly dismissed.

Henderson v. Wadsworth, 115 U. S. 264, 29 L. ed. 377, 6 Sup. Ct. Rep. 40; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419.

The supreme court of the District of Columbia holding a special term for orphans' court business, having first taken cognizance of this cause, had the exclusive right to entertain and exercise such jurisdiction to its final determination.

Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *State ex rel. Rhodes*, 48 La. Ann. 1363, 20 So. 894; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317; *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Merrill v. Lake*, 16 Ohio, 373, 47 Am. Dec. 377; *Booth v. Ableman*, 16 Wis. 460, 84 Am. Dec. 711; *Ex parte Bushnell*, 8 Ohio St. 599; *Clepper v. State*, 4 Tex. 242; Story, Equity, 64k; *Slyhoof v. Flitcraft*, 1 Ashm. 171; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Peck v.*

Jenness, 7 How. 612, 12 L. ed. 841; *Smith v. McIver*, 9 Wheat. 532, 6 L. ed. 152; *Peale v. Phipps*, 14 How. 368, 14 L. ed. 459; *Shelby v. Bacon*, 10 How. 56, 13 L. ed. 326.

Plaintiffs in error, having appeared in the cause and submitted to the jurisdiction of the court, perpetrated a fraud, both upon that court and the Georgia court, in subsequently raising in the latter court the precise question which was pending undetermined in the former, and thereby violated the rule of comity between judicial tribunals.

Barkdull v. Herwig, 30 La. Ann. 618; *Ex parte Bushnell*, 8 Ohio St. 599; *Taylor v. Fort Wayne*, 47 Ind. 274; *Powers v. Springfield*, 116 Mass. 84; *Peck v. Jenness*, 7 How. 624, 12 L. ed. 846; *Taylor v. Carryl*, 20 How. 596, 15 L. ed. 1032; *Riesner v. Gulf, C. & S. F. R. Co.* 89 Tex. 656, 33 L. R. A. 171, 36 S. W. 53; *Zimmerman v. Sorelle*, 49 U. S. App. 387, 80 Fed. Rep. 417, 25 C. C. A. 518; *Wackerle v. People ex rel. Wackerle*, 168 Ill. 250, 48 N. E. 123, Reversing 65 Ill. App. 423; *Jenkins v. Simms*, 45 Md. 532; *Brooks v. Delaplaine*, 1 Md. Ch. 351.

[217] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

Counsel for defendant in error urge in their brief an objection to the jurisdiction of this court, which we shall first consider and dispose of.

It is claimed that the writ of error should be dismissed "because the interests of the plaintiffs in error in respect of the judgment of the court of appeals of the District of Columbia, to which said writ of error was directed, are several, and the matter in dispute, exclusive of costs, as to no one of the said plaintiffs in error, exceeds the sum or value of \$5,000."

By act of February 9, 1893 (27 Stat. at L. 436, chap. 74), this court was authorized, among other things, to review a final judgment or decree of the court of appeals of the District of Columbia in any case where the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000. What, therefore, was the matter in dispute in this controversy? The answer manifestly is that it was whether an estate valued at more than \$9,000 should pass in the mode provided in an alleged last will and testament, which, in effect, excluded the next of kin of the decedent from the enjoyment of the principal

[218] of the *estate, or in the mode provided by the law of the domicile of the decedent for the transmission of an intestate estate. On the one hand was Mrs. Gordon, a sister of the deceased, and representing the interests under the alleged last will, asserting the validity of that document, and opposed to her were the plaintiffs in error, some of the next of kin of the deceased, interested in establishing his intestacy. Had the trial court admitted in evidence the transcript of record from the De Kalb court, and given it the conclusive force contended for, it would seem beyond question that as to those interested in upholding the validity of the alleged will, the value of the estate affected by 177 U. S.

that instrument would have been the matter in dispute. The matter in dispute necessarily must be the same as to the unsuccessful next of kin who are prosecuting this writ of error, and the amount of whose several interests in the estate of the decedent was not a question litigated below. The case is analogous in principle to that of *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93. In that case it was held that where the representatives of a deceased intestate recovered a judgment against an administrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common and undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum. In the case at bar, the contestants below sought, not an allotment to them of their interests, if any, in the estate, but an adjudication that the alleged last will and testament possessed no validity, and that contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the corpus of the estate, such title, if any, being derived from the law of the alleged domicile of the deceased. In this aspect, the amount of the estate was the matter in dispute. *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 51, 52, 36 L. ed. 66, 68, 12 Sup. Ct. Rep. 364, and cases there cited. There is therefore no merit in the objection to the exercise of jurisdiction.

Coming, then, to the merits of the controversy, we find presented for our consideration the single question, Was the grant of letters of administration by the court of ordinary of De Kalb *county, Georgia, com-[219] petent evidence upon the issue tried in the supreme court of the District of Columbia respecting the domicile of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:

At the time when the proceedings before the De Kalb court were instituted (April, 1896), the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but, upon the ground that the domicile of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo*; and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the supreme court of the District of Columbia initiated the proceedings before the De Kalb county court. It was upon the hearing had in the supreme court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb

county court was offered in evidence upon the issue in respect to the domicile of the decedent at his death.

The transcript of record exhibiting such adjudication consists of (1) An unverified petition of Logan Bleckley, as one of the next of kin and heirs at law of Hugh A. Haralson, asking that letters of administration be granted upon the estate of said deceased, upon the ground that he was a resident of the county of De Kalb at his death, and had died intestate, "leaving an estate, undivided, of real and personal property of the probable value of \$10,000;" (2) consents of certain of the next of kin to the appointment of Bleckley; (3) the order of appointment; and, (4) the oath of office of the administrator, in which is embodied an averment that the decedent died intestate, so far as affiant knew or believed.

[220] By § 3393 of the Georgia Code of 1895 an application *for grant of letters of administration was required to be made to the ordinary of the county of the residence of the deceased, if a resident of the state, and if not a resident, then in some county where the estate or a portion thereof was situated.

The next section, prescribing the notice to be given of an application, reads as follows:

"Sec. 3394 (2503). *The citation.* The ordinary must issue a citation, giving notice of the application to all concerned, in the gazette in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time the application should be heard or regularly continued."

The order of appointment is recited to have been made at the May term, 1896. It reads as follows:

"The petition of Logan Bleckley for letters of administration on the estate of Hugh A. Haralson, deceased, having been duly filed, and it appearing that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why said letters should not be granted; and it also appearing that said deceased died a resident of said county intestate, and that said applicant is a citizen of this state and lawfully qualified for said administration, and no objection being offered thereto,—it is therefore ordered by the court that the said Logan Bleckley be, and he is hereby, appointed administrator on the estate of said deceased, and that letters issue to him as such, upon his giving bond, with approved security, in the sum of twenty thousand dollars, and taking and subscribing the oath as provided by law."

As said by this court in *Veatch v. Rice*, 131 U. S. 293, 33 L. ed. 163, 9 Sup. Ct. Rep. 730, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, un-

doubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

*Jurisdiction is the right to hear and de-[221] cide, and it must be exercised, speaking in a broad sense, in one of two modes—either *in rem* or *in personam*.

It will be observed that the statutory notice above referred to was not required to be directed against named individuals, nor had it for its object the obtaining of specific relief against anyone, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the state of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the state of Georgia than against individuals who might be resident without the state. It results that the proceedings referred to were not intended to constitute, and did not amount to, an action *in personam*. This results from the fact that they were devoid of the elements essential to an action *in personam*; and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller v. Holly*, 176 U. S. 398, *ante*, 520, 20 Sup. Ct. Rep. 410. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

*From the record of the proceedings in-[222] stituted in the De Kalb county court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the

state of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the state of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the state. To quote the language of Mr. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch, 277, 2 L. ed. 619:

"It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*."

As said also in *Pennoyer v. Neff*, 95 U. S. 722, 24 L. ed. 568:

"Except as restrained and limited by . . . [the Constitution, the several states of the Union] possess and exercise the authority of independent states, and . . . [two well-established] principles of public law . . . [respecting the jurisdiction of an independent state over persons and property] are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

"The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. Laws*, chap. 2; Wheat. *Int. Law*, pt. 2, chap. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state [123] have no operation outside *of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity and incapable of binding such persons or property in any other tribunals.' Story, *Conf. Laws*, § 539."

Now, it is undeniable that the sovereignty of the state of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb county court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the state of Georgia. The decision in *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, 177 U. S.

it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one state should have in the courts of another state did not require that they should have any greater force and effect in another state than in the state where such records and judicial proceedings originated and were had; that the probate of a will in one state by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that state by a valid instrument of that kind, and the validity of the will in that state; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property, situated in another state, except as permitted by the laws of such other state.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb county court was not entitled to probative force in the courts of another state in a controversy over the administration of assets not within the territorial jurisdiction of the state of Georgia, *at the time the grant of letters was [224] made, finds support in the opinion delivered by Lord Blackburn in *Concha v. Concha*, L. R. 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann v. Frame*, 176 U. S. 350, ante, 500, 20 Sup. Ct. Rep. 446, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the *Concha Case* were as follows:

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicile of the decedent, in favor of the domicile being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the court of chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicile of her father, and her right to do so was finally adjudicated by the House of Lords. The executors, or those who had succeeded them in the management of the administration suit, attempted to avail of the decree of the probate court as conclusive upon the question of domicile, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res judicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicile, because the finding as to domicile was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could

not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion, Lord Blackburn (who perhaps had in mind doubts intimated in the court of appeals [L. R. 29 Ch. Div. p. 276] as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):

[225] *—"What he [the probate judge] did decide was (and to that extent I think the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Cresswell Cresswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying: 'I find him to be a domiciled Englishman, and, therefore, on that account grant probate,' would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so."

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564):

"It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicile to distribute the property) would have respected the decision of the judge

[226] ordinary, it establishing that this *will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the judge ordinary having erroneously found that the testator was domiciled in England

when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be."

In *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186, and a continuation of the same action under the title of *Kearney v. Denn*, 15 Wall. 51, 21 L. ed. 41, the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the orphans' court of Prince George's county, Maryland, and proposed to read therefrom the verdict of the jury and the order of the orphans' court thereon on certain issues sent from the orphans' court to the circuit court of said county. These issues had been framed upon a contest, initiated in the orphans' court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court—the trial judge in the action in ejectment having excluded the transcript referred to—held that the decree upon the contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that, as the orphans' court possessed no general jurisdiction over the real *estate of a decedent, its action upon the ap-[227] plication for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in no wise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle v. Ferrie*, 13 Wall. 465, 20 L. ed. 507. And see *Butterfield v. Smith*, 101 U. S. 570, 25 L. ed. 868.

We are of the opinion that the De Kalb county court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the state of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile,

by a mere finding of such fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters by the De Kalb county court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the supreme court of the District did not err in excluding the transcript in question whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicile had in the supreme court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been surreptitiously removed from the District of Columbia by one of the caveators. *The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress (24 Stat. at L. 431, chap. 281) which makes it lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a state and there make

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application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such state.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicile of the deceased (*Wilkins v. Ellett*, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641), this does not make it necessary for us to decide that the payment *or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicile of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or was not to be charged with notice of the then pending proceedings in the supreme court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the supreme court of Georgia in the case of *Thomas v. Morrisett*, 76 Ga. 384, and an analogous decision by the supreme court of errors of Connecticut, in *Willett's Appeal*, 50 Conn. 330, it would seem altogether probable that the De Kalb county court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Finding no error in the record, the judgment of the Court of Appeals of the District of Columbia is affirmed.

Mr. Justice **Brown** concurs in the result.

*LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,

v.

A. L. SCHMIDT, in His Own Behalf and as Trustee for the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company.

(See S. C. Reporter's ed. 230-239.)

Constitutional law—due process of law—bringing in defendant after judgment—order to show cause as due process of law.

NOTE.—As to what constitutes due process of law—see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865; *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655; *Re Gannon* (R. I.) 5 L. R. A. 359; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224; and *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304.

1. The rendition of a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered, but was brought in subsequent thereto by an order to show cause, and condemned to pay the judgment, was not in violation of the provision as to due process of law in U. S. Const. 14th Amend., where such party had voluntarily appeared in the cause and actively conducted the defense.
2. The mere fact that a proceeding to hold a party liable to a judgment is by rule to show cause does not conflict with due process under U. S. Const. 14th Amend., for forms of procedure in the state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.
3. One who actually appeared and made a defense in an action to which he was not technically a party cannot contend that, when he was brought in by rule to show cause after the judgment was rendered, and was condemned to pay it, he was denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain.

[No. 178.]

Argued March 12, 13, 1900. Decided April 9, 1900.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decision affirming a judgment against one who was not originally a party to the cause, but was brought in by order to show cause and condemned to pay the judgment. *Affirmed.*

See same case below, 99 Ky. 148, 35 S. W. 135, 36 S. W. 168.

Statement by Mr. Justice **White**:

The three corporations directly or indirectly involved in this controversy are the Northern Division of the Cumberland & Ohio Railroad Company, the Louisville, Cincinnati, & Lexington Railway Company, and the Louisville & Nashville Railroad Company. In order to abbreviate we shall refer to them respectively as the Cumberland & Ohio, the Cincinnati & Lexington, and the Louisville & Nashville.

On July 2, 1879, the Cumberland & Ohio mortgaged its road to secure its certain negotiable bonds.

On July 28, 1879, the Cumberland & Ohio leased its road for thirty years to the Cincinnati & Lexington. The lease provided that if the earnings of the Cumberland & Ohio proved inadequate to pay the interest on the bonds secured by the mortgage above referred to, the lessee, the Cincinnati & Lexington, *would "supply the deficiency so far as it may be done by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line." The lease provided that the lessee, the Cincinnati & Lexington, should not assign the contract without the consent of the lessor, the Cumberland & Ohio. Contemporaneously with the execution of the lease, and in order to secure the carrying out of the stipulation providing for the ap-

plication of certain stated earnings of the Cincinnati & Lexington to the payment of the interest on the bonds of the Cumberland & Ohio, the former corporation executed a mortgage in favor of the bondholders of the Cumberland & Ohio, hypothecating the net earnings on the Cincinnati & Lexington arising from business coming from the leased line. Although the Cumberland & Ohio did not abandon its corporate life, and preserved its formal existence, all its railroad and appurtenances as a result of the lease passed from its own to the control of the Cincinnati & Lexington.

In November, 1881, the Cincinnati & Lexington conveyed all its property to the Louisville & Nashville, and made to the latter an assignment of the lease of the property of the Cumberland & Ohio. Despite the fact that the assignment of the lease was not approved by the original lessor, the Cumberland & Ohio, as provided in the lease, the Louisville & Nashville took control of both the roads of the Cincinnati & Lexington and Cumberland & Ohio, and operated the same, reaping all the revenues of every kind arising therefrom. In 1885, default having supervened in the payment of the interest on the bonds of the Cumberland & Ohio, issued and secured as above stated, the trustee under the mortgage commenced proceedings against the Cincinnati & Lexington to enforce the mortgage on net earnings derived from business of the Cumberland & Ohio. It is not denied that at the time the action was commenced the fact of the transfer of the property of the Cincinnati & Lexington and the assignment of the lease of the Cumberland & Ohio to the Louisville & Nashville was known to the trustee. However, the Cincinnati & Lexington was the only party made defendant. The relief *sought was a discovery of [232] the amount of net earnings derived from business coming from the Cumberland & Ohio, and a decree for the amount, when ascertained, for the benefit of the mortgage bondholders. A most protracted and hotly contested lawsuit ensued. The question of earnings coming to the Cincinnati & Lexington from business over the Cumberland & Ohio was thoroughly explored by reports, expert examination of books, testimony, etc., resulting in what is denominated by counsel for the plaintiff in error in their brief as a "wilderness of figures." At last a final decree was entered fixing the earnings which under the contract were attributable to the mortgage creditors of the Cumberland & Ohio, at the sum of \$53,565.62, which the defendant was ordered to pay into court, with interest, by a day stated. The sum not having been paid, a rule was taken on the defendant to compel performance, and in response it was answered:

"That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges, and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets, or funds of any kind

with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

The sale referred to in this answer being that which had been made by the Cincinnati & Lexington of all its property, including the assignment of the lease held by it from the Cumberland & Ohio to the Louisville & Nashville. In reply to a rule taken on the defendant to report the amount of net earnings which had accrued subsequent to the period embraced by the decree for \$53,565.62, the defendant said:

"States and shows to this court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

[233] *Thereupon the plaintiff sought leave by an amended and supplemental petition to make the Louisville & Nashville a party defendant to the cause. Among others the following averments were contained in the petition:

"Plaintiffs state that prior thereto the said Louisville & Nashville Railroad Company had purchased and acquired, and at the time of said conveyance held, the capital stock of the said Louisville, Cincinnati, & Lexington Railway Company, and, as such stockholder, took and appropriated, and has ever since enjoyed, the whole purchase price of the Louisville, Cincinnati, & Lexington Railway Company and all its said properties.

"Plaintiffs state that after the execution of said deed of November 1, 1881, said Louisville & Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati, & Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern Division of the Cumberland & Ohio Railroad Company aforesaid, and began to operate, and has ever since operated, said railroads and properties, and taken and appropriated to its own use the earnings thereof.

"Plaintiffs state that at all times since November 1, 1881, said Louisville & Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern Division of the Cumberland & Ohio Railroad and the said Louisville, Cincinnati, & Lexington Railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and judgment of the court of appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati, & Lexington Railway Company.

"Plaintiffs further state that the Louis-

ville & Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati, & Lexington Railroad Company actually knew all the provisions of the *lease, mortgages, and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages, and contracts, from the time of its said purchase until the 1st day of April, 1883, and knew at all times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati, & Lexington Railway Company and of the Northern Division of the Cumberland & Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati, & Lexington Railway Company and the Northern Division of the Cumberland & Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati, & Lexington Railway Company, and filed all other papers which were filed herein on behalf of the defense, and itself employed counsel in this case to make defense in the name of the Louisville, Cincinnati, & Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defense of this action, and has been in court defending this action, and has controlled the defense thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of —, 1885, and from the time the said Louisville & Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of —, 1886."

The leave to file was denied on the ground that it was too late to do so after judgment. This order, refusing to allow the amendment, was affirmed by the court of appeals of the state of Kentucky. That court, however, in its opinion intimated that the amendment was not necessary if the averments of the supplemental and amended petition were true, and that under the facts the Louisville & Nashville might be proceeded against by rule to show cause. 99 Ky. 148, 35 S. W. 135, 36 S. W. 168. Following the path thus pointed out by the court of appeals, a rule in the lower *court was applied for to compel the Louisville & Nashville to pay the amount of the judgment. The court considered the suggestion which had been made, in the opinion of the court of appeals, as not binding on it, and hence declined to allow the rule on the ground that the Louisville & Nashville, not having been named as a defendant in the proceeding, could not be by rule condemned to pay the judgment. The court of appeals reversed the order of the trial court, and directed the rule to issue as prayed for. The court in effect held that as the affidavit by which the rule was supported in substance

charged that the Louisville & Nashville prior to and during the entire suit had operated the roads from which the revenues accrued which were in controversy, and that that corporation had in substance volunteered in the cause to defend the same in the name of the technical defendant; had carried on the defense through its own counsel; had paid all the expenses of the litigation, the officers of the corporation which was technically a defendant being the officers of the Louisville & Nashville,—therefore the Louisville & Nashville had had under the laws of Kentucky due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defense, and could hence be condemned by rule to pay the judgment. The trial court thereupon entertained and issued the rule, which was served on the Louisville & Nashville. That corporation, for answer to the rule, said, among other things:

First. "That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent."

Second. "There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defenses against the alleged claim of the plaintiff, and to require it now to pay into court upon this rule the amount stated in the rule, or any other amount, would be to deprive this [236] respondent of its property *without due process of law, contrary to the Constitution of the United States in such cases made and provided."

The answer then pleaded a set-off to the amount of \$16,524.37, which it was claimed the Louisville & Nashville should be allowed if it was held bound to pay the judgment. The conclusion of the answer was as follows: "Wherefore, having fully responded, this respondent prays that the rule herein be discharged." The court, having expressed in a careful opinion its view that the Louisville & Nashville could not be condemned, by rule, because it had not been a technical party to the record, nevertheless, considering itself bound by the action of the court of appeals, made the rule absolute, and entered a decree against the Louisville & Nashville Railroad, condemning it to pay the judgment, subject to the set-off which had been pleaded in the answer to the rule, and this judgment was affirmed by the court of appeals of the state of Kentucky as a delay case. By an allowance of a writ of error the cause is now here for review.

Messrs. Helm Bruce and James P. Helm argued the cause and, with *Mr. H. W. Bruce*, filed a brief for plaintiff in error.

Messrs. John G. Simrall and Edmund F. Trabue argued the cause and, with *Messrs. Temple Bodley, John C. Doolan,*

James S. Pirtle, and Benjamin F. Washer filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **White**, after making the [236] foregoing statement, delivered the opinion of the court:

It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

*The claim of the plaintiff in error (the [237] Louisville & Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defense. In support of the second contention various provisions of the Kentucky law have been referred to in the argument, from which it is deduced that the Louisville & Nashville would have been without right in the proceeding brought, not against it, but against the Cincinnati & Lexington, to make defenses which may have appertained and been relevant to the Louisville & Nashville, and might not have related to the Cincinnati & Lexington, the party defendant on the record. But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville & Nashville became voluntarily, in the name of the Cincinnati & Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. The conclusions of fact found by the court of last resort of Kentucky are not subject to re-examination by this court. Clearly, also, the inevitable result of the conclusion of the court of appeals of Kentucky is that it was the duty of the Louisville & Nashville, having come in voluntarily in the cause to defend its interest, under the name of the technical defendant, if it had defenses which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville & Nashville to have followed it. Accepting, as we do, the interpretation placed by the courts of last resort of Kentucky on the law of that state, the contention of the plaintiff in error is at once demon-

strated to be without merit. Besides the conclusiveness of what we have just said, there is another view which is equally decisive. The record shows no offer of any defense whatever, by *the Louisville & Nashville, which was refused by the courts below. On the contrary, every defense made is shown to have been entertained, fully considered, and to have been ultimately decided. The argument then reduces itself to this: That one who has voluntarily appeared in a cause and actively conducted the defense is to be held to have been denied, by the courts of the state, the right to make a defense which was never presented. Moreover, even if we put out of view altogether all the proceedings had in the original cause during the many years when the suit was pending, and confine our attention solely to the events which took place after the application for the rule to show cause, on the Louisville & Nashville, the same conclusion is rendered necessary. It is undoubted that the Louisville & Nashville was made a party defendant to the rule in the most technical sense, and was actually served. It made answer and asserted its set-off. The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the state courts are not controlled by the Fourteenth Amendment, provided the fundamental rights secured by the amendment are not denied. But, it is argued, whilst it is true the effort by rule to enforce responsibility for the judgment did not violate the Fourteenth Amendment, and service of the rule was adequate notice, yet no opportunity to defend was afforded, because all right to defend had been cut off by the previous judgment. In effect it is asserted the rule summoned the corporation to show cause why it should not pay a judgment to which, under the previous decree, there was no right on its part to make any defense whatever. In other words, it is said the right to proceed by rule was upheld by the Kentucky court because the Louisville & Nashville was bound by the judgment and therefore the rule rested on an assumption which precluded the setting up of any defense to it. But the answer to this argument is plain. Although the Louisville & Nashville appeared in response to the rule, pleaded its set-off and declared that its answer constituted a full response, no defense personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. The argument, therefore, *asks us to say that the Louisville & Nashville in the proceeding in which it was duly served, and to which it responded, and as to which it had its day in court, was deprived of defenses which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defenses existed which were not made, and to decide that proceedings in a state court have denied due process of law because defenses were denied, when they

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were not presented. And especially must that be so where the court of last resort of the state, on review of all the proceedings, has held that full opportunity to make every defense was afforded. True it is that in *Rees v. Watertown*, 19 Wall. 107, 123, 22 L. ed. 72, 77, it was said: "Whether in fact the individual has a defense to the debt, or by way of exemption, or is without defense, is not important. To assume that he has none, and therefore that he is entitled to no day in court, is to assume against him the very point he may wish to contest." But this truism was stated with reference to a case where it was argued that a condemnation without notice could be justified on the assumption that if notice had been given no defense could have been made. Manifestly, the principle can have no application to a case where there was notice, and the presumption which we are asked to invoke is that although no defenses were pressed they may have possibly existed.

Affirmed.

*THE ALBERT DUMOIS.

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(See S. C. Reporter's ed. 240-259.)

Libel for collision—rules of navigation—rules in force on Mississippi below New Orleans—vessels meeting end on or nearly so—mistake in turning to starboard—failure to stop and reverse—faulty construction of vessel—running short-handed and without lookout—evidence of value—interest on valuation—division of damages—balance to vessel totally lost—deduction for damages to intervening claimants—lien for loss of life.

1. The navigation of the Mississippi below New Orleans was subject in January, 1897, to the original rules and regulations of the act of Congress of 1864, reproduced in U. S. Rev. Stat. § 4233.
2. The supervising inspectors' rules applicable to the Mississippi below New Orleans are those for the Atlantic and Pacific inland wa-

NOTE.—As to collision rules—see notes to *Williamson v. Barrett*, 14 L. ed. U. S. 68; *The Abbotsford v. Johnson*, 25 L. ed. U. S. 168; *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

As to rules of navigation—see note to *The Umbra*, 41 L. ed. U. S. 1053.

As to measure of damages for collision—see notes to *Smith v. Condry*, 11 L. ed. U. S. 35; *Williamson v. Barrett*, 14 L. ed. U. S. 68.

As to limited liability acts—see note to *Lawton v. Comer* (D. C. S. D. Ga.) 7 L. R. A. 155.

As to conclusiveness of testimony of experts—see note to *Hull v. St. Louis* (Mo.) 42 L. R. A. 753.

As to interest on sum allowed as damages—see *Wilson v. Troy* (N. Y.) 18 L. R. A. 449, and note.

Right to interest upon damages sustained in collision.

The owner of a ship which causes a collision without his special fault is liable for interest from the time of the collision, beyond the value of his ship, appurtenances, and freight, to which his liability is limited by Stat. 53 Geo.

ters, notwithstanding the title thereof excepts "rivers emptying into the Gulf of Mexico," since rule 9 of those pilot rules and rule 14 of the pilot rules for western rivers both contain a clause stating that "the line dividing jurisdiction between the pilot rules on western rivers and harbors, rivers, and inland waters at New Orleans shall be the lower limits of the city," and it cannot be supposed that the river below that point was intended to be exempt altogether from the jurisdiction of the supervising inspectors.

8. A vessel coming up a river at a speed of about 9 miles an hour and from 200 to 500 feet from the east bank, which sees directly ahead and about half a mile away the white and colored lights of a descending steamer, cannot be justified for violating rule 18 by putting the wheel to starboard and signaling an intent to pass starboard to starboard, by reason of her own proximity to the east bank and a cluster of white lights belonging to a tug and two luggers inside of the approaching vessel, and in fact moored to the east bank, on the theory that this was a special circumstance within the meaning of rule 24, rendering a departure from rule 18 necessary to avoid immediate danger, since, if there was any danger at all, it was not an immediate one or one which could not have been provided against by easing her engine and slackening her speed.
4. A vessel cannot be excused from stopping and reversing when required by the rules of navigation, merely because her own construction is so faulty that she cannot stop in time to prevent collision.

5. The fact that a vessel was short-handed and running without a proper lookout, though not decisive of a fault contributing to a collision, may be taken into consideration as bearing upon the probabilities of the case and raising a presumption against her.

6. A steamer which fails to stop and reverse when meeting another steamer end on or nearly so, which commits the fault of starboarding, is guilty of a contributory fault for failing to observe rule 21, which requires her to stop when risk of collision is involved as well as the 3d rule of the supervising inspectors to the same effect.

7. The fact that the owner of a vessel had at the time of a collision concluded a sale of one half the vessel for a certain sum is better evidence of her actual value than the conflicting opinions of experts.

8. The allowance of interest in admiralty cases is discretionary, and not reviewable on appeal by the Supreme Court of the United States, except in a very clear case.

9. The amount awarded to the owner of a vessel which was totally lost in a collision, when both vessels were in fault and proceedings had been taken by the owners of both for limitation of liability, is subject to a deduction of one half of the amount payable for the loss of the life of passengers in the collision, although no recovery could have been had on libels filed against such owner because of the total loss of his vessel and her freight and the extinguishment of his personal liability.

10. A lien or privilege upon a vessel for the loss of life of a passenger is not created by

III. chap. 159, § 1. *The Dundee*, 2 Hagg. Adm. 137.

In *African S. S. Co. v. Swanzy*, 25 L. J. Ch. N. S. 870, it was held that interest could not be allowed on the limited liability of the owners as fixed by Stat. 17 & 18 Vict. chap. 104, § 514, as the act contained no provision therefor.

But in *Nixon v. Roberts*, 4 L. T. N. S. 679, 30 L. J. Ch. N. S. 844, it was held that interest should be allowed under this act from the time when freight would become due if any were earned, and, if not, from the time of the collision.

And interest was allowed under the same act as amended by Stat. 25 & 26 Vict. chap. 63, § 54, limiting the liability of the owner to £8 per ton of the ship, goods, and merchandise. *The Northumbria*, 21 L. T. N. S. 681; *Straker v. Hartland*, 11 L. T. N. S. 622, 34 L. J. Ch. N. S. 122; *Smith v. Kirby*, L. R. 1 Q. B. Div. 131.

It should be allowed if payment is delayed. *The Amalia*, 34 L. J. Adm. N. S. 21, 8 L. T. N. S. 805.

Interest is allowed in cases tried in the admiralty division, or removed there by consent from the Queen's bench division, on the value of the property lost by reason of a collision or loss of a vessel at sea. *The Baron Aberdare*, 59 L. T. N. S. 251, 36 Week. Rep. 616.

Interest is allowable from the time of collision on one half the damages for which a vessel is liable under an agreement of compromise made eleven years after. *The Kong Magnus* [1891] Prob. 223.

While interest might properly be allowed on the value of a pilot boat lost by reason of a collision, it cannot be awarded against the stipulators beyond the sum in which they have bound themselves. *The Wanata*, 95 U. S. 600, *sub nom. The Wanata v. Avery*, 24 L. ed. 461.

In *The Manitoba*, 122 U. S. 97, *sub nom. Beatty v. Hanna*, 30 L. ed. 1095, 7 Sup. Ct. Rep.

1158, the value of a vessel lost by a collision was more than the bond given, and interest was not allowed on that account.

Interest on the value of a vessel destroyed in a collision cannot be allowed against stipulators who have bound themselves only in a sum equal to the value of the vessel. *The Ann Caroline*, 2 Wall. 538, *sub nom. The Ann Caroline v. Wells*, 17 L. ed. 833.

Interest may be allowed or not, in the discretion of the court, on the value of strippings saved from a ship which sinks after causing a collision. *The Scotland*, 118 U. S. 507, *sub. nom. Dyer v. National Steam Nav. Co.* 30 L. ed. 153, 6 Sup. Ct. Rep. 1174.

In *the Vaughan & Telegraph*, 14 Wall. 258, *sub nom. The Telegraph v. Gordon*, 20 L. ed. 807, interest was allowed without question on the value of the cargo of a canal boat sunk in a collision through the negligence of the steamer conducting it, with another steamer meeting it.

Interest was held to be allowable in *The Joshua Barker*, Abb. Adm. 215, on the value of a cargo of flour which, after being sunk at the wharf, was raised and sold without communication with the owners, though they were easily accessible.

And interest was allowed on the value of a cargo of barley lost by collision with the canal boat carrying it on the Hudson river. *The Mary J. Vaughan*, 2 Ben. 47, Fed. Cas. No. 9,217.

In *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68, the jury were instructed to allow as damages to a steamboat from a collision, the use of her during the time necessary to make repairs, and were told that they were not bound to give interest, but were to give such sum in damages as they should deem just and equitable. On appeal to the Supreme Court, it was held that nothing could be allowed for loss of use of the vessel, but that full damages for the

La. Civ. Code, art. 3237, subd. 12, providing a privilege for loss or damage caused to person or property by negligent management of the vessel, as this was not intended to apply to actions for damages resulting in death.

11. Valid claims may be asserted under a limited-liability act for damages on account of the loss of life of passengers in a collision, although there may be no lien or privilege upon the vessel given therefor by local law.

[Nos. 139, 272.]

Argued January 31, 1900. Decided April 9, 1900.

IN WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision reversing a decree of the District Court in case of a collision between the *Argo*, owned by Oscar M. Springer, and the *Albert Dumois*, owned by Anders Jakobsen in which Marie B. Bourgeois de Blesine and Genevieve Kepingler Hester claimed damages for the death of passengers on the *Argo*. *Affirmed*.

See same case below, 59 U. S. App. 108, *sub nom. Jakobsen v. Springer*, 87 Fed. Rep. 948, 31 C. C. A. 315.

Statement by Mr. Justice **Brown**:

241] *This was a libel in admiralty filed by Os-

car M. Springer, owner of the steamer *Argo*, a small vessel of 48 tons burthen, against the steamship *Albert Dumois*, to recover damages sustained by a collision between these two vessels in the early morning of January 28, 1897, in the Mississippi river, about 80 miles below the city of New Orleans. An intervening libel was also filed against the *Dumois* by the crew of the *Argo*, to recover the value of their clothing lost by the collision.

Upon the seizure of the *Dumois*, one Anders Jakobsen, of Christiana, Norway, appeared as claimant and owner, and on February 3, 1897, filed a petition for a limitation of liability, in which he also denied any negligence on behalf of the *Dumois*. Upon the same day, Marie B. Bourgeois de Blesine, mother of Faure de Blesine, a passenger on board the *Argo*, filed a libel *in personam* against Jakobsen, claiming damages for the death of her son through the negligence of the *Dumois*. Her suit was thereupon consolidated with that of Springer, and treated as a petition against the stipulation given for the release of the steamer under the proceedings for a limitation of liability. Upon the appraisalment of the *Albert Dumois* at the sum of \$30,000, and pending freight at the sum of \$1,333.75, and the filing of a stipulation to pay these sums into court, an or-

injury at the time and place of its occurrence, with legal interest, was the proper measure of damages.

In *The North Star*, 44 Fed. Rep. 492, the allowance of interest in case of a collision was held to be in the discretion of the court, and its allowance would not be disturbed where both parties were nearly equally in fault, and there was manifest discrepancy in the testimony of the party against whom it is awarded.

But on appeal the appellate court, differing with the conclusions of the district judge, which had induced him not to disturb the report of the commission upon that point, modified the decree by excluding the interest there allowed. *The North Star*, 22 U. S. App. 242, 62 Fed. Rep. 71, 10 C. C. A. 262. The court said: "It is well settled in this country that the question whether interest shall be allowed by the court of first instance or by the appellate court in admiralty, on the amount of damages awarded in a collision case, is one in the discretion of the court."

And while interest on the cost of repairs from the collision is usually allowed, it is a matter of discretion; and where the vessel is materially improved, and there is doubt whether the entire bill for repairs should be allowed, it will be refused. *The Alaska*, 44 Fed. Rep. 498.

In *Whitehall Transp. Co. v. New Jersey S. B. Co.* 51 N. Y. 369, the owners of a canal boat injured by a collision were held to be entitled to interest on the cost of repairs.

And in *Mailler v. Express Propeller Line*, 61 N. Y. 312, interest was allowed on the cost of repairs and the rental value of a sloop injured by a collision.

Interest on sums actually paid for materials and repairs prior to the filing of the libel is allowable as part of the damages for collision. *The Natchez*, 41 U. S. App. 708, 78 Fed. Rep. 183, 24 C. C. A. 49.

Interest may be allowed on the value of a sloop and its cargo, sunk by a steamer's colliding with it while drifting with the tide without

sufficient wind to give it steerage way. *Parrott v. Knickerbocker Ice Co.* 46 N. Y. 361.

But interest will not be allowed on an award of damages in a collision case, to a steamer guilty of gross recklessness in porting near the point of meeting another steamer in a fog and crossing her bow, where the latter is guilty only of excessive speed and failure to stop at the proper time. *The North Star*, 22 U. S. App. 242, 62 Fed. Rep. 71, 10 C. C. A. 262.

The jury may allow interest on the damage done to a vessel by a collision. *Fitch v. Livingston*, 4 Sandf. 492.

Interest is properly allowed on the damages sustained by a vessel in a collision. *The Bulgaria*, 83 Fed. Rep. 312.

Interest in the nature of and intended as damages may be allowed upon the sum awarded as damages for detention, which were specifically and sufficiently proved. *The Natchez*, 41 U. S. App. 708, 78 Fed. Rep. 183, 24 C. C. A. 49.

Interest on the value of the injury received by a vessel in a collision, from the time when it was inflicted, may be recovered as necessary to make full compensation, where payment has been withheld. *The Illinois*, 84 Fed. Rep. 697.

But in *Ormsby v. Johnson*, 1 B. Mon. 80, it was held that interest could not be allowed on the damage done to a flat boat and its cargo, run into and sunk by a steamboat.

In *Fowler v. Davenport*, 21 Tex. 626, it was held to be erroneous to allow interest on the value of cotton intrusted to a boat for transportation, which was damaged by reason of the boat's being run into by a raft.

Interest from the time of the collision cannot be added to the appraised value of the vessel at fault, in proceedings to limit the liability of the owners; but the owners are entitled to a discharge on surrendering the vessel or paying her value into court, although they should provide for the payment of interest on her value until such time as the money is paid if they prefer to give bond instead of making present payment. *The Battier*, 58 Fed. Rep. 704.

der was issued enjoining further proceedings against the steamship and her owner, and directing all persons claiming damages by reason of the collision to appear before a commissioner and make proof thereof.

[242] On May 5, 1897, Genevieve Keplinger Hester, widow of Harrison P. Hester, a passenger on the *Argo*, and natural tutrix of his minor child, filed an intervening petition under the limited liability proceedings, claiming damages for the death of her husband, and alleging that the same was caused solely through the fault of the *Dumois*.

Thereafter, on December 16, 1897, Springer, as the owner of the *Argo*, filed a surrender of his vessel and pending charter money to the intervening claimants against the *Dumois*, and prayed for relief under the limited liability act.

The case of the *Argo* as set forth in her libel and answer to the petition of the owner of the *Dumois* for a limitation of liability was this: On January 27, 1897, at 7 o'clock in the evening, the *Argo* started from the port of New Orleans on a trip to the jetties at the mouth of the Mississippi river. Upon the following morning, about 12.40 A. M., while proceeding down the middle of the river, at or near Oyster Bayou, the master noticed the white and red lights of a steamer coming up stream about 500 feet from the east bank, and immediately gave a signal of one blast of his whistle, signifying that he would turn to starboard and pass on the port side of the approaching steamer, to which the latter responded with two blasts of her whistle, and began crossing the river, shutting out her red and showing her green light. Thereupon the *Argo* promptly responded with one blast of her whistle, still claiming her right to pass on the port side of the approaching steamer, and put her helm hard-a-port to clear the *Dumois*, as she had the right to do, and as in the judgment of her master it was best for her to do. Whereupon the *Dumois* continued her course across the river and blew a danger signal of three blasts of her whistle, but too late to avoid a collision, the *Argo* striking the *Dumois* while she was crossing the *Argo*'s bow about 8 feet abaft her stem, causing the *Argo* to fill with water and sink about four minutes thereafter, whereby she was totally lost and two of her passengers were drowned.

[243] The case of the *Dumois* was that, while proceeding up the Mississippi river about half-past twelve at night, on a voyage from Port Limon, Costa Rica, to New Orleans, with her full complement of officers and seamen, she had reached a point in the Mississippi river about 80 miles below the city of New Orleans, and was proceeding up the river as close to the east bank as it was safe for her to do, at a moderate speed of about 9

pass the *Argo* to the left, starboard to starboard, and at the same time her wheel was put to starboard. In answer, the *Argo* wrongfully responded to the signal with one blast of her whistle. Thereupon the pilot of the *Dumois*, fearing that the *Argo* had misunderstood his signal, immediately repeated it, and at once caused three or more short blasts of her whistle to be given in quick succession, to indicate danger, and at the same time stopped and backed her engines; but the *Argo* neglected to stop and back, and kept her course and speed until her pilot saw the green or starboard light of the *Dumois*, when he attempted to pass her by putting his wheel hard-a-port, which brought the *Argo* in collision with the steamship, striking her at right angles on the starboard side, about 10 feet abaft the stem, from which collision the *Argo* sank and became a total loss.

Upon a hearing upon pleadings and proofs the district court announced in an oral opinion its conclusion that the collision was caused solely by the fault of the *Dumois*, and awarded the libellant Springer \$11,000 for the loss of the *Argo*; to Mrs. Hester, \$5,000; to Mrs. de Blesine, \$2,500, and to the crew of the *Argo* the respective sums claimed by them.

From this decree the owner of the *Dumois* appealed to the circuit court of appeals, assigning in substance as error that the collision was caused through the sole fault of the *Argo*, and that the amount awarded was excessive. An appeal was also taken by Springer, claiming that the amount awarded him as the value of the *Argo* was too small; but no appeal was taken by the intervening libellants.

The circuit court of appeals reversed the decree of the district court, holding that both vessels were in fault for the collision, and that as between the owners of the steamships the damages should be divided. It further increased the allowance of damages to Springer to \$15,000 and assessed those sustained by the *Dumois* at \$185. It was [244] further decreed that Springer recover \$7,500 of the *Dumois* and her bondsmen, subject to a credit of one half of the damages of the *Dumois*, and one half of the amounts decreed in favor of Mrs. Hester and Mrs. de Blesine, leaving a balance due upon this decree in favor of Springer of \$3,657.50, for which he was awarded execution. 59 U. S. App. 108, *sub nom. Jakobsen v. Springer*, 87 Fed. Rep. 948, 31 C. C. A. 315. Both parties filed petitions for rehearing, which were denied.

Whereupon both parties applied for and were granted writs of certiorari from this court.

Mr. Richard De Gray argued the cause and filed a brief for Springer:

No contribution can be claimed as between joint wrongdoers.

Addison, Torts, 1891 ed. p. 21.

Actual perceived danger alone demands the duty of slackening speed.

The Free State, 91 U. S. 200, *sub nom. Ludwig v. The Free State*, 23 L. ed. 299.

The burden of proof lies on the party al-

leging that he is justified in a departure from the rules of navigation in order to avoid immediate danger.

The Agra, L. R. 1 P. C. 501; *The General Lee*, Ir. Rep. 3 Eq. 155.

When a vessel has committed a positive breach of statute she must show, not only that probably her fault did not contribute to the disaster, but that it could not have done so.

The Pennsylvania, 19 Wall. 126, *sub nom. The Pennsylvania v. Troop*, 22 L. ed. 148; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934; *The Britannia*, 153 U. S. 143, *sub nom. The Britannia v. Cleugh*, 38 L. ed. 665, 14 Sup. Ct. Rep. 795; *The Victory & The Plymothian*, 168 U. S. 428, 42 L. ed. 530, 18 Sup. Ct. Rep. 149; *The Maggie J. Smith*, 123 U. S. 349, *sub nom. The Maggie J. Smith v. Walker*, 31 L. ed. 175, 8 Sup. Ct. Rep. 159.

Mr. Timothy E. Tarsney also argued the cause and filed a brief for Springer:

There is no lien arising from death caused by negligence, which can be asserted under the general admiralty law.

The Harrisburg, 119 U. S. 199, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

No lien or privilege upon the offending thing, which is necessary to give a court of admiralty jurisdiction to proceed *in rem*, is created by the Louisiana statute providing for survival of the right of action for an act of negligence in case of death.

The Corsair, 145 U. S. 335, *sub nom. Barton v. Brown*, 36 L. ed. 727, 12 Sup. Ct. Rep. 949.

The owners of both steamers having brought themselves within the limitations of the liability act, no sum can be awarded beyond the value of the vessel in the condition she is in after the collision.

Place v. Norwich & N. Y. Transp. Co. 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The Great Western*, 118 U. S. 520, *sub nom. Thommessen v. Whitwill*, 30 L. ed. 156, 6 Sup. Ct. Rep. 1172.

The rule is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms, and pass each other on the larboard side.

New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co. 22 How. 461, 16 L. ed. 397; *The Niagara*, 3 Blatchf. 37, Fed. Cas. No. 10,220; *Barrett v. Williamson*, 4 McLean, 589, Fed. Cas. No. 1,051; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68.

It is not enough for the party who departs from this rule to show that they would have gone clear if each had kept its course. He must also show that the other party ought to have perceived there was no probable chance of a collision by so doing.

Wheeler v. The Eastern State, 2 Curt. C. C. 141, Fed. Cas. No. 17,494.

Where one of two approaching steamers observes the rule that she is to port helm, 177 U. S.

the burden lies on the other that departed from the rule to make out a justification.

The Washington, 3 Blatchf. 276, Fed. Cas. No. 17,220.

If the collision occurs from such other vessel not having kept her course, the obligation rests on the latter to show sufficient excuse in the particular case for the departure from the rule.

The Corsica, 9 Wall. 630, *sub nom. The Corsica v. Schuyler*, 19 L. ed. 804; *The Chesapeake*, 5 Blatchf. 411, Fed. Cas. No. 2,643.

Where to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel.

The Galatea, 92 U. S. 439, *sub nom. Robert v. The Galatea*, 23 L. ed. 727.

A steamer which is bound to keep out of the way of another approaching so as to involve a risk of collision has no right to attempt to pass to the left, unless there is an imperative necessity for it.

The E. H. Coffin, 16 Blatchf. 421, Fed. Cas. No. 4,310.

The preferred steamer will not be held in fault for maintaining her course and speed so long as it is possible for the other to avoid her by porting,—at least in the absence of some distinct indication that she is about to fail in her duty.

Hutchinson v. The Northfield, 154 U. S. 629, 24 L. ed. 680, 14 Sup. Ct. Rep. 1184; *The Britannia*, 153 U. S. 130, *sub nom. The Britannia v. Cleugh*, 38 L. ed. 660, 14 Sup. Ct. Rep. 795; *The Delaware*, 161 U. S. 467, 40 L. ed. 774, 16 Sup. Ct. Rep. 516.

Mr. Wilhelmus Mynderse argued the cause and filed a brief for Jakobsen:

When one vessel is found grossly in fault, the court will not examine critically to see whether the other has exercised the highest degree of skill and management.

The Elizabeth Jones, 112 U. S. 514, *sub nom. Jones v. Slauson*, 28 L. ed. 812, 5 Sup. Ct. Rep. 468; *The Maggie J. Smith*, 123 U. S. 349, *sub nom. The Maggie J. Smith v. Walker*, 31 L. ed. 175, 8 Sup. Ct. Rep. 159; *The Victory & The Plymothian*, 168 U. S. 410, 42 L. ed. 519, 18 Sup. Ct. Rep. 149.

To secure the benefit of limitation of liability a surrender is essential, not merely of the physical wreck, but also of all the rights of action which were directly representative of the ship and freight.

O'Brien v. Miller, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140.

The owners of the *Albert Dumois* and of the *Argo* both instituted their respective proceedings for limitation of liability within the period of prescription, and therefore during the life of the liens. Thereafter the claims of Mrs. Blesine and Mrs. Hester were maintainable only in such proceedings, and were enforceable only against the security given therein.

U. S. Rev. Stat. § 4285; Admiralty Rules, 54-58; *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 123, 20 L. ed. 591; *Provi-*

dence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 598, 27 L. ed. 1045, 3 Sup. Ct. Rep. 379, 617; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

The claims filed by them respectively were proper claims to file in limited liability proceedings.

The Catskill, 95 Fed. Rep. 700.

If the Albert Dumois was partly in fault for the collision, then the decree against the bond given for that vessel in favor of Mrs. Blesine and Mrs. Hester, respectively, was correct. And, upon the assumption that both vessels were in fault, the decree was correct in offsetting against the allowance to the owner of the Argo one half of all damages sustained by the Albert Dumois physically, or paid by her stipulators.

The North Star, 106 U. S. 17, *sub nom.* *Reynolds v. Vanderbilt*, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; *The Chattahoochee*, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491.

Messrs. John D. Rouse and William Grant also filed a brief for Jakobsen:

No steamer has the right to navigate at such rate that it is impossible for her to prevent damage, taking all precautions the moment she sees danger to be possible.

The Syracuse, 9 Wall. 672, *sub nom.* *Hancock v. The Syracuse*, 19 L. ed. 783; *Newton v. Stebbins*, 10 How. 606, 13 L. ed. 559; *McCready v. Goldsmith*, 18 How. 89, 15 L. ed. 288; *The New York v. Rea*, 18 How. 223, 15 L. ed. 359; *The State of Alabama*, 17 Fed. Rep. 847; *The Pennsylvania*, 19 Wall. 125, *sub nom.* *The Pennsylvania v. Troop*, 22 L. ed. 148.

Not even flagrant fault on the part of one vessel will authorize the other to run her down, or excuse the other from adopting every proper measure to prevent an accident.

The America, 92 U. S. 432, 23 L. ed. 724.

The allowance of interest on damages in cases of this character is not a matter of right, but rests in the discretion of the lower court.

The Scotland, 118 U. S. 518, *sub nom.* *Dyer v. National Steam Nav. Co.* 30 L. ed. 155, 6 Sup. Ct. Rep. 1174.

Messrs. George Denègre, J. P. Blair and Walter D. Denègre filed a brief for Mrs. Hester.

[244] *Mr. Justice **Brown** delivered the opinion of the court:

This collision occurred in January, 1897, in the Mississippi river, about 80 miles below New Orleans, and the steamers in their signals and manœuvres were governed by the original rules and regulations of the act of 1864, reproduced in Rev. Stat. § 4233. A brief review of the numerous acts subsequent thereto upon the same subject will show that the act of 1864 continued in force upon the Mississippi river at the time of this collision.

1. The original act, now known as Rev. Stat. § 4233, was adopted from the British Orders in Council of 1863, was made of general application "in the navigation of vessels of the navy and of the mercantile marine of the United States," and was supplement-

ed by §§ 4412 and 4413, giving the board of supervising inspectors power to "establish such regulations to be *observed by all[245] steam vessels in passing each other as they shall from time to time deem necessary for safety."

This Code remained in force substantially unaffected by legislation until March 3, 1885, when the "Revised International Regulations for Preventing Collisions at Sea" were adopted by act of Congress (23 Stat. at L. 438, chap. 354), and made applicable to "the navigation of all public and private vessels of the United States upon the *high seas* and in all *coast waters* of the United States, *except* such as are otherwise provided for." By section 2 all laws inconsistent with these rules were repealed, "*except* as to the navigation of such vessels within the *harbors, lakes, and inland waters* of the United States." As to such waters the original Code of 1864 remained in force, explained and supplemented by the rules of the supervising inspectors. *The Delaware*, 161 U. S. 459, 463, 40 L. ed. 771, 772, 16 Sup. Ct. Rep. 516; *The New York*, 175 U. S. 187, 193, *ante*, 126, 128, 20 Sup. Ct. Rep. 67, 69.

On August 19, 1890, Congress adopted a new Code "to be followed by all public and private vessels of the United States upon the *high seas* and in all waters connected therewith, navigable by seagoing vessels" (26 Stat. at L. 320, chap. 802), article 30 of which declared that "nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any *harbor, river, or inland waters*." The 2d section repealed all inconsistent laws, and the 3d section provided that the act should take effect at a time to be fixed by the President by proclamation issued for that purpose. This act was amended by act of May 28, 1894 (28 Stat. at L. 82, chap. 83), providing certain lights for small vessels. By another act of June 10, 1896 (29 Stat. at L. 381, chap. 401), amending the law with regard to signals, it was declared in the 2d section that the original act as amended should "take effect at a subsequent time to be fixed by the President by proclamation," although another act approved February 23, 1895 (28 Stat. at L. 680, chap. 127), had already provided that it should take effect at a time to be fixed by the President. The President at first declared that the act should take effect March 1, 1895 (28 Stat. at L. 1250), which date was subsequently postponed by another proclamation (28 Stat. at L. 1259). *By[246] still another proclamation of December 31, 1896 (29 Stat. at L. 885), it was declared that the act of August 19, 1890, as subsequently amended, should take effect July 1, 1897.

Meantime, however, and on February 8, 1895 (28 Stat. at L. 645, chap. 64), Congress passed another Code to be "followed in the navigation of all public and private vessels of the United States, upon the *Great Lakes* and their *connecting and tributary waters*, as far east as Montreal," to take effect March 1, 1895. This act repealed the act of 1864

so far as it applied to the Great Lakes and their connecting waters. All this legislation, however, left the harbors, rivers, and other inland waters of the United States unaffected either by the acts of 1885, 1890, or 1895; and to make the intention of Congress more certain in this particular, on February 19, 1895 (28 Stat. at L. 672, chap. 102), Congress enacted that the original provisions of §§ 4233, 4412, and 4413 of the Revised Statutes, and regulations of the supervising inspectors pursuant thereto, shall be followed on the *harbors, rivers, and inland waters* of the United States, and the provisions of said sections were declared special rules duly made by local authority relative to the navigation of such waters, as provided for in article 30 of the act of August 19, 1890, above quoted. Section 4 provided that the words "inland waters" should not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal, and that the act should not, in any respect, affect the act of February 8, 1895.

Finally, on June 7, 1897 (30 Stat. at L. 96, chap. 4), Congress adopted a set of regulations to be "followed by all vessels navigating all *harbors, rivers, and inland waters* of the United States, except the Great Lakes and their connecting and tributary waters, as far east as Montreal and the Red River of the north and rivers emptying into the Gulf of Mexico, and their tributaries." This act, as well as that of August 19, 1890, adopting regulations for preventing collisions at sea, was amended February 19, 1900, so far as it related to lights on steam pilot vessels; but as this act of 1897 was approved June 7, to take effect four months thereafter, it is unnecessary to consider to what waters it is applicable. It certainly has no bearing [247] upon this collision, which took place *January 28, 1897, and is cited merely as a part of the history of Congressional action upon the general subject.

The effect of all this legislation was at the time of the collision, and perhaps is still, to leave the rivers emptying into the Gulf of Mexico subject to the provisions of the original act, Rev. Stat. § 4233.

2. If the legislation of Congress in this connection be somewhat complicated, the result is at least clear that the navigation of the Mississippi was subject to the original rules and regulations of Revised Statutes, § 4233; but the rules of the supervising inspectors, supplementary thereto, are ambiguous, and in one respect quite difficult of interpretation. There are three sets of these rules: 1. Pilot rules for Atlantic and Pacific inland waters; 2. pilot rules for western rivers; 3. pilot rules for the Great Lakes and their connecting tributary waters as far east as Montreal. The third may be left out of consideration in this case.

The pilot rules for western rivers are entitled, "Rules and Regulations for the Government of Pilots of Steamers Navigating the Red River of the North and Rivers Whose Waters Flow into the Gulf of Mexico, and their Tributaries." There can be no doubt whatever that these rules apply to the Mis-

issippi and its tributaries, and there could be no doubt that it applied to the river below New Orleans, were it not for rule 14, which declares that "the line dividing jurisdiction between the pilot rules on western rivers and harbors, rivers, and inland waters at New Orleans, shall be the lower limits of the city." This should evidently be construed as if it read: "The line dividing jurisdiction between the pilot rules on western rivers and the pilot rules on harbors, rivers, and inland waters at New Orleans shall be the lower limits of the city." This excludes the Mississippi below New Orleans, and indicates that some other rules are applicable.

But on referring to the pilot rules for the Atlantic and Pacific coast inland waters, we find them entitled, "Rules and Regulations for the Government of Pilots of Steamers Navigating *Harbors, Rivers, and Inland Waters* (except the Great Lakes, the Red River of the North, and *Rivers Emptying into the Gulf of *Mexico* and their Tributaries), [248] when Meeting or Approaching Each Other, Whether by Day or Night, and as Soon as Fully Within Sound of the Steam Whistle." Rule 9 of these pilot rules contains the same provisions as rule 14 of the pilot rules for western rivers, namely, that the line dividing jurisdiction between pilot rules on western rivers and harbors and inland waters at New Orleans shall be the lower limits of the city. There could be no doubt whatever that the intention was to divide the jurisdiction as to the Mississippi river between the rules applicable to western rivers and the rules for Atlantic and Pacific coast inland waters, were it not for the fact that in the entitling of these latter rules rivers emptying into the Gulf of Mexico are excepted. But we are of opinion that these words were intended as a general exception of the waters covered by the pilot rules for western rivers, and that they were not intended to apply to the Mississippi below New Orleans, in view of the provision of both sets of rules that the pilot rules for western rivers should cease to be applicable at the lower limits of that city. As New Orleans is practically the head of navigation for foreign trade, it was perfectly reasonable that the supervising inspectors should apply to the lower Mississippi the rules and regulations adopted for the harbors, rivers, and inland waters navigated by vessels engaged in foreign trade, while they still left the regulations provided for western rivers to remain applicable to the Mississippi above New Orleans, where the commerce is almost altogether domestic in its character. The only alternative of this proposition is to hold that the supervising inspectors intended to exempt from their jurisdiction altogether the waters of the Mississippi below New Orleans, some 150 miles in length,—a supposition so improbable that it must be rejected at once. We hold, therefore, that the Atlantic and Pacific coast rules apply to these waters.

Such being the rules and regulations applicable to this case, we are remitted to the inquiry how far they were obeyed and how far disregarded by the vessels concerned in this collision. The night was clear and

starlight, the river substantially straight at this point, and about half a mile wide, with no obstruction or other special circumstances, under rule 24, rendering a departure [249]*from the general rules necessary in order to avoid immediate danger. In short, the conditions were all favorable to safety, and the collision could not have occurred without egregious fault on the part of one or both vessels. In endeavoring to locate this fault we are at liberty to consider the movements of each vessel from its own standpoint, and, without attempting to reconcile the conflicting statements of the two crews or to settle disputed questions of fact, to inquire upon the showing made by each whether that vessel was guilty of fault contributing to the collision.

3. As to the *Albert Dumois*: She was a Norwegian vessel, 210 feet long, drawing 17 feet of water, and was bound up the river to New Orleans. While proceeding up the east side of the river at a speed of about 9 miles an hour, and from 250 to 500 feet from the east bank, she made directly ahead, and at a probable distance of about half a mile, the white and colored lights of the *Argo* coming down the river. Her theory of the case was, and the entire testimony of her watch showed, that the *Argo* was approaching her "end on, or nearly end on," within the meaning of rule 18, which declares that "if two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Notwithstanding this, however, the wheel of the *Dumois* was put to starboard, and a signal of two whistles blown to the *Argo*, manifesting an intention on the part of the *Dumois* to sheer out into the river and pass the *Argo* starboard to starboard. Her excuse for doing this was her own proximity to the east bank and a cluster of white lights belonging to a tug and two luggers inside of the *Argo*, and in fact moored to the east bank of the river.

We cannot, however, accept this as a "special circumstance" within the meaning of rule 24 rendering a departure from rule 18 necessary "to avoid immediate danger," since if there were any danger at all it was not an immediate one, or one which could not have been provided against by easing the engines of the *Dumois* and slackening her speed. Exceptions to the general rules of navigation are admitted with reluctance on [250]*the part of the courts, and only when an adherence to such rules must almost necessarily result in a collision—such, for instance, as a manifestly wrong maneuver on the part of an approaching vessel. *Belden v. Chase*, 150 U. S. 674, 699, 37 L. ed. 1218, 1227, 14 Sup. Ct. Rep. 264; *The Britannia*, 153 U. S. 130, *sub nom. The Britannia, v. Cleugh*, 38 L. ed. 660, 14 Sup. Ct. Rep. 795; *The Test*, 5 Notes of Cases, 276; *The Superior*, 6 Notes of Cases, 607; *The Khedive*, L. R. 5 App. Cas. 876; *The Benares*, L. R. 9 Prob. Div. 16; Marsden, Collisions, 480. As was said in *The John Buddle*, 5 Notes of Cases, 387: "All rules are framed for the benefit of ships

navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, howsoever wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary are most distinctly approved and established; otherwise, vessels would always be in doubt and doing wrong."

The case of *The Concordia*, L. R. 1 Adm. & Eccl. 93, resembles much the instant case in this particular. That was a collision between two steam vessels meeting nearly end on in the river Thames. Defendants alleged that the helm of their vessel was put to starboard to avoid a barge. It was held that the burden of proof that a departure from the rule, which required both steamers to port, was necessary in order to avoid immediate danger, rested upon the defendants, and that, in the absence of sufficient evidence to show what became of the barge, the defendants had failed in their proof, and were therefore in fault for the collision, the result of not porting their helm. See also *The Agra*, L. R. 1 P. C. 501.

Manifestly the *Argo* had a right to rely upon the *Dumois* pursuing the usual course of putting her helm to port, and her failure to do so was likely to raise a doubt on the part of the *Argo* as to her own duty, and to bring about the collision it was designed to avoid. If, as insisted by the crew of the *Argo*, the *Dumois* was nearer to the east bank than the descending steamer, and exhibited to the latter her white and red lights only, the fault of the *Dumois* in starboarding and crossing the course of the *Argo* becomes still more manifest. The fact put forward by the [251] pilot of the *Dumois*, that the *Argo* seemed so close to the luggers that she appeared to be one of them (although contradicted by the testimony of the libellant that the *Argo* was in the middle of the river) was one which undoubtedly called for caution on the part of the *Dumois*, but it did not involve an immediate danger which justified a departure from the general rule.

4. The *Argo*, a vessel of 48 tons burthen, 101 feet in length, and drawing 6 feet of water, had been chartered by some representatives of the press to meet, at the mouth of the river, a congressional committee sent to inspect the jetties and to report the proceedings of the committee. According to her inspection certificate the *Argo* should have had one pilot, one engineer, and a crew of five men, but as they were in great haste to get away, Messrs. Hester, Lindauer, and Blesine, newspaper correspondents, all of whom were said to be familiar with the management of water craft, agreed to enroll themselves as part of the crew, and if necessary to lend a hand. Their assistance does not seem to have been of any great value, as they all "turned in" immediately upon coming on board. The *Argo* left New Orleans about 7 o'clock in the evening, having on board a master, who also served as pilot, an engineer, a fireman, one deck hand, and a steward.

who also served as cook, besides the newspaper correspondents. She took her course down the river at a speed of about 20 miles an hour, and at the time of making the lights of the Dumois was either in the middle of the river or between that and the east bank. There was conflict of evidence upon her exact location, but in the view we have taken of the case it does not become necessary to determine this with accuracy. Her testimony indicates that she made the white and red lights of the Dumois upon her port bow, and blew her a signal of one whistle; that the Dumois responded with a signal of two whistles, starboarded her helm, shut in her red and exhibited her green light, and took her course across the path of the Argo. The Argo again blew her a signal of one whistle, to which the Dumois again responded with two, followed it with a danger signal, and the Argo, still maintaining her great speed, put [252] her wheel hard-a-port, struck the *Dumois upon her starboard bow, and was herself almost immediately sunk by the force of the impact.

The master of the Argo excuses his failure to stop and reverse, which it was his duty to do as soon as he saw the wrong maneuver of the Dumois, by the fact that the starboarding of the Dumois put him in a position in which he was obliged to decide instantly what ought to be done; that, in the exercise of his best judgment, he determined to put his helm hard-a-port, and endeavor to cross the bows of the Dumois; and that, if he made a mistake in this particular, it was an error *in extremis*, for which the Argo is not responsible. The argument is undoubtedly entitled to great weight, but we think the real error was not committed *in extremis*. The theory of the Argo is that she was coming down the middle of the river, and that she made the Dumois on her port bow, exhibiting a red light. She was running herself at 20 miles an hour, with the added force of the current. The Dumois was running against the current at the rate of 9 miles an hour. That the Dumois must have starboarded and shown her green light some time before the Argo ported is evident from the place of the collision, which was to the westward of the middle of the river, and, upon the theory of the Argo, was near the westerly bank. As the Dumois was within 500 feet of the easterly bank when she starboarded,—the river at that point being about 2,500 feet wide,—she must have run under her starboard helm about a quarter of a mile before reaching the point of collision. Now, if the Argo had promptly ported as soon as she heard the cross-signal or observed the starboarding of the Dumois, she would inevitably have passed the point of intersection before the Dumois reached it. The fault of the Argo was not in the hard-a-port order when the collision was inevitable, but in failing to stop and reverse at once as soon as she noticed the starboarding of the Dumois. The testimony from the Dumois indicates that she blew her first whistle and starboarded as soon as the Argo's lights were seen, and that if the Argo had starboarded and reversed,

the collision would not have occurred. The truth seems to be that the Argo did not port when giving her first signal, but waited for some time, and then put her helm hard-a-port, but too late to be of any avail.

*The testimony indicates that the Argo is [253] chargeable with an infraction of the 3d rule of the supervising inspectors in failing to stop and reverse after receiving the cross-signals from the Dumois. This rule requires that "if, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and repeated blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other. Vessels approaching each other from opposite directions are forbidden to use what has become technically known among pilots as 'cross-signals,'—that is, answering one whistle with two, and two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in rules, which for any reason he deems injudicious to comply with, instead of answering with a cross-signal, must at once observe the provisions of this rule."

The master also seeks to excuse himself by alleging that the Argo was so constructed that her headway could not have been stopped in time to be of any service. This may be true, and yet the Dumois should not be held responsible for the faulty construction of the Argo in this particular. While a steamer may be so built as to attain the utmost possible speed, she ought also to be provided with such means of stopping or changing her course as are commensurate with her great speed; and the very fact of her being so fast and apparently uncontrollable is an additional reason for the greater caution in her navigation. Her increase of speed should have been obtained with as little increase of risk to other vessels as was possible, and if any precautions in that direction were neglected, it was a fault for which she alone ought to be called upon to respond. This court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require. *The *Maria Martin*, 12 [254] Wall. 31, sub nom. *Martin v. Northern Transp. Co.* 20 L. ed. 251; *The America*, 92 U. S. 432, sub nom. *The America v. Camden & O. R. Transp. Co.* 23 L. ed. 724; *The Lucille*, 15 Wall. 679, sub nom. *The Lucille v. Respass*, 21 L. ed. 248; *The Sunnyside*, 91 U. S. 208, sub nom. *Miner v. The Sunnyside*, 23 L. ed. 302.

But counsel for the Argo also insists that, as the two vessels, from the moment the Argo ported and the Dumois starboarded, were upon crossing courses, the 19th rule, which declares that "the vessel which has the other

on her own starboard side shall keep out of the way of the other," applied, and that the *Dumois* should have ported, and the *Argo* was bound, under the case of *The Britannia*, 153 U. S. 130, *sub nom. The Britannia v. Cleugh*, 38 L. ed. 660, 14 Sup. Ct. Rep. 795, to keep her course and speed. We are reluctant, however, to say that, where two vessels are meeting end on, or nearly end on, under the 18th rule, the faulty movement of starboarding by one absolves the other from the obligation of rule 21, which requires that "every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

In the case of the *Britannia*, the decision of the court that, of two crossing steamers, the preferred vessel should have kept her course and speed, was put upon the ground that the course of the *Britannia*, the obligated vessel, was precisely what might have been anticipated, and did not warrant the *Beaconsfield*, the preferred vessel, in disregarding the injunctions of the 23d rule, which required her to keep her course. It was intimated that a different conclusion might have been reached if it had appeared that the *Britannia* was herself violating a rule of navigation. Now, as it appears from the testimony of the *Argo's* crew that they not only heard the signal of two whistles from the *Dumois*, but saw her turn under her starboard wheel, and exhibit her green light when she should have ported, they were at once apprised of the fact that she was violating a rule of navigation, and that prompt action was required to avoid a collision.

The fact that the *Argo* was short-handed and was also running without a proper lookout, though not decisive of a fault contributing to the collision, may be taken into consideration as bearing upon the probabilities of the case, and raising a presumption against her.

[255] We are of opinion that the *Dumois* was primarily in fault *for this collision, in starboarding instead of porting when she first sighted the *Argo*; and while the case with respect to the *Argo* is by no means free from doubt, the majority of the court are also of opinion that the *Argo* was in fault for failing to observe the 21st rule, which required her to stop when risk of collision was involved, as well as the 3d rule of the supervising inspectors to the same effect.

5. There was no error in fixing the value of the *Argo* at the sum of \$15,000, an increase of \$4,000 over the amount fixed by the district court. The evidence of her builders was that she originally cost \$18,000, and that, if she had been kept in good repair, she would have been worth two thirds of that amount at the time of the collision. There was also testimony to the effect that her owner had, at the time of the collision, concluded a sale of one half the *Argo* for \$7,500, and that it was to have been delivered and the money paid for this moiety on the day following that upon which she was lost, and upon her return to the city. This is better evidence of her actual value than the con-

flicting opinions of experts more or less friendly to the owner, who put her value at from \$8,500 to \$30,000. As the district court and the circuit court of appeals agreed that her value did not exceed \$15,000, we should be unwilling to increase that amount unless upon clear proof of inadvertence or mistake.

There was no error in refusing to allow interest upon her valuation. The allowance of interest in admiralty cases is discretionary, and not reviewable in this court except in a very clear case. *The Scotland*, 118 U. S. 507, 518, *sub nom. Dyer v. National Steam Nav. Co.* 30 L. ed. 153, 155, 6 Sup. Ct. Rep. 1174.

6. In the assessment of damages an important question arose as to whether a moiety of the amounts awarded to Mrs. Blesine and Mrs. Hester should be deducted from the amount recoverable by the owners of the *Argo*. The libel of Mrs. Blesine was filed against Jakobsen as owner of the *Dumois*, and process of attachment prayed against his goods and chattels, credits and effects. This libel, subsequently consolidated with that of Springer, was treated as a petition against the bond given for the release of the steamer under the proceedings for a limited liability. A similar petition was filed by Mrs. Hester. In the *following December, [256] Springer, the libellant and owner of the *Argo*, surrendered to the claimants and interveners his vessel and the freight. These intervening libels, as well as that of the seamen, proceeded as one suit, and in the decree of the circuit court of appeals Mrs. Blesine was awarded \$2,500 and Mrs. Hester \$5,000, one half of which was deducted from the amount awarded to Springer.

Admitting that if these intervening libels had been filed against Springer as owner of the *Argo*, nothing could have been recovered of him by reason of the total loss of the *Argo* and her freight and the consequent extinguishment of personal liability on the part of the owner, does it follow that the *Dumois* is not entitled to deduct from the amount awarded to the *Argo*; or, in other words, to recover of the *Argo* one half of the amount payable to these libellants, in view of the fact that the *Argo* was also in fault? We think this question is practically answered by prior decisions of this court.

The case of *The North Star*, 106 U. S. 17, *sub nom. Reynolds v. Vanderbilt*, 27 L. ed. 91, 1 Sup. Ct. Rep. 41, arose from the mutual fault of two steamers, in which one, the *Ella Warley*, was totally lost. The court awarded the owners of the *Ella Warley* so much of their damage as exceeded one half of the aggregate damage sustained by both vessels. The owners of the *Warley* contended that, as she was a total loss, her owners were not liable at all, and that they were entitled to one half of their damages in full, without deduction for the half of the damage sustained by the *North Star*, the other vessel. We held, however, that the admiralty rule, that where both vessels are in fault they must bear the damage equally, applied, and that the one suffering least should be decreed

to pay to the other the amount necessary to make them equal, namely, one half of the difference between the respective losses sustained, and that when this resulting liability of one party to the other has been ascertained, then, and not before, was the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. "It will enable him to avoid payment *pro tanto* of the balance found against him."

[257] "The contrary view," said the court, "is based on the idea that, theoretically (supposing both vessels in fault), the owners of the one are liable to *the owners of the other for one half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. . . . These authorities conclusively show that according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties."

In *The Chattahoochee*, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491, which was also a collision occasioned by the mutual fault of a steamer and a schooner, followed by a total loss of the latter, the survivor was permitted to deduct from one half of the damages recovered for the loss of the vessel one half of the value of the cargo of the latter, notwithstanding the total loss of the schooner, and the fact that under the Harter act she would not have been liable to the owner of the cargo for negligence in navigation. We held in that case that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability had been fixed upon the principle of an equal division of damages.

The case under consideration is distinguishable from this only in the fact that intervening libels are for loss of life, for which no lien is given upon the vessel, in the absence of a local law to that effect, while in the case of the *Chattahoochee* the libel sought to recover for the loss of the cargo, for which a lien was given by the law maritime upon the vessels in fault.

Assuming for the present that the question of lien is material, we are next to inquire whether such lien is given by the local law of Louisiana. We are cited in this connection to two articles of the Civil Code, the first of which, article 2315, as amended in 1884, declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the [258] right of this action shall survive, in *case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the 177 U. S.

space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be."

It was held by us in *The Corsair*, 145 U. S. 335, *sub nom. Barton v. Brown*, 36 L. ed. 727, 12 Sup. Ct. Rep. 949, a case arising out of a collision which also took place on the lower Mississippi, that this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of the law as administered in Louisiana.

Our attention is also called by the owners of the *Dumois* to subdivision 12 of article 3237 of the Civil Code, which reads as follows: "Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect, or want of skill in the direction or management of any steamboat, barge, flatboat, water craft, or raft, the party injured shall have a privilege to rank after the privileges above specified." No reliance was placed upon this article in the case of the *Corsair*, probably because it was thought to refer only to losses or damages to persons still living, and that an action would lie in favor of the party injured. Certainly, if this article had been supposed to give a remedy for damages occasioned by death, to the representatives of the deceased person, it would never have escaped the attention of the astute counsel who participated in that case.

The question whether "damage done by any ship," jurisdiction over which was given to the High Court of Admiralty in England, included actions brought by the personal representatives of seamen or passengers killed in a collision, has been the subject of many and conflicting judicial opinions in the English courts, a summary of which may be found in *The Corsair*, 145 U. S. 345, *sub nom. Barton v. Brown*, 36 L. ed. 730, 12 Sup. Ct. Rep. 949; and was finally settled against the jurisdiction by the House of Lords in the case of *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59.

In this country the law is so well settled that by the common *law no civil action lies [259] for an injury resulting in death, that we need only refer to the case of *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, and to the same doctrine applied in admiralty in the case of *The Harrisburg*, 119 U. S. 199, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. The object of article 3237 was not to extend the cases in which damages might be recovered to such as resulted in death, but merely to provide that, in cases of damages to person or property, where such damage was occasioned by negligence in the management of any water craft, the party injured should have a privilege or lien upon such craft. We deem it entirely clear that the article was not intended to apply to cases brought by the representatives of a deceased person for damages resulting in death.

But it does not necessarily follow that because there is no lien there can be no deduction of a moiety of these damages from the sum awarded to the Argo. Neither the case of the North Star nor that of the Chattahoochee is put upon the ground of a lien, since in both cases the vessel against which the deductions were made was totally lost by the collision, and in the Chattahoochee the provisions of the Harter act would have exonerated her, even if no total loss had occurred. But no extended discussion of this is necessary, since the question is settled by the case of *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612, in which it was unanimously held that the limited-liability act applied to cases of personal injury and death, as well as to those of loss of, or injury to, property. This was an independent libel *in personam* against the steamship company to recover damages for death, and the company pleaded in defense certain proceedings in a case of limited liability instituted by it and then pending. There was a statute of Massachusetts relied upon, which gave a personal remedy, but no lien upon the vessel. The loss occurred within the jurisdiction of the state. The single question presented was whether the limited-liability act applied to damages for personal injury and loss of life, and thus deprived those entitled to damages of the right to entertain suit for recovery, provided the ship owner had taken appropriate proceedings to limit his liability. The court, after a careful examination of the law of limited liability of ship owners, had no difficulty in reaching the conclusion that it covered the case of injuries to persons, as well as that of injury to goods and merchandise, and that these proceedings were a good defense to the libel.

It follows that the claims of the intervening libellants, Mrs. Blesine and Mrs. Hester, were valid claims under the limited-liability act, notwithstanding that there was no lien under the local law, and that there was no error in deducting a moiety of these claims from the amount awarded Springer.

Upon the whole case we are of opinion that the decree of the Circuit Court of Appeals was right, and it is therefore, as to both cases, affirmed.

The CHIEF JUSTICE and Mr. Justice Peckham dissented.

SUPREME LODGE KNIGHTS OF PYTHIAS, *Plff. in Err.*,

v.

JOSEPHINE R. WITHERS.

(See S. C. Reporter's ed. 260-276.)

Insurance in benevolent society—forfeiture for delay in payment of dues—secretary's failure to transmit dues received—secretary as agent of order, and not of member.

The failure of the secretary of a local, subor-

NOTE.—As to when an insurance agent is the agent of the assured—see note to *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* (Mich.) 20 L. R. A. 277.

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dinate branch or section of the Knights of Pythias, to transmit to the general board of control, within the time specified by the general laws of said order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member, and not of the order, where the general laws also require the member to pay dues to such secretary only, and provide that the secretary shall transmit immediately after the 10th of each month all moneys collected by him, and that the local branch shall be responsible to the board of control for all such moneys collected by the secretary.

[No. 170.]

Argued March 6, 1900. Decided April 9, 1900.

IN ERROR to the Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment in favor of the plaintiff in an action on a certificate or policy of insurance. *Affirmed.*

See same case below, 59 U. S. App. 177, 89 Fed. Rep. 160, 32 C. C. A. 182.

Statement by Mr. Justice Brown:

*This was an action originally begun in [261] the circuit court of Hale county, Alabama, by Josephine R. Withers, to recover of the defendant the amount of a certain certificate or policy of insurance upon the life of her husband.

The case was removed to the circuit court of the United States for the middle district of Alabama, upon the petition of the defendant and upon the ground that the Supreme Lodge Knights of Pythias was a corporation organized by act of Congress, and hence that the controversy arose under the Constitution and laws of the United States.

The case was submitted to a jury upon an agreed statement of facts, and the court instructed a verdict for the plaintiff in the sum of \$3,000, the amount of the policy, with interest, upon which verdict a judgment was entered for \$3,392.54. The case was taken by writ of error to the circuit court of appeals, which affirmed the judgment. 59 U. S. App. 177, 89 Fed. Rep. 160, 32 C. C. A. 182. Whereupon the defendant sued out a writ of error from this court.

The facts, so far as they are material, are stated in the opinion of the court.

Mr. Aldis B. Browne argued the cause for plaintiff in error and, with Messrs. Alex. Britton and H. H. Field, filed a brief on the question of jurisdiction.

Messrs. Thomas G. and Chas. P. Jones and Mr. H. H. Field filed a brief for plaintiff in error:

A member of a fraternal association is bound by and presumed to know the provisions of the constitution and by-laws of the association, and these enter into and form a part of the contract.

Bacon, Ben. Soc. & Life Ins. §§ 69, 74, 81;

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Niblack, Ben. Soc. 2d ed. §§ 18, 136; 5 Thomp. Corp. § 5987; 5 Am. & Eng. Enc. Law, 2d ed. 100; 3 Am. & Eng. Enc. Law, 2d ed. 1059, 1081-3.

Such member is bound by, and presumed to take notice of, all by-laws enacted by the society after his admission, where, as in this case, the application and certificate so provide.

Bacon, Ben. Soc. & Life Ins. §§ 185, 188; Niblack, Ben. Soc. 2d ed. §§ 25-27, 137; Korn v. Mutual Assur. Soc. 6 Cranch, 192, 3 L. ed. 195; 7 Cranch, 396, 3 L. ed. 383; Pain v. Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502; May v. New York Safety Reserve Fund Soc. 14 Daly, 389; Supreme Commandery K. of the G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Borgards v. Farmers' Mut. Ins. Co. 79 Mich. 440, 44 N. W. 856; Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co. 98 Wis. 292, 73 N. W. 1015; Bowie v. Grand Lodge of Legion of the West, 99 Cal. 392, 34 Pac. 103; Masonic Mut. Ben. Asso. v. Severson, 71 Conn. 719, 43 Atl. 192; Supreme Council A. L. of H. v. Adams, 68 N. H. 236, 44 Atl. 380; Fullenwider v. Supreme Council of the R. L. 180 Ill. 621, 54 N. E. 485.

These rules have been applied in the following cases against this defendant, involving similar contracts:

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; Supreme Lodge, K. of P. v. La Malta, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493; Supreme Lodge, K. of P. v. Kutscher, 179 Ill. 340, 53 N. E. 620; Supreme Lodge, K. of P. v. Trebbe, 179 Ill. 348, 53 N. E. 730; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712; Dornes v. Supreme Lodge K. of P. 75 Miss. 466, 23 So. 191; Lloyd v. Supreme Lodge K. of P. 98 Fed. Rep. 66, 38 C. C. A. 654.

The provision that officers of sections are the agents of the members, and shall in no wise be considered as the agents or the representatives of the board of control of the endowment rank or of the supreme lodge, was valid and binding upon the deceased under his contract of membership.

Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348; Peet v. Great Camp of K. of M. of the World, 83 Mich. 92, 47 N. W. 119; Grand Lodge of A. O. of U. W. v. King, 10 Ind. App. 639, 38 N. E. 352; Sovereign Camp, Woodmen of the World v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Maier v. Fidelity Mut. Life Asso. 47 U. S. App. 329, 78 Fed. Rep. 566, 24 C. C. A. 239; United States L. Ins. Co. v. Smith, 92 Fed. Rep. 503, 34 C. C. A. 506; Hubbard v. Mutual Reserve Fund Life Asso. 80 Fed. Rep. 681; Bernard v. United L. Ins. Asso. 14 App. Div. 142, 43 N. Y. Supp. 527; Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; McCoy v. Roman Catholic Mut. Ins. Co. 152 Mass. 272, 25 N. E. 289; Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 31 N. E. 31.

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Mr. Edward De Graffenreid argued the cause and filed a brief for defendant in error:

The fraud or mistake of a knavish or blundering agent, within the scope of his powers, will not enable the company to avoid a policy to the injury of assured, who innocently became a party to it, although a stipulation in the policy provides that such agent shall be deemed the agent of the insured.

Whiteside v. Supreme Conclave Improved O. of H. 82 Fed. Rep. 275; Knights of Pythias of the World v. Bridges, 15 Tex. Civ. App. 196, 39 S. W. 333; Bacon, Ben. Soc. & Ins. § 426, and authorities cited.

There is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact.

Bacon, Ben. Soc. § 153; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 235, 20 L. ed. 623.

By-laws enacted subsequent to the issuance of a policy must be reasonable, or they are void.

Allnutt v. Subsidiary High Court of U. S. A. O. of F. 62 Mich. 110, 28 N. W. 802; People ex rel. Quien v. Theatrical Mechanical Asso. 8 N. Y. Supp. 675; Erd v. Bavarian Nat. Aid & Relief Asso. 67 Mich. 233, 34 N. W. 555; Brady v. Coachman's Benev. Asso. 39 N. Y. S. R. 181, 14 N. Y. Supp. 272.

*Mr. Justice Brown delivered the opinion-[261] ion of the court:

The Supreme Lodge Knights of Pythias is a fraternal and benevolent society, incorporated by an act of Congress of *June 29, 1894[262] (28 Stat. at L. 96, chap. 119), as the successor of a former corporation of the same name, organized under an act approved May 5, 1870. The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those members of the order who have taken out benefit certificates. Such members are admitted into local subordinate branches known as sections. The members of each section elect their own president and secretary. The endowment rank is governed by a board of control whose officers are a president and secretary, and whose place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the Supreme Lodge, and by rules and regulations adopted by the board of control and approved by the Supreme Lodge.

On January 1, 1883, Robert W. Withers made application for membership in the endowment rank, and in that application made the following statement: "I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules, and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." His application was accepted, and, after receiving a certificate under the first act of incorporation which he voluntarily surrendered, he received the certifi-

cate upon which this action is brought. This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were "made a part of this contract, . . . and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required, and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of \$3,000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, . . . upon due notice and proof of death and good standing in the rank at the time of his death, . . . and it is understood and agreed that any violation of the within-mentioned conditions or other *requirements of the laws in force governing this right shall render this certificate and all claims null and void, and the said Supreme Lodge shall not be liable for the above sum or any part thereof."

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Withers was a member of section 432, at Greensboro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank Withers was required to pay \$4.90 monthly in accordance with his age and the amount of his endowment.

In January, 1894, defendant adopted and promulgated the following general laws:

"Sec. 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of section without notice, on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title, and interest such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the board of control, a new certificate shall be issued, and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

"Sec. 6. The secretary of the section shall forward to the board of control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the board of control on or before the last day of the same month the section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title, and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section.

[264]"Provided, that the section whose membership has forfeited *their endowment, and whose warrant has been suspended, shall re-

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gain all right as a section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said section shall pay to the board of control the amount of all monthly payments, assessments, and dues accrued upon said members.

"Sec. 10. Sections of Endowment Ranks shall be responsible and liable to the board of control for all moneys collected by the secretary or other officers from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the board of control or of the Endowment Rank or of the Supreme Lodge."

For over twelve years Withers made his monthly payments as required by law to the secretary of the section, and the money was regularly remitted to the board of control at Chicago. His last payment was made prior to October 10, 1895, as required by section 4, for the dues of that month. As there were a large number of members in the section, and as their dues were not all collected until the latter part of the month, the secretary of the section did not send the money to the board of control until October 31, when he mailed to the secretary of that board a check covering all the amounts due by all the members of the section for that month. The letter did not leave the postoffice until the next day, and was received by the board of control November 4. No notice was ever mailed by the board of control to Withers notifying him of his suspension; but on November 1st, as required by section 6, the secretary of the board of control mailed to Mr. Chadwick, the secretary of the section at Greensboro, a notice of the suspension of all members thereof, with an intimation that the members of the section might regain their rights under certain conditions therein named. No notice was mailed to the president of the section. In view of the technical character of the defense, it is worthy of mention that the board of control did not strictly comply with its own regulation in this particular.

*Upon receiving the remittance, and on [265] November 4, the secretary of the board of control mailed the following postal card to the secretary of the section:

Office Board of Control,
Chicago, November 4, 1895.

Received of Section No. 432 one hundred and thirteen 30-100 dollars in payment of monthly payments and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt.

H. B. Stolte,
Secretary Board of Control.

The insured was suddenly taken ill and died of an attack of cholera morbus on No-

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vember 1, 1895. Proofs of death were waived by the defendant, which, however, refused to pay the amount of the certificate.

It is hardly necessary to say that the defense in this case is an extremely technical one, and does not commend itself to the average sense of justice. It ought to be made out with literal exactness. It is admitted that Withers for twelve years paid all his dues promptly to the secretary of the section as required by section 4 of the general laws, and that the failure of the board of control to receive them on or before the last day of the month was the fault of the secretary, and not of the insured. The whole defense rests upon the final clause of section 10, declaring that "officers of sections are the agents of the members and shall in no wise be considered as the agents of the representatives of the board of control of the Endowment Rank or of the Supreme Lodge." It appears to have been the habit of the secretary, Mr. Chadwick, not to remit each payment as it was made, but to allow all the dues of each month to collect in his hands and to remit them together by a check covering the whole amount, about the close of the month. In this connection he makes the following statement: "It had never been the custom of my office for me to send the money off by the twentieth of the month" (although section 6 required him to forward it immediately after the tenth). "I usually sent the money off about the last days of the month. For the previous year I had mailed to the secretary of the board of control the dues of the section as follows: October 27, 1894, November 28, 1894, December 29, 1894, January 29, 1895, February 27, 1895, March 30, 1895, April 29, 1895, June 29, 1895, July 31, 1895, *August 29, 1895, September 28, 1895, October 28, 1895, October 31, 1895—all of which sums were accepted by the board of control."

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The position now taken by the defendant, that in receiving the money from the insured members, and remitting the same to the board of control, the secretary of the section was the agent of the insured, and not of the board of control, is inconsistent with the requirement of section 4, which makes it obligatory upon policy holders to pay their monthly dues to the secretary of the section, and to him only, as well as with the provision of section 10, that "sections of Endowment Rank shall be responsible and liable to the board of control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prescribed by law." The question at once suggests itself, To whom does the money belong when paid to the secretary of the section? If to the insured, it was within his power to reclaim it at any time before it was remitted. If to the board of control, it was the duty of the secretary of the section to remit it. Why, too, should the board of control attempt to deal with it at all beyond requiring it to be paid them by a certain day? Section 10 is a complete answer since that makes the sections respon-

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sible to the board of control from the moment the money is collected, and section 6 makes it the duty of the secretary to remit it at once.

There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so, if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less, that it would not be a good payment as of a certain day, though the *re-[267]mittance, through the fault of the person receiving it, did not reach the creditor until the following day.

The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section, who was bound to remit them to the board of control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction; and in case such remittance was not made within thirty days from such suspension (sec. 6) apparently to make it necessary under section 4 for each policy holder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days, every member of the section might lose his rights under his certificate and stand in the position of one making a new application, with a forfeiture of all premiums previously paid. The new certificate would, of course, be refused if his health in the meantime had deteriorated, and the examining physician refused to approve his application. This would enable the company at its will to relieve itself of the burdens of undesirable risks by refusing certificates of membership to all whose health had become impaired since the original certificate was taken out, though such certificate-holder may have been personally prompt in making his monthly payments.

It could not thus clothe the secretaries of the sections with the powers of agents by au-

thorizing them to receive monthly payments and instructing them to account for and remit them to *the Supreme Lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it" presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the Supreme Lodge, and his actions were, at least, as much for the convenience of the lodge as for that of the insured. If the Supreme Lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority.

The reports are by no means barren of cases turning upon the proper construction of this so-called "agency clause," under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policy holder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy, conferring power and authority upon the agent, he is treated as the agent of the company rather than of the policy holder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs, to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained.

It was formerly held in New York (*Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, and *Alexander v. Germania F. Ins. Co.* 66 N. Y. 464, 23 Am. Rep. 76), that, where the insured had contracted that the person who had procured the insurance should be deemed his agent, he must abide [269] by his agreement; and where *such person had, through fault or mistake, misstated in the application to the company the declarations of the assured, the latter must suffer for the error or wrong; but in a subsequent case (*Whited v. Germania F. Ins. Co.* 76 N. Y. 415, 32 Am. Rep. 330), this doctrine was held to be limited to such acts as the agent performed in connection with the original application, and that in a renewal of the policy such party was treated as the agent of the defendant, for whose acts it was bound; and that it was within his power to make a valid waiver of the conditions of the

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policy. Said the court in its opinion: "That he was the agent of the defendant it would be fatuous to deny; were it not for a clause in the policy" (the agency clause) "upon which the defendant builds. . . . But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured . . . he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place and moves and speaks as one having authority from it; and *pro hac vice*, at least, he does then rightfully put off his agency for the insured and put on that for the insurer. . . . Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them and while under authority from the defendant to act for it." So in *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128, the insured signed a blank form of application, which was filled up by the company's agent without any knowledge or dictation of the insured. There were false statements therein, occasioned by the mistake or inadvertence of the agent. The policy contained the agency clause, as well as the condition that the application must be made out by the defendant's authorized agent, and it was held, using the language of the court in the *Whited Case*, that the latter clause "swallowed down" the former, and that there was no warranty binding upon the plaintiff.

In *Patridge v. Commercial F. Ins. Co.* 17 Hun, 95, it was said of the agency clause: "This is a provision which deserves *the con-[270] demnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the president of the assured. . . . Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. And when a contract is, *in fact*, made through the agent of a party, the acts of that agent in that respect are binding on his principal."

In *Nassau v. Susquehanna Mut. F. Ins. Co.* 109 Pa. 509, under a by-law providing that "in all cases the person forwarding applications shall be deemed the agent of the applicant," it was held, under the circumstances of the case, that the agent of the company soliciting insurance was not the agent of the applicant, and that such by-law was not binding upon him. Although the insured is supposed to know at his peril the conditions of the policy, that will not bind him to a provision which is not true, and one which the company had no right to insert therein. "We do not assent," said the court,

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"to the proposition that the offer" (that the agent made his own valuation of the property) "was incompetent, because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and having obtained his consent proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company." The court, speaking of the agency clause, observed: "This court, in the case above cited [*Columbia Ins. Co. v. Cooper*, 50 Pa. 331], characterized a somewhat similar provision as a 'cunning condition.' The court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence, a by-law of the company of which he had no knowledge, and by which he was not bound, could not affect him in matters occurring before the granting of the policy. . . . And even a by-law of a mutual company, which declares that black is white, does not necessarily make it so." Similar cases are those of *Eilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. 157; and *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447.

The case of *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545, resembles the case under consideration. In that case it was held that, where the assured contracts with one as the agent of the insurer, believing him to be such, and does not employ such supposed agent to act for him in obtaining insurance, such person has no power to act for or bind the insured, though the policy may provide that the person procuring the insurance shall be deemed the agent of the insured, and not of the company. Plaintiff paid the premium to the person with whom she contracted for the insurance, and of whom she obtained the policy. It was held that such person, assuming to be the agent of the com-

pany, the payment was binding upon the company, whether he paid the money over or not. In that case the person to whom the money was paid was not in reality an agent of the company, although plaintiff believed him to be such, but only a street insurance broker, who represented himself to be the agent of the company. Said the court: "Under such circumstances who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was 'an innocent party in the transaction, or should it fall upon the company, who alone enabled Pusehman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company.'" [272]

In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566. In *North British & M. Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458, the agency clause was held to be absolutely void as applied to a local agent, upon whose counter signature the validity of the policy, by its terms, was made to depend.

In *Boetcher v. Hawkeye Ins. Co.* 47 Iowa, 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage.

Speaking of the agency clause in *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, it is said: "This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed. . . . We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an 'unreal authority.'" See also *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, in which the act of an insurance agent in making out

an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy.

In *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. Speaking of the agency clause, it is said: "The verbiage of this condition is not candid; it seems to have been used with studied design to obscure the real purpose. It is a snare, set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application; nor is the agent in his printed instructions enjoined to inform those with whom he treats of it. . . . Its inevitable effect is to greatly weaken the indemnity on which the assured rely. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land their agents and representatives to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them; and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves and the establishment of it between other parties."

[274] The case of *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several "groves" (corresponding to the sections in this case) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made forfeited his claim to have a certain sum in the nature of life insurance paid to his widow, or heirs, *after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are, at least, as much its agents to collect and pay over the dues of their members, as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death, the amount of insurance might be recovered, notwithstanding a default of the grove in paying over such dues to the defendant.

The agency clause was also once before this court in the case of *Grace v. American C. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207, in which a clause in the policy that the person procuring the insurance to be taken should be deemed the agent of the assured and not of the company, was held to import nothing more than that the person obtaining the insurance was to be

deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that, where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

In the following cases the officers of the subordinate lodge, or conclave, were treated as the agents of the Supreme Conclave in the matter of granting extensions of time for the payment of assessments: *Whiteside v. Supreme Conclave I. O. of H.* 82 Fed. Rep. 275; *Knights of Pythias of the World v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333.

In the case under consideration it may be immaterial, except as bearing upon the equities of the case, that the agency clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to Withers's attention, or that he had actual knowledge of it. If he were bound at all, it could only be by the stipulation in his original application, and by the terms of his certificate that "he would be bound by the rules and regulations of the order, now in force or that may hereafter be enacted." All that is required of him is a full compliance with such laws, and there is not the slightest evidence that he failed *personally [275] in any particular to comply with any laws of the order, present or future. The only failure was that of the secretary of the section, who, to say the least, was as much the agent of the order as he was of Withers, although the latter is sought to be charged with his dereliction by a clause inserted in the general laws, long after the certificate was issued. The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the board of control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power of declaring that the default of Chadwick, by so much as one day (and it did not exceed four days in this case), to pay over this money, should cause a forfeiture of every certificate within his jurisdiction, is a practical injustice too gross to be tolerated.

Without indorsing everything that is said in the cases above cited, we should be running counter to an overwhelming weight of authority were we to hold that the agency clause should be given full effect regardless of other clauses in the certificate or the by-

laws, indicative of an intention to make the officers of subordinate lodges agents of the supreme or central authority. We should rather seek to avoid, as far as possible, any injustice arising from a too literal interpretation, and only give the clause such effect as is consistent with the other by-laws and with the manifest equities of the case. We are therefore of opinion that in this case the secretary of the section was in reality the agent of the Supreme Lodge from the time he received the monthly payments, and that the insured was not responsible for his failure to remit immediately after the tenth of the month.

[276] We have not overlooked in this connection the case of *Campbell v. *Supreme Lodge K. of P. of the World*, 168 Mass. 397, 47 N. E. 109 in which a different conclusion was reached, upon a similar state of facts. In that case plaintiff put his right to recover upon the theory that the mailing of the remittance was a compliance with the requirement of section 6 that such payments and dues should be received on or before the last day of the month. This position was held by the court to be untenable. It was said that the money must have been actually received at the office of the board of control before the end of the month. The question of agency was not considered, and the trend of the argument is so different that the case cannot be considered an authority upon the propositions here discussed. The cases of *Peet v. Great Camp of K. of M. of the World*, 83 Mich. 92, 47 N. W. 119, and *McClure v. Supreme Lodge K. of H.* 41 App. Div. 131, 59 N. Y. Supp. 764, are not in point.

The judgments of the Circuit Court and of the Court of Appeals were right, and they are therefore affirmed.

JOHN W. ARNOLD, *Plff. in Err.*,

v.

LEWIS HATCH.

(See S. C. Reporter's ed. 276-281.)

Ownership of property levied upon—title to personal property on farm—effect of contract to manage farm and return or replace personalty.

A contract between the owner of a farm and his son, by which the latter is given the management of the farm, farm implements, and live stock, with full liberty to sell and dispose of them, replace old stock and implements with new, and appropriate the net proceeds to himself, and is charged with the duty to make all repairs, pay all taxes and other expenses, replace all implements as they are worn out, and keep up all live stock, and is given as his own the net profits, but without fixing any purchase price or providing for payment by the son for the property, while either party is at liberty to terminate the arrangement at any time, upon which the son is required to turn back the farm with its implements, stock, and other personalty of the same kind and amount as was on the farm when he took charge of it, and in as good condition as when

he took them; and the fact that the personal property on the farm is assessed in the name of the son,—do not give him title to such personalty so as to subject it to levy on execution against him.

[No. 183.]

Argued March 14, 1900. Decided April 9, 1900.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a decision affirming a judgment for a claimant of property levied upon as that of another person. *Affirmed.*

See same case below, 60 U. S. App. 659, 89 Fed. Rep. 1013, 32 C. C. A. 602.

Statement by Mr. Justice **Brown**:

This was an intervening petition by the defendant in error, *Lewis Hatch, filed in the [277] district court for the northern district of Illinois, in the case of *Joseph G. Heim, Receiver, v. Frank W. Hatch*, praying for the release by the marshal and a return to petitioner of a large amount of cattle and other farm property alleged to belong to him, and levied upon by the marshal as the property of Frank W. Hatch.

The cause originated in an action begun in the district court for the northern district of Illinois, by Joseph G. Heim, as receiver of the First National Bank of Southbend, Washington, against Frank W. Hatch, to enforce against the defendant an individual liability as a stockholder of the bank, which had become insolvent. Defendant having made default, a judgment was rendered against him in the sum of \$4,351.09 and costs, for which an execution was issued and levied upon the cattle and other farm property in dispute. Whereupon Lewis Hatch, the father of Frank W. Hatch, filed this petition, to which the plaintiff in error, John W. Arnold, marshal for the northern district of Illinois, made answer, denying the petitioner's ownership of the property, and admitting his levy upon it as the property of Frank W. Hatch.

The case came on for trial before a jury, and resulted in a verdict for the petitioner, upon which judgment was entered. On writ of error from the circuit court of appeals this judgment was affirmed. 60 U. S. App. 659, 89 Fed. Rep. 1013, 32 C. C. A. 602. Whereupon plaintiff in error, Arnold, sued out a writ of error from this court.

Mr. Kenesaw M. Landis argued the cause and filed a brief for plaintiff in error.

Mr. George A. Dupuy argued the cause and filed a brief for defendant in error.

*Mr. Justice **Brown** delivered the opinion [277] of the court:

This case presents the frequent question of the title and ownership of personal property levied upon as the property of an execution debtor, and claimed by another party. The undisputed facts are that, in 1883, the petitioner, Lewis Hatch, who then and for about twenty-five years prior thereto, had resided *upon and worked a large farm in Mc-

Henry county, Illinois, made a contract with his son, Frank W. Hatch, a young man just out of school, under which it was agreed that the latter should undertake the management of the farm, farm implements, and live stock, make all repairs, pay all taxes and other expenses, replace all implements as they were worn out, keep up all live stock, and have as his own the net profits. It was further stipulated that each party should be at liberty to terminate the arrangement at any time, and that the son should turn back to his father the farm with its implements, stock, and other personalty, of the same kind and amount as was on the farm when the father retired, and in as good condition as when he took them.

As all questions connected with the veracity of witnesses, the bona fides of this arrangement, and its exact terms, are forestalled by the verdict of the jury, we are bound to consider the case as if the arrangement had been reduced to writing, and such writing were the only evidence bearing upon the subject. As the only testimony in the case was that of the father and the son, and as their statements were entirely harmonious, we are simply to inquire as to the correctness of the charge of the court to the jury, that, if they believed the arrangement was substantially such as was stated by the petitioner and his son, it did not have the effect in law to vest the title to any of the property or proceeds of the farm in Frank W. Hatch, although he may have had power to sell the same to others without any further authority from his father. There was evidence showing, not only that the son assumed the entire management of the farm, but that he was at full liberty to sell and dispose of its products, to replace old stock and implements with new, and to appropriate the net proceeds to himself; and that his only obligation was to return the property on demand, or substituted property of the same kind and amount, whenever either party should see fit to terminate the arrangement.

[279] We do not know that it is necessary to fix an exact definition to the relations between these parties, or to determine whether the law of master and servant, landlord and tenant, or bailor and bailee governed the transaction. The main object is to *ascertain the intent of the parties with respect to the ownership of the property. There is no doubt that the title to the farm remained in the father, who continued to occupy the homestead, and provided accommodations for certain of the farm hands; that the arrangement was made with his son soon after he left school, and apparently for the purpose of starting him in business. He was then unmarried, and lived in the same house with his father, who furnished the board of the hired men until after the son was married, when, after living some time with his wife in the homestead, he built at his own expense a small house for his own use about 20 or 30 rods distant from that of his father, although some of the hired men still lodged with the latter. In 1887 the son, Frank W.

Hatch, gave up the arrangement, moved with his family to Texas, and settled there with the intention of making it his home. Upon going there he left all the stock upon the farm just as he had received it from his father. He subsequently became dissatisfied, and returned to his father's farm under the same arrangement. He continued under this arrangement until 1892, when he went to the state of Washington for the purpose of locating there; invested in real estate and apparently in bank stock, in which he appears to have been unfortunate. Again returning to Illinois, he resumed the management of the farm.

It further appeared from the tax schedules of personal property in that school district, that the property in question was assessed in the name of Frank W. Hatch. While this testimony was doubtless entitled to consideration, the jury evidently did not give it great weight, as it was part of the agreement between the father and son that the latter should pay the taxes.

There was also evidence that, in the spring of 1897, the son sold to his father for \$1,000 a quantity of wool produced on the farm; but as it was also a part of the agreement that the son should have the product of the farm there was nothing inconsistent with it in this sale of the wool.

It is very evident from this testimony that no sale of the farm property was intended. There was no purchase price agreed upon, no time fixed for the payment; and the reservation that the arrangement might be terminated the day after it was made, *as well as [280] that it might indefinitely continue, is wholly inconsistent with the theory of a sale. Indeed, the only *indiciu*m of a sale is the provision that the identical property received need not be returned, but that other property of a similar kind might be substituted. Plaintiff in error relies in this connection upon a line of cases which hold that, where a man turns over personal property to another, under an arrangement by which the latter is not obliged to restore the specific articles of property, but is at liberty to deliver other property of the same kind and value, the receiver becomes the owner of the property; as, where wheat is delivered to an elevator with the understanding that the obligation to return it shall be discharged by the delivery of other like wheat (*Story, Bailments*, § 439; *Lonergan v. Stewart*, 55 Ill. 49; *Bretz v. Diehl*, 117 Pa. 589, 11 Atl. 893; *Smith v. Clark*, 21 Wend. 83, 34 Am. Dec. 213; *Johnston v. Browne*, 37 Iowa, 200), although even then a usage to return substituted property may turn the transaction into a bailment. *Erwin v. Clark*, 13 Mich. 10. But these authorities have no application to the case under consideration. Here there was no provision for a substituted property beyond that required by the nature of the property delivered. The arrangement was to be indefinite in its continuance. The property was mostly animals which would necessarily die, be sold, or slaughtered in a few years, and a gradual substitution of their progeny or other simi-

lar cattle and a renewal of worn-out implements was all that was contemplated. The stipulation that this might be done was a mere incident of the main agreement by which the property was to be returned in like good order and condition as received.

The son was undoubtedly intrusted with extensive powers, but no greater than the management of a large farm would necessarily require. The father had become an old man, and naturally wished to rid himself of the responsibility, even of supervision, and to put his son upon the footing of an independent farmer. It is possible that he contemplated leaving the property to his son upon his death; but it was clearly his intention to reserve the power of revoking the arrangement in case it did not prove satisfactory to him. As the father remained in possession of the farm, there was nothing in the mere fact that he *intrusted his son with the management that was necessarily calculated to mislead creditors into the belief that the latter was the owner of the property. Apparently the receiver was unable to produce evidence manifestly inconsistent with the agreement as sworn to by both father and son, and their testimony authorized the jury to find the ownership of the property to be in the former.

Similar agreements have been sustained as against creditors in a number of cases. *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782; *Wilber v. Sisson*, 53 Barb. 259; *Bowman v. Bradley*, 151 Pa. 351, 17 L. R. A. 213, 24 Atl. 1062; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Haywood v. Miller*, 3 Hill, 90; *Brown v. Scott*, 7 Vt. 60; *Peters v. Smith*, 42 Ill. 422; *State v. Curtis*, 20 N. C. (4 Dev. & B. L.) 226.

There was no error in the judgment of the court of appeals, and it is therefore affirmed.

THOMAS W. HYDE, *Plff. in Err.*,
v.

BISHOP IRON COMPANY *et al.*

(See S. C. Reporter's ed. 281-290.)

Public lands—application to enter land partly for benefit of others.

A single application to enter 160 acres of land by a person who has made a contract to divide a quarter thereof, when obtained, with another person, in violation of U. S. Rev. Stat. § 2262, cannot be sustained as to any part of the land, but is invalid even as to the part which he had not agreed to divide.

[No. 126.]

Argued January 29, 30, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a decision affirming a judgment in an action of ejectment. *Affirmed.*

See same case below, 72 Minn. 16, 74 N. W. 1016.

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Statement by Mr. Justice **Brewer**:

On April 3, 1895, the Bishop Iron Company, one of the defendants in error, filed in the district court of the eleventh judicial district of Minnesota, in and for the county of St. Louis, its complaint in ejectment, alleging that it was the absolute owner in fee simple and entitled to the immediate possession of the undivided $\frac{1}{2}$ of the following described land, situate in the county of St. Louis, to wit: The N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ *of section 30, township 63 north, range 11 [282] west of the fourth principal meridian, and that it was the lessee of the remaining undivided $\frac{1}{2}$ of said land under a lease in writing from and executed by the owners in fee simple of said remaining undivided $\frac{1}{2}$, by the terms of which lease plaintiff was entitled to the immediate, sole, and exclusive possession of said undivided $\frac{1}{2}$; that the defendant, the present plaintiff in error, on January 1, 1895, wrongfully and unlawfully entered into and took possession of said tract, and had ever since kept possession thereof. The prayer of the complainant was for possession, for costs and disbursements. The defendant answered and filed a cross petition, and on his application certain parties were made defendants to that cross petition. He subsequently filed an amended answer and cross petition.

In the latter these facts are alleged: That ever since August 20, 1884, the petitioner has been in the actual, open, and exclusive possession of the tract in controversy; that at the time of his taking possession it was unoccupied and unsurveyed land of the United States; that prior to July 20, 1885, the lands in that district were duly surveyed and an approved plat thereof filed in the land office at Duluth, Minn., that being the land office of the district in which those lands are situated; that on July 20, 1885, he duly offered to the local land office and made application to file his declaratory statement for said tract and lots 5 and 6 and the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of said section 30, and tendered the fees required by law to be paid on said application and filing; that he was informed by the local land officers that they would reject such application unless limited to the tract in controversy; that he then and there notified said local land officers that his house and the land he cultivated was upon and within said tract, and that he desired and intended to claim the same as a pre-emption, whether or not he was successful in a contest which he had in reference to the other tracts in the application; that he was told by them that if he was a settler in good faith his rights would be protected; that on the same day, but without his knowledge, the register made this indorsement upon the application:

"Land Office, Duluth, Minn., July 20th, 1885. The within *application to file D. S. [283] on the within described land is refused as to the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and lots 5 and 6 of Sec. 30, T. 63. R. 11 W. for the reason that the date of settlement alleged herein does not antedate the unadjusted location of Sioux half-breed scrip No. 19 E, in the name

of Orile Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the pre-emption law subsequent to said date of filing of said scrip, to wit, June 16, 1883, you are allowed thirty days for appeal, and are advised that if you fail to do so within that time this decision will be final."

That said officers retained said application, and also indorsed it as follows: "Filed Aug. 20, 1885;" that ignorant of this last indorsement, and within the proper time, after July 20, 1885, he formally appealed from the action of the local land office to the Commissioner of the General Land Office, which appeal was duly transmitted to that office on August 20, 1885; that thereafter, and on October 15, 1885, one Joseph H. Sharp, claiming to be the attorney in fact of James H. Warren, located the tract in controversy in the name of the said Warren, filing in support of said location certain Chippewa Indian scrip; that petitioner was ignorant of this location and filing until April 10, 1886, and then he made application in the local land office to contest said selection and location, and this application was also transmitted by the local land officers to the General Land Office at Washington.

The cross petition further alleged that on June 16, 1883, and before the surveys had been made of these lands, Orille Moreau, by her attorney in fact, located Sioux half-breed scrip Nos. 19 D and 19 E on lands therein described by metes and bounds, which locations, after the surveys, were adjusted by the local land officers in the name of the locator, as follows: Scrip No. 19 D upon lots 3, 5, and 6 and the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of said section 30, and No. 19 E upon lots 1 and 2 and the S.W. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ and the N.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of said section 30; that on October 9, 1884, petitioner instituted a contest in the local land office against the said location of scrip No. 19 D, and on October 19, 1884, Angus McDonald a like contest against [284] the *location of said scrip No. 19 E; that on the hearing of this latter contest the following testimony was received:

Testimony of S. F. White.

S. F. White, being duly sworn upon oath, deposes and says: I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the contestants in these cases to secure me for advances and legal services, and I am unable to find it. I supposed until about two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it, and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning, when I made a last final search through my safe and have been unable to find it and have no idea where it is.

Testimony of Mr. Hyde.

Q. Did you have any contract with Mr.

White in writing or otherwise by which he was to receive any compensation or interest in the land?

A. Yes, there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you see it last?

A. I have not seen it since it was drawn by Mr. White.

Q. What did it contain?

A. It contained when I prove up on the land I was to secure him on a one-half interest.

Q. Who witnessed the contract?

A. Powers, McDonald, and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White.

Mr. McDonald's Testimony.

Mr. White has furnished me the supplies to keep me on the *claim. I am making the [285] improvements for myself. I don't know of anyone being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the understanding that he is to have a half of it if we secure it.

Redirect:

Q. The half interest you speak of Mr. White is to have was to be a deed of or security upon a half of the land for advances and services?

A. It was a security.

Q. This interest you have spoken of as to Mr. Powers and which you say you cannot fix the amount of, what was that? Was it not simply that he was to be paid for his time and services, and there was no telling how much he would have to put in it?

A. He was to be paid for his time; that is all I mean by an interest he was to have.

Cross-examination:

I am to let him have an interest in the land when I get it to pay him for his time and services. The contract I have with Mr. White for this one half is in writing.

Q. When you get this land is it not the understanding between you and Mr. White that you are to deed him an undivided one-half interest in it?

A. No, sir; we never mentioned a deed.

Q. What do you mean then by saying that White was to have a half interest?

A. To secure him for advances.

[286] Q. *Then, if it was to secure him for advances made, how can you give him a half interest unless you deed him one half?

A. I could not very well.

Q. Then your understanding is you are to deed him one half interest in it?

A. No; that is not my understanding.

Q. Really you do not know anything about it, do you?

A. I know my own transaction about it, but I don't know White's.

—that no further or other evidence was taken on either of said hearings relative to the said contract with the said White; and that by agreement this testimony offered in the McDonald case was to be considered in determining the validity of both locations, to wit, that of No. 19 D as well as that of No. 19 E. The cross petition then stated that such testimony was improperly admitted; that it was irrelevant, incompetent, and immaterial because not bearing upon the question of the validity of these scrip locations; that the local land officers upon the termination of the hearing found the scrip locations valid, and both the petitioner and McDonald appealed therefrom to the Commissioner of the General Land Office; that the Commissioner reversed the decision of the local land officers and held the scrip locations invalid; and from his decision an appeal was taken by the locator to the Secretary of the Interior, who, on February 18, 1889, affirmed the decision of the Commissioner of the General Land Office, but erroneously and contrary to law held that said lands were open to entry by the first legal applicant. The cross petition then proceeded to show that for five succeeding years proceedings were continued in the land department at Washington and before the local land office at Duluth, in which repeated hearings and contests were had in reference to the validity of these scrip locations, and also of the location made by Warren of Chippewa scrip on the tract in controversy, the outcome of which was a final decision that Warren's application to enter this land with the Chippewa Indian scrip was valid and entitled to priority, and on the strength of that a patent was issued to him, and from him the plaintiff obtained its title.

[287] *Demurrers were interposed to the amended cross petition, which were sustained. On appeal to the supreme court of the state this ruling on the demurrers was on July 24, 1896, affirmed. 66 Minn. 24, 68 N. W. 95. Thereafter, in the district court, a reply was filed to the amended answer. The case came on for hearing on pleadings and proofs at the November term, 1896. Findings of fact and conclusions of law were made by the trial court, and judgment entered for the plaintiff, which judgment was thereafter, on April 22, 1898, affirmed by the supreme court (72 Minn. 16, 74 N. W. 1016), and reverse which judgment this writ of error was sued out.

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Messrs. John Brennan and L. A. Pradt argued the cause, and Messrs. Arthur L. Sanborn and Louis K. Luse filed a brief for plaintiff in error.

Mr. James K. Redington argued the cause and, with Messrs. Frank B. Kellogg and J. H. Chandler filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Brewer delivered the opinion [287] of the court:

The testimony is not preserved in the record, and no question can arise upon the findings of fact, for they are simply to the effect that the plaintiff had the legal title to an undivided $\frac{1}{2}$ and the leasehold right from the legal holders of the remaining $\frac{1}{2}$, and that the defendant was in possession without any color of title or right to the lands, so that the only questions which can be considered are those which arise upon the demurrers to the amended cross petition.

Upon the facts disclosed in that cross petition we remark that as the contest in reference to this tract was pending before the land department for nine years and carried on with exceeding vigor, as shown by the record of the frequent motions, applications, and so forth on the part of the respective parties, it would seem impossible to believe that the department was not fully advised of the facts respecting the locations and entries. We are not called upon to determine *whether every step in this protracted controversy was carried on with technical accuracy in the matter of procedure, and it may be, as counsel contend, that upon some of the motions and in some of the contests testimony was received which was not pertinent to that particular phase of the controversy, but it is quite evident that in one form or another, on some motion or another, in some stage of the proceedings, all the facts and claims of either party were fully presented, considered, and determined by the department. This is not a case on error, in which the regularity of every step taken in the land department is to be considered and determined, and upon that inquiry judgment entered, affirming or reversing its decision, but it is an independent suit in the courts in which the inquiry is whether the parties to the proceedings in the land department had full and proper notice of those proceedings, whether the department heard the claims and evidence offered by each party, and then whether upon the facts as found by it there was any error in matter of law in its decision. It may be remarked in passing that there is no allegation of corruption or perjury, or any of the grounds upon which sometimes a court of equity will set aside the conclusion of another tribunal, even where the proceedings are regular in form. And, as it is evident from the showing made in the cross petition that both parties were often and fully heard and no limitation placed upon their right to offer testimony, we must accept as conclusive the findings of fact made by the department, and in-

quire simply whether the law was properly adjudged.

Coming now to the merits of the controversy, the defendant, the cross petitioner, made a single application to enter 160 acres, one quarter of which is the tract in controversy. There were not two separate applications, one to enter the 40 and another the remaining 120 acres, and it cannot now be treated as though there were two. If the applicant was guilty of any violation of law such violation vitiated the proceeding *in toto*. This is not like *Cornelius v. Kessel*, 128 U. S. 457, 32 L. ed. 482, 9 Sup. Ct. Rep. 122, in which an entry of two tracts was sought, one of which was not at the disposal of the United States by reason of its being within a swamp-land grant to the state, and [289] it was held that the validity of the *entry as to the other was not affected thereby. In that case there was no wrong on the part of the entryman. He had acted in good faith, had not attempted any fraud, or to do anything in disregard of the mandates of the statutes, either in letter or spirit, and obviously the land department erred in canceling the entire entry by reason of its covering land not subject to disposal. Here there was a distinct violation of law on the part of the entryman, and one which vitiated the application as a whole. The Revised Statutes, § 2262, require a pre-emption applicant to make affidavit "that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself," and also provide that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same." It was this statute which the land department found the applicant had violated, in that he was seeking to enter a portion of the land, not solely for his own benefit, but also in part for the benefit of others. It would be a gross perversion of the spirit of this statute to permit a party who has made a single application to enter a tract of land to ignore its unity after it has been proved that he has made a contract in defiance of the statute in reference to half the land, and have it divided into two separate and independent applications, and then his application sustained and his title confirmed as to that part of the land in respect to which he had made no contract. Such a construction would enable an applicant without any risk to speculate on the chances of escaping detection in his effort to violate the statute and thwart the purposes of Congress in the disposal of public lands.

No one can read the testimony which was offered before the land officers without perceiving that there was sufficient in it to justify a finding that the applicant had made a contract in direct violation of the statutory provisions. It is true he himself testified that he was to secure Mr. White "on a one-half interest," but the contract itself was

not produced, having in some way disappeared, and McDonald, who was a party to it * (for it was a joint contract between [290] White, the applicant, and McDonald), testified that Mr. White, paying expenses, did so under an agreement that he was to have half of the land. We do not stop to inquire whether an agreement to give a mortgage for money advanced comes within the letter or spirit of the statute, for there was enough in the testimony to justify the conclusion of the department that it was a contract to divide the land when obtained, and it is not the province of the courts to review such finding of fact.

These are the only questions which we deem of importance, and, finding no error in the record, *the judgment of the Supreme Court of Minnesota is affirmed.*

MORRIS KEIM, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 290-296.)

Executive departments—discharge of clerk—review by court.

1. The action of the Secretary of the Interior in discharging a clerk in his department for incompetency is not subject to review in the courts, either by mandamus to reinstate the clerk, or by compelling payment of salary although he had not been removed, in the absence of any specific provision therefor by act of Congress.
2. The preference of honorably discharged soldiers and sailors for appointments to civil offices under the act of Congress of August 15, 1876, § 3 (19 Stat. at L. 169), and the civil service act of 1883, § 7 (22 Stat. at L. 406), is limited to cases in which such persons are "equally qualified," and does not authorize the appointment of incompetent or inefficient clerks.

[No. 57.]

Submitted March 5, 1900. Decided April 9, 1900.

APPEAL from the Court of Claims to review a decree dismissing a petition for salary of a clerk who had been discharged. *Affirmed.*

See same case below, 33 Ct. Cl. 174.

Statement by Mr. Justice **Brewer**:

*This case comes on appeal from a decree [290] of the court of claims dismissing appellant's petition. 33 Ct. Cl. 174. The findings of that court show that petitioner was on April 17, 1865, honorably discharged from the military service of the United States by reason of disability resulting from injuries received in such service. He passed the civil service examination, and on May 7, 1888, was appointed to a clerkship in the Post Office Department. On March 16, 1893, at his own

NOTE.—As to the right to remove officers summarily—see *Trainor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95, and note.

[291] request and on the certificate of the civil service commission, he was transferred *to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, with a salary of \$1,200 per year. On March 1, 1894, his salary was reduced to \$1 000 per annum, at which salary he continued to serve to July 31, 1894, when he was discharged, and has not since been permitted to perform the duties of his clerkship, although ready and willing to do so. The discharge by the Secretary of the Interior was made upon this recommendation from the Commissioner of Pensions: "The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him. William Lochren, Commissioner." The fourth and sixth findings are as follows:

"IV. At the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of a clerk in plaintiff's place; the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, retained at the time of plaintiff's discharge, and now retains, other clerks of the same division who have received since plaintiff's discharge, and are now receiving, the same salary, to wit, \$1,000 per annum (one receiving \$1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who are not shown to this court, except as in these findings set forth, to have possessed at the time of plaintiff's discharge better or inferior business capacity for the proper discharge of the duties of their said offices than the qualifications for the said duties possessed by plaintiff at that time. On or about the day plaintiff received notice of his discharge additional clerks were appointed to duties in the same division in which he served in said bureau, who never rendered any military or naval service. It does not appear that any of these clerks were regarded or reported as inefficient by any superior officer; nor does it appear that those so retained or those thereafter appointed possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by the plaintiff."

"VI. There is no evidence that the plaintiff made any effort to secure other employment, or that he has, or has not, been employed at any kind of work from and after [292] his said discharge *July, 1894. Nor is there evidence as to the difference in amount between his salary while in the government service and any moneys he might have earned or could have reasonably earned or has earned in other ways since his said discharge."

The petitioner requested additional findings, of which the only portions material to this inquiry are in the latter part of finding 3, that "he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at
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all times, since said last-named date, stood ready and willing to discharge the duties thereof." And finding 5: "That petitioner was at the time of his so-called discharge an efficient clerk, and discharged his duties faithfully and efficiently, and at the time of his said discharge he possessed and now possesses the necessary business capacity for the proper discharge of the duties of said clerkship."

These findings the court declined to make, "deeming said requested findings, if true, to be irrelevant to the issue presented."

Mr. John C. Chaney submitted the cause for appellant.

Assistant Attorney General Boyd submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Brewer delivered the opinion of the court: [292]

Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.

It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. Thus, in *Decatur v. Paulding*, 14 Pet. 497, 515, 10 L. ed. 559, 568, in which was presented the question of the right of the circuit court of the District of Columbia to issue a writ of mandamus to the Secretary of the Navy to perform an executive act not merely ministerial, but *involving the exercise of judgment, it was said by Chief Justice Taney: [293]

"The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

The same proposition was reaffirmed in *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12, in an elaborate opinion by Mr. Justice Bradley. See also *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607. In *United States ex rel. McBride v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167, 171, it was said by Mr. Justice Miller:

"Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that, so

long as the legal title to these lands remained in the United States and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

[294] In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. "It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated *inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Re Hennen*, 13 Pet. 230, 259, 10 L. ed. 138, 152; *Parsons v. United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed.

The Revised Statutes, § 1754, provides:

"Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

But this does not avail the petitioner. He was preferred for appointment and held under that appointment for years. There was no disregard of that section either in letter or spirit; no evasion of its obligations. He was not appointed on one day and discharged on the next, but after his first appointment continued in service until it was found that he was inefficient.

Section 3 of the act of August 15, 1876 (19 Stat. at L. 169, chap. 287) is:

"That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments,

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the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

*In section 7 of the civil service act of 1883 [295] (22 Stat. at L. 406, chap. 27) is this proviso:

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes."

But these sections do not contemplate the retention in office of a clerk who is inefficient, nor attempt to transfer the power of determining the question of efficiency from the heads of departments to the courts. The proviso in section 3 of the act of August 15, 1876, expressly limits the preference to those "equally qualified."

No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy. Congress has generously provided for the discharge of those obligations in a system of pensions more munificent than has ever before been known in the history of the world. But it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service. The preference, and it is only a preference, is to be exercised as between those "equally qualified," and this petitioner was discharged because of inefficiency. That, it may be said, does not imply misconduct but simply neglect, but a neglected duty often works as much against the interests of the government as a duty wrongfully performed, and the government has a right to demand and expect of its employees, not merely competency, but fidelity and attention to the duties of their positions.

Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a *duty [296] which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the commission, and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and, if courts should not be called upon to supervise the results of a civil service examination, equally inappropriate would be an investigation into the ac-

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tual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments; and, until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

We see no error in the conclusions of the Court of Claims, and its *decree is affirmed*.

CONSOLIDATED CANAL COMPANY.

Appt.

v.

MESA CANAL COMPANY.

(See S. C. Reporter's ed. 296-305.)

Water power on irrigating canal—injury by dam on lower section—rights under contract.

The rights of one who has created a water power by lawfully raising one section of an irrigating canal, in the process of enlarging it under a contract with the owner entitling him to enlarge that section and have the use of the increased flow of water thereby caused, but making no provision for the creation of any water power in so doing, while it expressly provides that it shall not in any way interfere with the rights, titles, interests, or privileges of the owner of the canal, except as therein provided, are not infringed by a dam which the owner of the canal makes in the lower section thereof, raising the water therein so high that it destroys the water power, when this is done by him for the purpose of enabling him to irrigate therefrom lands to which the water could not be conducted from the canal without thus raising the level of the water therein.

[No. 200.]

Submitted March 15, 1900. Decided April 9, 1900.

A PPEAL from a decision of the Supreme Court of the Territory of Arizona affirming a decree in favor of the defendant in a suit to restrain the maintenance of a dam in an irrigating canal. *Affirmed*.

See same case below, 53 Pac. 575.

Statement by Mr. Justice Brewer:

This case comes on appeal from a decision of the supreme court of the territory of [297] Arizona (53 Pac. 575), affirming *a decree of the district court of Maricopa county in favor of the defendant in a suit brought by the appellant to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in appellant's canal, or to destroy a certain water power claimed by appellant.

The facts, as shown by the findings and statement prepared by the supreme court, are as follows: The appellee was the owner of the Mesa canal. On January 10, 1891, it made a contract with A. J. Chandler, who

subsequently transferred his rights thereunder to the appellant. The material portions of the contract are as follows:

"This article of agreement, made and entered into this 10th day of January, A. D. 1891, by and between the Mesa Canal Company, a corporation duly organized and legally existing under and by virtue of the laws of the territory of Arizona, having its principal office and place of business at Mesa city in the county of Maricopa and territory of Arizona, party of the first part, and A. J. Chandler, of the city of Phoenix, in the county and territory aforesaid, party of the second part, witnesseth:

"That, whereas, the said party of the first part is an irrigating corporation, and as such is now the owner operating the Mesa canal in said county and territory;

"And, whereas, said party of the second part desires to increase the size and capacity of said canal between the point in Salt river where the water is now taken out, or by consent of the directors of the Mesa Canal Company may hereafter be taken out, and a point in said Mesa canal known as 'Ayers' head gate,' so as to increase the flow of water through said portions of said canal as aforesaid, and for the purpose of the party of the second part, his associates and assigns, obtaining water thereby through said canal, and in order to have the said canal increased in size, dimensions, and capacity, without cost or expense to said party of the first part, and without in any way interfering with the rights, titles, interests, or privileges of said party of the first part in and to said canal and the water flowing through said canal, except as hereinafter provided.

"Now, therefore, the Mesa Canal Com-[298] pany, party of the first part, for and in consideration of the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration and purposes herein contained and expressed, does for itself and for its successors or assigns hereby grant unto the said A. J. Chandler, his associates, heirs, or assigns, forever, the following rights and privileges upon the terms and conditions herein expressed, *viz.*:

"That the said A. J. Chandler, his associates, heirs, or assigns, shall have the right and privilege of entering upon any and all of the following portions of said Mesa canal at any time prior to the first day of March, A. D. 1891, for the purpose of widening and enlarging and increasing the size and capacity of said Mesa canal between the point in Salt river where the water is now or may hereafter be taken out for said canal, and a point on said canal known as 'Ayers' head gate' and enlarge and increase the size and dimensions of the main dam and head gates at the point of commencement of said canal in Salt river, and enlarge and increase the size and capacity of said Mesa canal so that the same when so enlarged and increased in size shall have a carrying capacity in addition to its present carrying capacity not ex-

ceeding forty thousand inches of water, miners' measurement, nor less than tenthousand inches of water, miners' measurement, and said enlargement shall be fully made and completed by the thirtieth day of December, A. D. 1891. The present carrying capacity of said Mesa canal for the purpose of this agreement shall be seven thousand inches, miners' measurement.

"All the cost and expense of enlarging and increasing the size of said dam, head gate, and canal as aforesaid shall be borne and paid by the party of the second part, his associates, heirs, or assigns, forever. And said enlargement shall be made without in any way interfering with any of the rights, titles, interests, or privileges of said party of the first part in and to the said canal and the water flowing through said canal, except as hereinafter provided.

[299] "The party of the first part hereby reserves the right to further *enlarge said portion of the Mesa canal whenever they deem it necessary to do so, provided such enlargement shall not interfere with or lessen the rights or privileges herein granted to the party of the second part, his associates, or assigns.

"Said party of the second part, his associates, or assigns, shall, in enlarging said main dam, head gates, and canal as aforesaid, in all respects enlarge said dam, head gates, and canal in a good, substantial, and workmanshiplike manner, according to the most approved methods of constructing and building irrigating canals.

"All suits, liabilities, costs, expenses, or judgments, and all damages or loss incurred or sustained by the party of the first part caused by said enlargement, shall be borne by the party of the second part, his associates or assigns forever, and all suits or proceedings against the party of the first part by reason of said enlargement to be defended at the expense of the party of the second part.

"It is expressly understood and agreed by the parties hereto, their successors, or assigns, that at all times when there is an abundance of water in Salt river liable to appropriation and flowage through said canal when so enlarged, then and at all such times the said party of the first part shall have the right to use from said canal in addition to the amount hereinbefore specified as the capacity of said canal two thousand inches of water, miners' measurement.

"The management and control of the canal between the point known as 'Ayers' head gate' to and including the dam in Salt river, when so enlarged as aforesaid, shall be in the party of the second part, his heirs, associates, or assigns. Provided, that the party of the second part, his heirs, associates, or assigns, shall, before he or they are entitled to receive or use any water through said canal, first deliver to the party of the first part, their heirs, or assigns, at the point in said Mesa canal known as 'Ayers' head gate,' and shall continue to deliver the seven thousand inches of water, miners' measurement,

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above expressed as the carrying capacity of said Mesa canal, or such portion thereof as may be apportioned to said Mesa canal by decree of any court. Provided, the stockholders who are now using or may *hereaft-[300] er use water above the 'Ayers' head gate' shall have their water delivered to them as at present above the 'Ayers' head gate' aforesaid, or said stockholders shall have their water delivered to them at the 'Ayers' head gate' with the other stockholders, as they may demand. Provided, further, that the water shall be delivered to the party of the first part after the completion of said canal as aforesaid for a period of five years, without cost to the party of the first part, their successors or assigns, and thereafter for a sum not exceeding three dollars per share per year forever, to be paid for in the same manner as they now pay for the same.

"Provided, further, that if the said party of the second part, his associates, heirs, or assigns, shall neglect to deliver water as agreed herein, or shall fail to carry out any of the terms of this agreement, and shall be notified by the directors of the Mesa Canal Company of such failure or neglect to carry out the terms of this agreement, and shall still neglect to carry out the terms of this agreement for a period of ten days thereafter, or in such case as a break in the canal, head gates, and dam, whereby the water is turned out for a period of five days, then and at all such times it is hereby agreed by the party of the second part, his heirs, associates, or assigns, that the directors of the Mesa Canal Company shall have the right and power to take full charge and control of said enlarged portion of said Mesa canal without process of law, and the same shall become the property of the Mesa Canal Company and shall so remain until the party of the second part, his associates, heirs, or assigns, shall fully comply with the term and requirements of this agreement, and then shall revert back to the party of the second part, his associates, heirs, or assigns, and shall be and remain in the party of the second part, his associates, heirs, or assigns, so long as the terms of this agreement shall be by them complied with.

"This agreement shall not give or convey to the party of the second part, his associates, heirs, or assigns, any title or ownership in or to the capital stock of said Mesa Canal Company, but shall only convey such privileges and rights as are herein mentioned."

*The appellant, as the transferee from [301] Chandler, enlarged and reconstructed the Mesa canal down to a place called the "Division Gates," which point had by mutual consent been substituted for Ayers' head gate as the point of division of the waters, and delivery by the appellant to the appellee of the water to which the latter was entitled. In thus enlarging and reconstructing the canal the appellant raised the grade thereof for the purpose of carrying the water at a higher elevation, thereby enabling the canal to cover more and other lands, and at the point where the division gates were

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located the elevation was about five feet above the grade of the canal before reconstruction, and by the construction of those gates at the point the appellant delivering the water to the appellee secured a fall of five feet in the water thus delivered.

Other findings were as follows:

"After appellant had delivered the water in the manner aforesaid for some years, the appellee built a dam in its canal a short distance below the division gates, that raised the water and caused it to flow through a lateral ditch, which enabled the appellee to irrigate some lands on which it had not been able to place water through its canal from its former elevation. The effect of this raise in the water was to reduce the fall at the division gates.

"After appellee had built its dam and backed up the water, as aforesaid, appellant had constructed a water wheel and a mill for grinding grain to be driven thereby, and had erected them at the division gates, so that the wheel was turned by the water as it fell from the division gate into the Mesa canal, a distance of about 5 feet. Afterwards appellant increased the height of the dam that it had formerly built to such an extent that it raised the surface of the water and backed the same up against the division gate in such manner as to destroy $3\frac{1}{2}$ feet of the 5 feet fall and totally destroyed the water power.

[302] "The water raised by the dam and the water affording the water power thus destroyed is the 7,000 inches of water which appellant is obligated by the terms of the agreement aforesaid *to first deliver to the appellee before said appellant is entitled to receive or use any water through said canal.

"A further result of the erection of the water in appellee's canal below the division gates was to very slightly, if at all, impede the flow of water in appellant's canal above the division gates and thereby detract very slightly from the carrying capacity of appellant's canal.

"The cost of the reconstruction of the canal from Ayers' head gate to the division gates exceeded \$10,000, and the water power created at the fall was equal to about 40 horse power."

Mr. John D. Pope submitted the cause for appellant.

Messrs. C. M. Frazier, R. C. Garland, and W. W. Wright, Jr., submitted the cause for appellee.

[302] *Mr. Justice Brewer delivered the opinion of the court:

While the title to any portion of the Mesa canal may not have been changed by this contract, yet for convenience we shall speak of that portion thereof under the control of the appellant as its canal, and of the balance as the appellee's canal.

In view of the finding of the supreme court we need not stop to consider any question in respect to the influence of the dam placed by appellee upon the flow of water in appellant's canal, and this notwithstanding

the fact that in the trial of the case much of the testimony, pro and con, was in reference to that matter. We are concluded as to the question of fact by the finding, and it is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling. *Parker v. Winnipiscogee Lake Cotton & Woollen Co.* 2 Black, 545, 552, 17 L. ed. 333, 337.

We pass, therefore, to the only substantial question, which is whether the dam built by appellee, having the effect as it did of raising the flow of water in its canal so as to destroy the water power obtained by appellant through the construction of its canal, was an infringement of the rights secured to appellant by the contract of January 10, 191. The appellant seems to be of the opinion that by that contract it had a right to raise its canal to such an elevation as it saw fit, while the appellee had no such liberty. We search the contract in vain for any express stipulation to that effect. If the appellant had a right to raise the grade of its canal 5 feet, we see nothing to forbid the appellee to raise its grade to the same height. There is no reference in the contract to water power. Obviously the only matter then contemplated was a supply of water for irrigation purposes. The appellee is styled "an irrigating corporation, and as such . . . operating the Mesa canal." The expressed purpose of appellant was "obtaining water thereby through said canal." The water power was evidently an afterthought, suggested by the condition of things when the appellant had finished the reconstruction of its canal. The appellant must point to some stipulation in the contract which the action of the appellee has broken, for the entire right given by it to the appellant is declared to be "without in any way interfering with the rights, titles, interests, or privileges of said party of the first part in and to said canal and the water flowing through said canal, except as hereinafter provided."

No right passed to the appellant except that which was expressly named. All other rights, titles, interests, or privileges were retained by the appellee. The appellant was to deliver the 7,000 inches of water out of the enlarged canal, and the appellee was to receive and pay therefor. The appellant was to increase the carrying capacity of the canal not less than 10,000 nor more than 40,000 inches, and this surplus water it had a right to use. But the appellee reserved the right if it saw fit at any time to still further enlarge the carrying capacity of the canal, and the only limitation in respect to such enlargement was that it should not "interfere with or lessen the rights" granted to the appellant. What were those rights? Obviously the right to take and use the surplus over 7,000 inches of water flowing through the canal, as enlarged by appellant.

It may be that neither party to this contract could change the grade of its canal so as to compel the other to make a like *change of grade. Thus, when the appellant, in the first instance, enlarged and reconstructed its

canal, it raised the grade 5 feet. If it had seen fit to lower the grade 5 feet, instead of raising it, doubtless, in order to fulfil its contract of delivery, it would have had to provide some pumping arrangements, and could not have demanded that the appellee lower its grade 5 feet in order to receive the water. And so it may be that the appellee could not now raise its grade 10 feet and then demand that the appellant either raise its grade 5 feet more or put in pumping works to insure the delivery of the water. But as to any action which does not interfere with the delivery of water by the appellant to the appellee, there is nothing in the contract to restrain at least the appellee from doing as it pleases with its canal.

It does not appear that the appellee was acting maliciously and for the mere sake of injuring the appellant. On the contrary, its purpose as disclosed was to irrigate lands which it had not theretofore been able to irrigate from its former elevation, and we know of no reason why it had not a right to do so. It made no stipulation as to the lands which it should irrigate. It had the same right which it had before the contract of enlarging or reducing the number of acres reached by the flow of its water. It does not appear that the lands which it was seeking to irrigate by raising the elevation in the upper part of its canal could have been reached in any other way, and it was not bound to desist from any enlargement of its own business for the mere benefit of the appellant or to enable the latter to enjoy something which was not conveyed to it by the terms of the contract.

We need not stop to inquire what are the rights of separate appropriators of water in the absence of a contract. We are dealing with those which grow out of this contract, bearing in mind that all rights are reserved to the appellee which are not in terms granted to the appellant. If 7,000 inches of water was more than sufficient to supply the territory which it was then irrigating, there is nothing which forbade the appellee to enlarge that area, and in order to enable it to reach that larger area it might make any [305] change in the construction of its canal—at least any change which did not interfere with the free delivery of the water by the appellant.

We see no error in the decision of the Supreme Court of Arizona, and its judgment is affirmed.

UNITED STATES, *Petitioner*,
v.

JOSEPH S. HARRIS, Edward M. Paxson,
and John Lowber Welsh, Receivers of the
Philadelphia & Reading Railroad Com-
pany.

(See S. C. Reporter's ed. 305-310.)

*Receivers—liability under statutes regulat-
ing carriers of live stock.*

NOTE.—As to statutory duties of carriers of live stock with reference to care of stock during transportation—see *Chesapeake & O. R. Co. v. American Exch. Bank (Va.)* 44 L. R. A. 449, and note

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Railroad receivers are not liable to an action for penalties under U. S. Rev. Stat. §§ 4386-4389, for failure to comply with the regulations as to transportation of live stock by "any company, owner, or custodian of such animals," since receivers are plainly not within the letter of the statute and not necessarily within its purpose or spirit, and therefore, as the statute is penal, it cannot be construed to extend to them.

[No. 169.]

Argued March 5, 6, 1900. Decided April 9, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a decision affirming a judgment in favor of defendants in an action against railroad receivers for penalties. *Affirmed.*

See same case below, 57 U. S. App. 259, 85 Fed. Rep. 533, 29 C. C. A. 327.

Statement by Mr. Justice Shiras:

*This was a suit brought in November, [305] 1895, in the district court of the United States for the eastern district of Pennsylvania, by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company, to recover a penalty in the sum of \$500 for an alleged violation of §§ 4386, 4387, 4388, and 4389 of the Revised Statutes of the United States.

There was a verdict in favor of the United States, but afterwards, on a question reserved at the trial, judgment was entered in favor of the defendants *non obstante veredicto*. 78 Fed. Rep. 290. Thereupon a writ of error was sued out from the circuit court of appeals for the third circuit, and on March 14, 1898, the judgment of the district court was affirmed. 57 U. S. App. 259, 85 Fed. Rep. 533, 29 C. C. A. 327. The cause was then brought to this court on a writ of certiorari.

Solicitor General John K. Richards argued the cause and filed a brief for petition-
er.

Mr. John G. Lamb argued the cause and filed a brief for respondents.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Shiras delivered the opinion [306] of the court:

This was an action to recover penalties for an alleged violation of the laws of the United States relating to the transportation of live stock; and the question involved is whether the defendants, who were in charge and control of the Philadelphia & Reading Railroad as receivers, appointed by the circuit court of the United States, were liable in such an action.

The act under which this suit was brought was passed March 3, 1873, and was entitled "An Act to Prevent Cruelty to Animals while in Transit by Railroad or Other Means of Transportation within the United States."

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It appears in the Revised Statutes as §§ 4386, 4387, 4388, and 4389, as follows:

"Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

"Sec. 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, [307] and *custody furnished, and shall not be liable for any detention of such animals.

"Sec. 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

"Sec. 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge."

The contention on behalf of the government is that, by the words "any company," used in § 4388, Congress intended to embrace all common carriers, whether by rail or water, upon whom the duty was imposed by § 4386 of unloading and feeding the animals; that the word "company" is used in a popular sense as signifying the person or persons, the association or corporation, carrying on the business of a common carrier by rail or water; that, as shown by its title, the act in question was a humane one, de-

signed to prevent cruelty to animals while in course of interstate transit; that the regulations were to be complied with whenever animals were transported by rail or boat from one state or another; and that whoever had charge of the railroad or the boat had to see that these wholesome and humane regulations were obeyed, or had to pay the penalty for violating them.

To strengthen the argument that Congress intended to include even receivers when managing a railroad under an appointment by a court, the government's counsel calls attention *to the provisions of the 2d and [308] 3d sections of the act of August 13, 1888 (25 Stat. at L. 436, chap. 866), reading as follows:

"Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It is claimed that the effect of such legislation is to place receivers upon the same plane with railway companies as respects their liability to be sued for acts done while operating a railroad.

Upon the whole, the proposition of the government's counsel is that the words "any company, owner, or custodian of such animals," used in § 4388, are intended to cover all those who can possibly violate the preceding two sections; that the words "every company" must, therefore, be held to include a railroad company, whether a person, a partnership or a corporation, and whether acting individually, or through officers or receivers.

It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But *we are not now concerned with [309] the general intention of Congress, but with its special intention, manifested in the en-

actments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner, or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?

It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and an attentive examination has brought us to the same conclusion.

It must be admitted that, in order to hold the receivers, they must be regarded as included in the word "company." Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

It may well be that Congress, in omitting to expressly include receivers in these sections, intended to leave them subject to the control and direction of the courts, whose officers they are. It does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed.

[310] *We cannot better close this discussion than by quoting the language of Chief Justice Marshall, in the case of *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37:

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. . . . But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though

penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." See likewise *Sarlls v. United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720.

The judgment of the Circuit Court of Appeals is affirmed.

*CREDITS COMMUTATION COMPANY[311]
and Combination Bridge Company, *Appts.*,

v.

UNITED STATES *et al.* (No. 233.)

CREDITS COMMUTATION COMPANY *et al.*, *Appts.*,

v.

F. GORDON DEXTER and Oliver Ames, 2d. Trustees, *et al.* (No. 234.)

CREDITS COMMUTATION COMPANY
et al.

v.

OLIVER AMES, 2d, and Samuel Carr, Executors, *et al.* (No. 235.)

(See S. C. Reporter's ed. 311-317.)

Appeal—from denial of intervention—adjudication against intervenor's claim.

A statement in an order denying leave to in-

NOTE.—As to what is "final decree" or judgment of state or other court from which appeal lies—see note to *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

As to what decrees are final—see note to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379.

As to orders, judgments, and decrees reviewable in the circuit court of appeals—see note to *Salmon v. Mills*, 13 C. C. A. 374.

tervene, that leave is denied, "not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene," does not amount to an adjudication against the rights asserted in the petitions as if upon demurrer thereto, but the denial is only an exercise of usual discretion in passing upon the right of intervention, which is not a final decision for the purpose of appeal.

[Nos. 233, 234, & 235.]

Submitted February 26, 1900. Decided April 9, 1900.

A PPEALS from orders of the United States Circuit Court of Appeals for the Eighth Circuit denying petitions for leave to intervene. *Affirmed.*

See same case below, 62 U. S. App. 728, 91 Fed. Rep. 570, 34 C. C. A. 12.

Statement by Mr. Justice Shiras:

[311] *On October 9, 1893, Oliver Ames, 2d, and Samuel Carr, executors of Frederick L. Ames, deceased, and Peter B. Wyckoff and Edwin F. Atkins, filed in the circuit court of the United States for the eighth circuit a bill of complaint against the Union Pacific Railway Company and a number of other companies in which the Union Pacific Railway Company had interests, praying for the appointment of receivers, the enforcement of certain alleged liens, and the administration of the properties of the Union Pacific Railway Company. On October 13, 1893, S. H. H. Clark, Oliver W. Mink, Ellery Anderson were appointed receivers, and on November 13, 1893, upon petition of the Attorney General of the United States, John W. Doane and Frederick R. Coudert were appointed additional receivers.

On January 21, 1895, a bill of complaint was filed in the said circuit court by F. Gordon Dexter and Oliver Ames, 2d, as trustees of the first mortgage of the Union Pacific Railway Company, to foreclose that mortgage.

[312] At the May term, 1897, the United States filed, in a circuit court of the United States for the eighth judicial circuit, a bill of complaint against the Union Pacific Railway Company, and against S. H. H. Clark, Oliver W. Mink, Ellery Anderson, John W. Doane, and Frederick R. Coudert, who had theretofore, on October 13, 1893, in the suit brought in said court by Oliver Ames, Samuel Carr, and others against the said Union Pacific *Railway Company, been appointed receivers therefor, and against F. Gordon Dexter and Oliver Ames, as trustees, the Union Trust Company of New York, as trustee, J. Pierpont Morgan and Edwin F. Atkins, trustees, the Central Trust Company of New York, as trustee. The object of this bill was to secure a decree of foreclosure of the subsidy lien of the United States upon the property of the Union Pacific Railway Company between Council Bluffs, Iowa, and a point 5 miles west of Ogden, Utah.

On April 28, 1897, the Credits Commutation Company, a corporation of the state of Iowa filed a petition in each of said three 177 U. S.

cases, praying for leave to intervene therein as a party, and to be heard to assert certain alleged rights and interests. On May 22, 1897, the Combination Bridge Company, a corporation of the state of Iowa, also filed petitions in said cases for leave to intervene therein for the same reasons set forth at length in the petitions of the Credits Commutation Company. On May 24, 1897, after hearing the counsel of the respective parties, an order was entered by the circuit court denying the prayers for leave to intervene, and on the same day an appeal was allowed to the circuit court of appeals for the eighth circuit. On December 7, 1898, motions by the appellees to dismiss said appeals were sustained, and said appeals were accordingly dismissed; and thereupon the appellants in open court prayed an appeal to this court, which was allowed. *Credits Commutation Co. v. Ames*, 62 U. S. App. 728, 91 Fed. Rep. 570, 34 C. C. A. 12. Motion to dismiss or affirm was submitted.

Messrs. Henry J. Taylor and John C. Coombs submitted the cause for appellants in Nos. 233, 234, 235:

Even if the decree or order appealed from was within the discretion of the circuit court, and an exercise thereof, nevertheless the same would remain reviewable on appeal.

Farmers' Loan & T. Co., Petitioner, 129 U. S. 206, 32 L. ed. 656, 9 Sup. Ct. Rep. 265.

The decree of the circuit court appealed from shows upon its face that the circuit court refused to exercise discretion, and did adjudicate upon the merits and law, questions, and the decision therefore properly presents questions reviewable on appeal.

Pittsfield Nat. Bank v. Bayne, 140 N. Y. 321, 35 N. E. 630; *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151; *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *Hays v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

The order of dismissal on its face expressly negatives the exercise of discretion, and shows that it is preceded by a determination and denial of the appellants' rights, and proceeds solely from such determination and denial. The order is therefore a final determination of the appellants' rights and is appealable.

People ex rel. Smith v. Fire & Bldg. Dept. Comrs. 103 N. Y. 370, 8 N. E. 730, and cases cited.

The very purpose of this sequestration was avowedly a final disposition of all rights, title, and assets, as completely as though the same constituted a mere fund in court.

Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97, 10 Sup. Ct. Rep. 736.

To constitute a final judgment it is not essential that it should be a bar to another suit.

Colorado Eastern R. Co. v. Union P. R. Co. 94 Fed. Rep. 312, 36 C. C. A. 263.

Attorney General Griggs, Solicitor General Richards, and Mr. John C. Cowin 783

submitted the cause for appellee the United States in Nos. 233, 234:

The decision in order to be reviewable must be final, and the act of Congress of March 3, 1891, establishing the circuit court of appeals, has made no change in this fundamental requirement.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Chicago, St. P. M. & O. R. Co. v. Roberts*, 141 U. S. 690, 35 L. ed. 905, 12 Sup. Ct. Rep. 123; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Kirwan v. Murphy*, 170 U. S. 205, 42 L. ed. 1009, 18 Sup. Ct. Rep. 592.

The orders of the circuit court of the United States for the district of Nebraska denying the appellants leave to intervene were not final decisions of that court. Hence they were not appealable orders. This is perfectly well settled.

United States v. Girault, 11 How. 22, 13 L. ed. 587; *Dainese v. Kendall*, 119 U. S. 53, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 95 Fed. Rep. 497, 36 C. C. A. 155.

Orders granting or denying leave to intervene in pending cases are discretionary and hence not appealable. Decisions which rest in the judicial discretion of a court of original jurisdiction cannot be reviewed in an appellate court.

Cook v. Burnley, 11 Wall. 672, 20 L. ed. 84; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Connor v. Peugh*, 18 How. 394, 15 L. ed. 432; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422, 78 Fed. Rep. 664, 24 C. C. 271, 36 L. R. A. 826; *Re Streett*, 8 U. S. App. 645, 62 Fed. Rep. 218, 10 C. C. A. 446; *Smith v. Glasgow Invest. Co.* 42 U. S. App. 105, 74 Fed. Rep. 332, 20 C. C. A. 432; *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426.

Recitals by a court, in its order, of opinions of law or fact, or by way of inducement, are immaterial and give to such orders or decrees no different aspect or character for the purpose of review, or of determining whether they are reviewable. Such determination is to be governed solely by the essence of what is done, and not by the appellation given to it in the order.

Corning v. Troy Iron & Nail Factory, 15 How. 451, 14 L. ed. 768; *Potter v. Beal*, 5 U. S. App. 49, 50 Fed. Rep. 860, 2 C. C. A. 60; *Caverly v. Deere*, 24 U. S. App. 617, 66 Fed. Rep. 309, 13 C. C. A. 452; *Russell v. Kern*, 34 U. S. App. 90, 69 Fed. Rep. 94, 16 C. C. A. 154; *Evans v. Suess Ornamental Glass Co.* 53 U. S. App. 567, 83 Fed. Rep. 708, 28 C. C. A. 24.

Messrs. Winslow S. Pierce, William R. Kelly, and G. M. Lambertson submitted the cause for other appellees in Nos. 233, 234. **Messrs. John F. Dillon and Lawrence Greer** were with them on the brief.

Messrs. Winslow S. Pierce, John F. Dillon, William R. Kelly, and G. M. Lambertson submitted the cause for appellees in No. 235. **Mr. Lawrence Greer** was with them on the brief.

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Mr. Justice **Shiras** delivered the opinion[312] of the court:

The Credits Commutation Company and the Combination *Bridge Company, corpora-[313] tions of the state of Iowa, filed petitions for leave to intervene in three suits against the Union Pacific Railway Company. The object of those suits was to enforce by foreclosure the payment of bonds secured by mortgage and of a debt due to the United States created by certain subsidy bonds, and, pending such proceedings, the appointment of receivers to prevent the disintegration of properties of the railway company.

The Combination Bridge Company is the owner of a bridge across the Missouri river at Sioux City. The Credits Commutation Company is the owner of the stock of the bridge company, and also of interests in the capital stock of certain railroads connected by the said bridge. The petition alleges that the Credits Commutation Company was organized for the purpose of connecting said bridge and railroads with the Union Pacific Railway.

The Union Pacific Railway Company is a consolidated company, composed of the Union Pacific Railroad Company and the Kansas Pacific Railway Company, and Congress, by the act of July 1, 1862, in order to "secure to the government the use of the same," conferred upon said companies grants of large and valuable tracts of the public lands, and further subsidized said companies by an advance to them of the public credit in the form of bonds of the United States. The 15th section of the said act of July 1, 1862, was in the following terms:

"And be it further enacted, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word 'company' is used in this act it shall be construed to embrace the words 'their associates, successors, and assigns,' as if the words had been properly added thereto."

The petition alleges that the Credits Commutation Company was organized in the latter part of 1894, but admits that said company has abstained from making any application to the President of the United States to fix the place at which, and the *just and[314] equitable terms upon which, said company should build a railroad to connect with the road of the Union Pacific Railway Company, because the latter company had been embarrassed and all its property was in the hands of receivers, and bills to foreclose in behalf of the holders of mortgage bonds and to enforce the creditor rights of the United States had been filed. It seems to be the theory of the petitioners that, under the provisions of the act of Congress, they have a right to connect their railroads, now or to be constructed, with the railroad of the Union Pacific Railway Company, and that they have, therefore, a right to intervene in the foreclosure proceedings, in order to pro-

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test their right to so connect and to protect the right of the public in such railroad connections.

As heretofore stated, the circuit court denied the petitions for leave to intervene, and upon appeal to the circuit court of appeals that court dismissed the appeals. The view of the circuit court of appeals was that the order of the circuit court refusing leave to intervene was not a final judgment or decree from which an appeal could be taken, and that, at any rate, the action of the lower court in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention. 62 U. S. App. 728, 731, 91 Fed. Rep. 570, 571, 34 C. C. A. 12, 13.

To show that the circuit court, in denying the petition for leave to intervene, was not exercising the usual discretion of a chancellor in passing upon a petition of an outside party for leave to intervene, but adjudicated the petitioners' rights asserted in the petitions, as if upon demurrer thereto, we are pointed to the language used: "Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene."

It is urged that the circuit court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, so as to preclude them from resorting thereafter to some other tribunal, and that, therefore, its judgment was a final one and properly reviewable on appeal.

[315] *We cannot accept this view of the meaning and effect of the order in question. What was sought in the petitions was leave to intervene in a pending and undetermined cause, and that right alone was determined. The very terms used by the court, that the facts stated were "not sufficient to show that the petitioners, or either of them, have a legal right to intervene," shows that what was considered was the right to intervene. That right refused, the petitioners were left free to assert such other rights as they might possess in any other tribunal. That this was the view of Judge Sanborn himself is seen in the following language of his opinion:

"Whatever the petitioners' right or interest may be, it is nothing more than a contingent, speculative, future possibility. It is contingent, because it is conditioned upon the construction of a railroad. It is speculative, because it depends for its existence upon the question whether or not capitalists shall see sufficient profit in the construction of such a railroad to induce them to put in the necessary money for that purpose. It is future, because it has not yet come into existence, and it is possible, because it may come into existence. Courts of equity are not accustomed, perhaps they have not the power, to adjudicate upon possible rights which are not in being and which are merely susceptible of

coming into being at some unlimited time in the future."

The question was well considered by the circuit court of appeals, and we quote and adopt its statement, as follows:

"When such action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. . . . It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be *a practical denial [316] of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character. The petitioners were under no obligation to intervene in the litigation against the Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation, could, we think, with more propriety and with less difficulty, have been litigated by an independent bill after they had completed, or were about completing, their line to a suitable junction point. Prior to that time the questions which they sought to raise by means of the intervening petitions were speculative questions, which the lower court, as we think, very properly, refused to consider or determine."

In *Connor v. Peugh*, 18 How. 394, 15 L. ed. 432, it was said by Mr. Justice Grier, giving the opinion of the court:

"On the 5th of June, 1885, the tenant in possession came into court for the first time, and moved to set aside the judgment and execution issued thereon, and to be allowed to defend the suit for reasons set forth in her affidavit. The court refused to grant this motion, 'whereupon the said Mary Ann Connor prayed an appeal.'

"The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry, and ouster, the judgment was properly entered against the casual ejector. No one but a party to the suit can bring a writ of error. The tenant hav-

ing neglected to have herself made such cannot have a writ of error to the judgment against the casual ejector. The motion made afterwards to have the judgment set aside [317] and for *leave to intervene was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is the subject of a bill of exceptions or a writ of error."

In *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49, it was held that an appeal does not lie from an order of the court below denying a motion in a pending suit to permit a person to intervene and become a party thereto. *Guion v. Liverpool, L. & G. Ins. Co.* 109 U. S. 173, 27 L. ed. 895, 3 Sup. Ct. Rep. 108, is to the same effect.

Whether the contention of the petitioners that, under the legislation of Congress, they and railroad companies similarly situated had a right to connect with the road of the Union Pacific Railway Company, or shall have such a right with respect to that road in the hands of purchasers under the decree of foreclosure, at such places and upon such just and equitable terms as the President of the United States may prescribe, were not questions that, under the pleadings and evidence, were before the circuit court for its determination; and as its action in denying the petitions to intervene was an exercise of purely discretionary power, and not final in its character as respects such alleged right to connect, we think the Circuit Court of Appeals was right in holding that the appeals could not be entertained by that court, and its *decree*, dismissing the same, is accordingly *affirmed*.

Mr. Justice **McKenna** took no part in the decision of the cases.

[318]*SARANAC LAND & TIMBER COMPANY,
Plff. in Err.,
v.

JAMES A. ROBERTS, as Comptroller of the
State of New York.

(See S. C. Reporter's ed. 318-331.)

Error to Federal court—effect of prior decision on error to state court—tax titles—defects cured by statute of limitations.

1. A decision by the Supreme Court of the United States affirming a decision of a state court that upheld a state statute of limitations, the constitutional validity of which was dependent upon the existence of some precedent or coincident remedy, must be regarded as expressly deciding that such remedy exists, and cannot be disregarded as a precedent in a later case on writ of error to a lower Federal court, on the theory that the existence of such remedy was merely assumed by the Supreme Court of the United States in the former case because it was bound in that particular to follow the decision of the state court, but is not so bound in a case arising in a Federal court.

2. Any defects or irregularities in the proceedings by which a tax title to land is ac-

quired—such as the sale for aggregate unpaid taxes of several years on a tract which had been assessed in separate parcels, or part of which had in some years not been assessed at all, and the failure to publish a proper notice of redemption—will not affect the validity of the tax title under N. Y. Laws 1885, chap. 448, after the expiration of the two years thereby prescribed, even if some of the defects are to be deemed jurisdictional, since the statute is not merely a curative one, but is a statute of limitations.

[No. 94.]

Argued December 21, 22, 1899. Decided April 9, 1900.

IN ERROR to the Circuit Court of the United States for the Northern District of New York to review a decision sustaining the constitutionality of a statute validating tax titles after lapse of a certain period of time. *Affirmed*.

See same case below, 83 Fed. Rep. 436.

Statement by Mr. Justice **McKenna**:

*This is an action of ejectment brought to [318] recover a tract of 7,500 acres of forest land, known as the northwest quarter of township 24, Great Tract One, Macomb's Purchase, situated in Franklin county, in the northern district of the state of New York.

The plaintiff deraigned title by various mesne conveyances from one Daniel McCormick, who became the grantee of the state of New York in 1798. The defendant claims through deeds executed to the state of New York in pursuance of sales for taxes.

The defendant also set up as a defense a six months' statute of limitations contained in chapter 448 of a law enacted in 1885, certain statutes against champerty, the illegal organization of the plaintiff in error, and a former adjudication made on an application to cancel one of the tax sales under which the state claimed title.

The first sale upon which the title of the state is based was made in 1877 for unpaid taxes of 1866 to 1877, inclusive. A certificate was issued dated October 18, 1877, showing a sale to the state of the whole of the northwest quarter for the sum of \$2,756.40, and subsequently a deed in the usual form, and dated *June 9, 1881, which was rec- [319] orded in Franklin county clerk's office June 8, 1882.

The subsequent sales were made respectively in 1881 for the unpaid taxes of 1871 to 1876; in 1885 for those of 1877 to 1879; in 1890 for those of 1881 to 1885. At all of the sales except the first one the property was treated as already state property, and struck off to the state without giving opportunity for bids. Certificates and deeds were duly issued to the state in pursuance of the sale of 1881 and 1885 in due form, and duly recorded in the clerk's office of the proper county. A certificate alone was issued in pursuance of the sale of 1890.

The taxes for the years 1866 and 1867 were assessed against the whole quarter as one parcel. In the years 1868, 1869, and 1870

the whole quarter was not assessed, and so much of it as was assessed was placed upon the rolls in two parcels, and described as follows:

"Township 24, Great Tract One, Macomb's Purchase; N. W. $\frac{1}{4}$, excepting 1,000 acres, lying in N. W. corner; also 1,215 acres which is water, leaving 5,285 acres.

"Macomb's Purchase, Great Tract One, township 24, 1,000 acres, lying in the northwest corner of northwest quarter."

There was evidence tending to show that on the tract in controversy there were bodies of water, but no part of them was within the parcel of 1,000 acres laid out in a square form in the northwest corner.

In December, 1894, the defendant caused a notice to be published once a week for three successive weeks in a newspaper published in Franklin county, of which the following is a copy:

To Whom It May Concern:

Notice is hereby given that the following is the list of wild, vacant forest lands located in the county of Franklin to which the state holds title, and that from and after three weeks from the 22d day of December, 1894, possession thereof will be deemed to be in the comptroller of this state, pursuant to the provisions of section 13 of chapter 711, Laws of 1893.

William J. Morgan,
Deputy Comptroller.

[320] *The list attached to this notice contained the land in question.

When the testimony in the case was closed the counsel for each of the respective parties, with the approval of the court, admitted that there was no question of fact in the case to be submitted to the jury; that the issues depended upon the construction that the court should give to the law; and thereupon the jury was discharged, and a written stipulation waiving a jury trial was signed by the attorneys of record for the respective parties, and filed with the clerk.

The plaintiff requested the court to rule on certain propositions of law which were based on the assumption of the sale of the tract in one parcel for the aggregate unpaid taxes for several years, and claiming the following as jurisdictional defects in the sale, and not cured or validated by chapter 448 of the Laws of 1885, or chapter 711 of the Laws of 1893: The sale of the whole tract for taxes which were assessed against separate and distinct parcels of it; such sale when during one or more of the years a part of the tract was not assessed; such sale when some of the taxes were assessed against the whole tract and others against a part only; insufficiency of the description to identify and distinguish the parcel sold; that at the sale of 1881 the comptroller treated the property as that of the state, and struck it off to the state without giving opportunity for other bids; and that chapter 448 of the Laws of 1885 was unconstitutional and void, and repugnant to the Fourteenth Amendment of the Constitution of the United States.

These propositions of law the court re-

fused to affirm, and the court's action is assigned as error.

It is also urged that it was error to admit in evidence, over the objection of plaintiff, the deed from the state made on the sale of 1881 conveying to the state two parcels of land in the northwest quarter of township 24 by the following description:

"Macomb's Purchase, Great Tract One, township 24, northwest quarter, 5,285 acres, more or less, being all that remains of the said northwest quarter after excepting therefrom 1,000 acres in the northwest corner thereof, and 1,215 acres covered by water; 1,000 acres in the northwest corner of the northwest quarter."

*Also in receiving in evidence the certificate of sale issued on the sale of 1890, because it was not in evidence of a legal title.

The assignments of error may, as is said in the brief of plaintiff in error, be reduced in a general way to two—

"First. Is chapter 448 of the Laws of New York of 1885 a valid and constitutional law when set up by the state in its own favor?

"Second. Were the defects shown to exist in the tax sales, or either of them, of such nature as to be beyond the reach of that law if valid, accepting the construction which has been put upon it by the New York court?"

The act referred to is inserted in the margin.† The circuit court found in favor of the state, basing its decision upon the constitutionality of chapter 448, following *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38, and holding also the law to be curative of the defects urged against the validity of the tax sales. 83 Fed. Rep. 436. The complaint was filed January 25, 1895. The plaintiff sued out this writ of error.

†Laws 1885, Chapter 448.

An Act to Amend Chapter Four Hundred and Twenty-seven of the Laws of Eighteen Hundred and Fifty-five, Entitled, "An Act in Relation to the Collection of Taxes on Lands of Nonresidents, and to Provide for the Sale of Such Lands for Unpaid Taxes."

Sec. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An Act in Relation to the Collection of Taxes on Lands of Nonresidents, and to Provide for the Sale of Such Lands for Unpaid Taxes," is hereby amended so as to read as follows:

"§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale, shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration

Mr. Frank E. Smith argued the cause and, with **Mr. Thomas F. Conway**, filed a brief for plaintiff in error:

The questions which in *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38, were assumed to have been correctly decided because they were questions of state law must now be decided by this court for itself.

Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 19 L. ed. 997; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The act in question does not attempt to cure "jurisdictional defects." A tax sale void by reason of such defect remains void notwithstanding the statute.

Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400; *Ne-ha-sa-ne Park Asso. v. Lloyd*, 7 App. Div. 359, 40 N. Y. Supp. 58; *Marsh v. Ne-ha-sa-ne Park Asso.* 18 Misc. 314, 42 N. Y. Supp. 996, Reversed in 25 App. Div. 34, 49 N. Y. Supp. 384.

A sale of land for taxes must, we think, be wholly good or wholly bad. It is indivisible, and unless it can be sustained as a whole it cannot be sustained in part. It is also manifest that the sale of the 1,215-acre parcel for the unpaid taxes of five years cannot, independently of curative legislation, be justified because as to two of those years it was legally liable.

People v. Hagadorn, 104 N. Y. 516, 10 N. E. 891.

The sale of the whole quarter for taxes which were not a lien upon the whole quarter was illegal and void. It is not different in principle from the case of the assessment of an entire tract, followed by payment of a proportionate part of the tax upon a specific part of the land, and a sale of the entire tract for the unpaid balance. Such a sale is void *in toto*.

Black, Tax Titles, 2d ed. § 258; *Marsh v. Ne-ha-sa-ne Park Asso.* 18 Misc. 314, 42 N. Y. Supp. 996, Reversed in 25 App. Div. 34, 49 N. Y. Supp. 384.

A sale of land for unpaid taxes must be made as the land has been assessed and taxed; and the practice of bunching into one

parcel two or more lots which have been separately assessed, and selling them as one for the aggregate tax, has been uniformly condemned.

Blackwell, Tax Titles, 5th ed. § 526; Cool-ey, Taxn. 2d ed. p. 493; *National F. Ins. Co. v. McKay*, 5 Abb. Pr. N. S. 445; *Thompson v. Burkans*, 61 N. Y. 52; *Turner v. Boyce*, 11 Misc. 502, 33 N. Y. Supp. 433; *Marsh v. Ne-ha-sa-ne Park Asso.* 18 Misc. 314, 42 N. Y. Supp. 996, Reversed in 25 App. Div. 34, 49 N. Y. Supp. 384.

Certainty of description is indispensable in all proceedings to divest the title of a citizen for nonpayment of taxes, or otherwise *in invitum*.

Tallman v. White, 2 N. Y. 66; *Re New York C. & H. R. R. Co.* 70 N. Y. 191; *Re New York C. & H. R. R. Co.* 90 N. Y. 342; *Zink v. McManus*, 121 N. Y. 259, 24 N. E. 467.

The rule requiring certainty of description applies with peculiar force to the assessment roll, as that is the foundation on which all the proceedings to levy and enforce a tax must rest.

Blackwell, Tax Titles, 5th ed. § 224; Black, Tax Titles, 2d ed. § 112; *Stout v. Mastin*, 139 U. S. 151, 35 L. ed. 121, 11 Sup. Ct. Rep. 519; *Tallman v. White*, 2 N. Y. 66; *Greene v. Lunt*, 58 Me. 518.

A description which would be sufficient in a voluntary deed, as between grantor and grantee, may be wholly insufficient in tax proceedings.

Blackwell, Tax Titles, 5th ed. § 226; Devlin, Deeds, § 1405; *Stout v. Mastin*, 139 U. S. 151, 35 L. ed. 121, 11 Sup. Ct. Rep. 519; *Tallman v. White*, 2 N. Y. 66.

Tax proceedings must be certain in themselves, and cannot be aided by extrinsic proof.

Black, Tax Titles, 2d ed. §§ 406, 407; Blackwell, Tax Titles, 5th ed. § 227; *Stout v. Mastin*, 139 U. S. 151, 35 L. ed. 121, 11 Sup. Ct. Rep. 519; *Tallman v. White*, 2 N. Y. 66; *Curtis v. Brown County Supers.* 22 Wis. 167; *Orton v. Noonan*, 23 Wis. 102; *People v. Mahoney*, 55 Cal. 286; *Bowers v. Andrews*, 52 Miss. 596.

When in tax proceedings the officials attempt to exclude from their operation a specific part of the tract otherwise proceeded against, the part excepted must be described

of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances, or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancelation, as now provided by law, on a direct application to the comptroller or an ac-

tion brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

Sec. 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren, and Washington, but shall not affect any action, proceeding, or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

with certainty, or the proceedings will be void.

Black, Tax Titles, 2d ed. § 405; *Marsh v. Ne-ha-sa-ne Park Asso.* 18 Misc. 314, 42 N. Y. Supp. 996, Reversed in 25 App. Div. 34, 49 N. Y. Supp. 384; *Johnson v. Ashland Lumber Co.* 52 Wis. 458, 9 N. W. 464.

The description was fatally defective because neither of the excepted parcels was so described that it could be located.

Zink v. McManus, 121 N. Y. 259, 24 N. E. 467.

Such a description has been sustained in some states, where by statute land sold for taxes must be laid out in a square form.

Newby v. Brownlee, 23 Fed. Rep. 320.

There is no such statute in New York.

Treating the land as already the property of the state, and denying opportunity for competitive bidding, was a jurisdictional defect.

Turner v. Boyce, 11 Misc. 502, 33 N. Y. Supp. 433; *Andrus v. Wheeler*, 18 Misc. 646, 42 N. Y. Supp. 525, Reversed in 22 App. Div. 596, 48 N. Y. Supp. 118; *Meigs v. Roberts*, 42 App. Div. 290, 59 N. Y. Supp. 215.

Mr. Theodore E. Hancock argued the cause and, with Mr. John C. Davies, filed a brief for defendant in error:

The validity and constitutionality of this particular statute is res judicata.

People v. Turner, 117 N. Y. 227, 22 N. E. 1022; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38.

Similar statutes have been repeatedly construed as not in contravention of the Federal Constitution, and as valid for the purpose of limiting the time within which actions similar to this shall be commenced.

Geekie v. Kirby Carpenter Co. 106 U. S. 379, 27 L. ed. 157, 1 Sup. Ct. Rep. 315; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Williams v. Albany Supers.* 122 U. S. 163, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1244; *Re Brown*, 135 U. S. 701, 34 L. ed. 316, 10 Sup. Ct. Rep. 972; *Townsen v. Wilson*, 9 Pa. 270; *Bronson v. St. Croix Lumber Co.* 44 Minn. 348, 46 N. W. 570; *Coulter v. Stafford*, 48 Fed. Rep. 266; *Land & River Improv. Co. v. Bardon*, 45 Fed. Rep. 706; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *Ostrander v. Darling*, 127 N. Y. 70, 27 N. E. 353; *Allen v. Armstrong*, 16 Iowa, 508; *Smith v. Cleveland*, 17 Wis. 563; *Freeman v. Thayer*, 33 Me. 83; *Raley v. Guinn*, 76 Mo. 270; *Pillow v. Roberts*, 13 How. 472, 14 L. ed. 228.

A departure from the strict letter of a statute, which, had it been directed by statute, would not have rendered it unconstitutional, cannot be said to be a jurisdictional defect in a constitutional sense; and a curative statute may validate acts which the legislature might originally have authorized, and limit the time within which actions to set aside tax sales based upon irregularities shall be commenced.

Ensign v. Barse, 107 N. Y. 339, 14 N. E. 400, 15 N. E. 401; *People v. Turner*, 117 N. Y. 238, 22 N. E. 1022; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400; *People ex rel. Flow-* 177 U. S. U. S., Book 44.

er v. Bleckwenn, 55 Hun, 169, 7 N. Y. Supp. 914; *Re Lamb*, 51 Hun, 633, 4 N. Y. Supp. 858.

The United States courts will follow the decisions of the state courts in the construction of the state statutes relating to the forms of assessments and methods of procedure in making sales.

Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 228; *Lamborn v. Dickinson County Comrs.* 97 U. S. 181, 24 L. ed. 926; *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455, 10 L. ed. 1029; *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402; *De Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120; *Beryman v. Bly*, 27 U. S. App. 650, 66 Fed. Rep. 40, 13 C. C. A. 319; *Sanford v. Poc*, 37 U. S. App. 378, 69 Fed. Rep. 546, 16 C. C. A. 305; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Lane County v. Oregon*, 7 Wall. 71, 19 L. ed. 101; *State Railroad Tax Cases*, 92 U. S. 618, sub nom. *Taylor v. Secor*, 23 L. ed. 675; *Witherspoon v. Duncan*, 4 Wall. 217, 18 L. ed. 342.

There is no uncertainty in the description, as the 1,000 acres would be in the form of a square.

Marsh v. Ne-ha-sa-ne Park Asso. 25 App. Div. 40, 49 N. Y. Supp. 384; *Dolan v. Treleven*, 31 Wis. 147; *Bowers v. Chambers*, 53 Miss. 259; *Doe ex dem. Hooper v. Clayton*, 81 Ala. 391, 2 So. 24; *Walsh v. Ringer*, 2 Ohio, 328; *Prior v. Scott*, 87 Mo. 308; *Enochs v. Miller*, 60 Miss. 19; *McCready v. Lansdale*, 58 Miss. 877; *Bybee v. Hageman*, 66 Ill. 519; *Colcord v. Alexander*, 67 Ill. 581; *Major v. Brush*, 7 Ind. 232.

The defects complained of by plaintiff in error were simply irregularities, and not of a jurisdictional nature.

Marsh v. Ne-ha-sa-ne Park Asso. 25 App. Div. 36, 49 N. Y. Supp. 384; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

*Mr. Justice McKenna delivered the [322] opinion of the court:

If chapter 448 is constitutional, its limitation attached some years before this action was commenced. It was held constitutional by this court in *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38. The contention now is, however, that our conclusion depended upon reasoning not applicable to the case at bar. It is said that to the validity of a statute of limitations a remedy precedent to and during the period of limitation must exist, and that a remedy did exist we assumed was decided by the state court as a state question, and that on a writ of error to its judgment we were bound by the ruling, and for that reason affirmed the judgment. But the pending case being on error to a United States court, we [323] not only may, but must, exercise an independent judgment—decide for ourselves, not follow the state court—whether a remedy existed.

But was the conclusion in the *Turner Case* as dependent as contended? The question is best answered by the case itself.

The action was brought in the state court, and was replevin for logs cut upon wild forest lands. The state claimed title through sales for delinquent taxes and deeds executed in pursuance of them. The defendant attacked the deeds, alleging the invalidity of the taxes for 1867 and 1870, and offered evidence to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the third Tuesday of August; and that the assessors omitted to meet on the third Tuesday to review the assessment for that year.

The state objected to the evidence as immaterial because the comptroller's deed was made conclusive evidence of those matters by the statute of the state of 1885, chap. 448,—the statute now in controversy. To the objection it was replied that the statute infringed the 1st section of the Fourteenth Amendment to the Constitution of the United States. The state's objection, however, was sustained, and judgment was directed and entered for the state, which was affirmed by the court of appeals, 145 N. Y. 451, 40 N. E. 400.

Mr. Justice Gray delivered the opinion of this court. He stated the law of 1885 establishing a forest preserve and the creation of a forest commission and its duties, and that at the date of the passage of the statute the time for redemption from tax sales was two years. He then stated the enactment and provisions of the law whose constitutionality was attacked, the time of the tax sales, the time for redemption and its expiration, the period the comptroller's deeds were on record, and the time that they became conclusive, and said:

"The statute according to its principal intent and effect, and as construed by the court of appeals of the state, was a statute of limitations. *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking [324] into consideration *the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry v. Anderson*, 95 U. S. 628, 632, 633, 24 L. ed. 365, 366; *Re Brown*, 135 U. S. 701, 705-707, 34 L. ed. 316-318, 10 Sup. Ct. Rep. 972.

"The statute now in question relates to land sold and conveyed to the state for non-payment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded, and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the state in the opinion that the limitation of six months, as applied to a case of this kind, is not

repugnant to any provision of the Constitution of the United States.

"It was argued in behalf of the plaintiff in error that the statute was unconstitutional because it did not allow him any opportunity to assert his rights even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the court of appeals in the case at bar, and in the subsequent case of *People ex rel. Millard v. Roberts*, 151 N. Y. 540, 45 N. E. 941, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct application to the comptroller to cancel the sale or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local Constitution and laws."

The decision establishes the following propositions:

1. That statutes of limitations are within the constitutional power of the legislature of a state to enact.

*2. That the limitation of six months was [325] not unreasonable.

3. That the statute took away no remedy which the landowner had before its passage.

4. That the state court held he had a remedy, although there was difference of opinion whether it was by direct application to the comptroller to cancel the sales or by action of ejectment against the comptroller or forest commissioners.

5. That as the state courts decided he had a remedy it was not for us to determine what that remedy was under the local Constitution and laws,—that is, whether it was either a direct application to the comptroller or by action of ejectment.

What, then, did this court assume, that it did not decide or ought now to decide? Counsel for plaintiff in error say that—

"The *Turner Case* established the sufficiency of the time allowed by the law now in question, but it treated the existence of a court competent to try the disputed rights and of a person liable to be sued for that purpose as questions of state law, and foreclosed by the judgment of the state court. These things ought now to be decided and not assumed."

The case, however, as we have seen, was not so limited. It decided more than that the time allowed by the statute was reasonable and sufficient. It also decided that the statute took away no remedy the landowner had before its passage, and that the law of the state gave him a remedy. What it precisely was,—which of the three enumerated ones it was,—was not decided. Not, however, because of the assumption of anything, but because it was not demanded. And why? The

question presented was the constitutionality of the statute. That depended upon the existence of a remedy in the landowner during the period of its limitation, and whether a remedy existed what better evidence or authority could there be than the decisions of the courts interpreting the laws of the state? To accept them as such was not to assume anything without deciding it. It was to ascertain a necessary element of decision, and then exercising decision. This was our duty then, and it is our duty now, and the fact that the case comes for review from the circuit court of the United States neither enforces nor justifies different considerations. If a precedent or coincident remedy is necessary *to the constitutional validity of a statute of limitations, the existence of such remedy is necessary to be decided, and it depends upon the same considerations, and must be upon the same examination, no matter in what court it may be presented or may come.

The reasoning of the *Turner Case* was therefore complete, and we think it is decisive against the contention of the plaintiff in error. The sufficiency of the remedies enumerated was not contested. It is not contested now. The existence of remedies is denied, but to the reasoning which attempts to support the denial we reply by repeating what we said in the *Turner Case*—that as the New York court of appeals has uniformly held that the landowner had a remedy, “it is not for us to determine what that remedy was under the local Constitution and laws.”

The defects which plaintiff in error claims to have been in the assessments and to have been jurisdictional are stated as follows:

“1. The sale of the whole tract of land in question for the aggregate unpaid taxes of several years when, during one or more of those years, a part of the tract sold was not assessed or taxed at all.

“2. The sale as one tract of two or more parcels separately assessed.

“3. The assessment of taxes by a description so uncertain as not to identify the parcel of land taxed.

“4. Treating the land on the sale as already the property of the state, and denying opportunity for competitive bidding.”

The first two are treated by counsel as similar and dependent upon the same grounds of objection. The specification of those grounds is that at the sale of 1877 the whole quarter, containing 7,500 acres, was sold as one parcel for the aggregate unpaid taxes of 1866-1870 inclusive, amounting, with interest and costs, to \$2,756.40, but that it was not assessed as a whole except for the years 1866 and 1867; that for the years 1868, 1869, and 1870 it was assessed in two parcels: (1) the northwest quarter of township 24, “excepting 1,000 acres lying in the northwest corner; also 1,315 acres which is water;” and (2) “1,000 acres lying in the northwest corner of the northwest quarter.” And that

[327] *1,215 acres was not assessed at all for those years. The plaintiff in error, however, does not show that it was in any way injured by the manner of selling. Its counsel supposes

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a possible severalty of ownership of the different parcels, and claims a cause of action from an injury which might have resulted to someone else. “We take it to be settled law,” counsel say, “that the constitutionality of a statute is to be tested, not so much by what is *done* as what *may be done* under it. . . . The present record is silent as to the actual ownership of the different parcels of the quarter in question during the years 1866-1870, but plainly they might have been the subject of separate ownership.” And counsel proceed to show how a separate owner, if he had existed, would have been embarrassed in his right of redemption by the necessity of paying some other person’s taxes besides his own, and of which he had not been notified during the pendency of the tax proceedings.

We are not concerned with what might have been, but only with what was. The plaintiff in error now sues as owner of the whole tract, and if there was a several ownership of it, or of parts of it, such ownership should have been shown if anything can be claimed from it. We may not suppose it from this record. It is manifest that the manner of sale could do no injury to the owner of the whole tract. Its separation in parcels on the assessment roll would be artificial and mere description. It would not affect its value, would not require the owner to pay someone’s else taxes, would not make him pay more than was justly due from him, either before a sale or after a sale, if he then desired to exercise the right of redemption.

But even if we should suppose a several ownership of the lands at the time of the assessment or sale, we do not think that the defects in the latter were jurisdictional, and certainly of all other defects the law of 1885 is not curative only—it is one of limitation. It matters not, therefore, what the rights of any predecessor of the plaintiff might have been if seasonably asserted. They were not seasonably asserted, and they are therefore now precluded.

The law is like any other statute of limitations. It is not *affected by what the rights of plaintiff in error were. Whatever they were their remedy is gone, and the title and possession of the state, whatever may have been the defects in the proceedings of which they are the consummation, cannot now be disturbed. This was the ruling in *Marsh v. Ne-ha-sa-ne Park Asso.* 25 App. Div. 34, 49 N. Y. Supp. 384, where the cases were reviewed, and we think correctly interpreted.

In *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022, the remedies of the landowner before and after a sale were considered, and the law defined as one of limitation. The court said: “Considered as an act of limitation, the only question in relation thereto is whether such limitation is just and gives the claimant a reasonable opportunity to enforce his rights. (See authorities, *supra*.) Under all the circumstances of the case it cannot, we think, be said, as a question of law, that the time afforded is unreasonable. Considered as establishing a rule of evidence,

the only question for examination is whether property is thereby necessarily taken without due process of law."

That case seems to have been qualified somewhat by *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604, where it was decided that the law was not conclusive against jurisdictional defects. But *People v. Turner* was reaffirmed in 145 N. Y. 451, 40 N. E. 400. If the cases are in conflict the latter must prevail, but assuming their reconciliation to be in the character of the defects passed on, they are equally authoritative against plaintiff in error.

In *Joslyn v. Rockwell* two defects were said to be jurisdictional: The payment of taxes and the occupation of the lands. Of the latter it was said: "The act of 1885 (chap. 448) is one, by its title, relating 'to the collection of taxes on lands of nonresidents, and to provide for the sale of such lands for unpaid taxes.' It is provided that occupied lands are not the lands of nonresidents. (1 R. S. 339, § 3.) And where lands of a nonresident of a county are occupied by a resident of the town an assessment to the owner in the 'nonresident' part of the roll is illegal, and the lands should be assessed to the resident occupant. *People ex rel. Barnard v. Wemple*, 117 N. Y. 77, 22 N. E. 761. 'If the lands were occupied the act of 1885 would not apply.' In the case at bar there is no such fact to preclude the application of the law.

[329] *In the case of *Meigs v. Roberts*, recently decided by the court of appeals of New York, [162 N. Y. 371, 377, 56 N. E. 838] *Joslyn v. Rockwell* has been explained and limited, and *People v. Turner* again affirmed.

The action was ejectment, and the plaintiff Meigs traced his title by a chain of conveyances from an original grant by the state in 1798. The defendant justified his possession under deeds to the state in pursuance of sales for taxes. One of them was assailed on account of an alleged defect in the notice of redemption published by the comptroller. The defendant pleaded that the action was not brought within the time prescribed by the provision of chapter 448 of the Laws of 1885 and subsequent laws. The trial court dismissed the complaint on the ground that the land was in the occupation of the state, and suit could not be maintained against it without its consent. An appeal having been taken, the appellate division reversed the judgment and granted a new trial, holding that the action could be maintained, but also holding that the notice of redemption of the tax sale of 1881 was fatally defective, and that the deed made in pursuance of the sale did not pass title, and that the defect was not cured by the provisions of chapter 148 (subsequently re-enacted in part in 1891 and 1893), which makes the conveyance of the comptroller upon tax sales, after the two years from its record in the county in which the lands are situated, conclusive evidence of

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the regularity of the proceedings in which conveyance was made.

The case was taken to the court of appeals, which reversed the appellate division.

The court said:

"We do not find it necessary to pass upon many of the questions which have been elaborately argued before us, or even the one upon which the decision of the trial court proceeded. We are of opinion that the lapse of time between the record of the conveyance of 1884 and the commencement of this action barred the right to the plaintiff to maintain it, even assuming the other questions in the case should be resolved in his favor. The learned appellate division held that the failure to publish a proper redemption notice was jurisdictional as to the conveyance of 1884, and, hence, not cured by chapter 448 of the Laws of 1885, and cited *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401, and *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604, as authorities for that proposition. We think the learned court took too narrow a view of the statute of 1885. This statute, though in some aspects a curative law, is primarily and essentially much more; it is a statute of limitation. It was distinctly held to be such in two decisions of this court (*People v. Turner*, 117 N. Y. 227, 22 N. E. 1022; *People v. Turner*, 145 N. Y. 459, 40 N. E. 400), and by the Supreme Court of the United States. *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38. A curative act in the ordinary sense of that term is a retrospective law, acting on past cases and existing rights. The power of the legislature to enact such laws is therefore confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. Cooley, Const. Lim. p. 454. A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Forster v. Forster*, 129 Mass. 559. But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right. *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Turner v. New York*, 145 N. Y. 451, 40 N. E. 400. *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401, was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932. In *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604, as well as in the two cases of *People v. Turner*, all of which arose under the statute

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of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional, and not cured by that act. Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings which are beyond the scope of retrospective legislation will equally take a claim out of the bar of a statute of limitations. The existence of such defects was necessarily considered in the authorities cited, because the statute of 1885 in terms exempted from its operation cases [331] where *the taxes had been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notices of redemption or in their publication; on the contrary, it is expressly provided that the controller's deed, after the lapse of the requisite time, shall be conclusive evidence that 'all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and regularly given.'

These considerations dispose also of the other objections to the assessment and sale. If further comment be needed as to the insufficiency of the description, it may be brief. It is based on the possibility of there having been more or less land than 1,215 acres covered by water. But whether there were depends upon a question of fact, and what the court found we are not informed by the record. Not insisting on that, however, the evidence of the plaintiff tended to show that the area covered was 1,035 acres; the evidence of the defendant tended to show that the area was 1,284 acres. Even if the court found the latter, the difference between it and the assessment did not make the description insufficient. A description of land for the purposes of taxation is sufficient if it affords the means of identification, and does not positively mislead the owner. *Cooley, Taxn.* 407; *Keeley v. Sanders*, 99 U. S. 443, 25 L. ed. 327.

The assessment was not of the land covered by water. That was an exception from a larger tract, and an error of a few acres in a part so completely defined by its character surely did not so impair the identity of the larger tract as to hide it from the search or knowledge of its owner, whether he was anxious or indifferent about his taxes.

The same comment can be made of the "1,000 acres lying in the northwest corner of the northwest quarter" of the tract, whether we regard it as a parcel or an exception from another parcel. *Jackson ex dem. Kellogg v. Vickory*, 1 Wend. 407, 19 Am. Dec. 522; *Dolan v. Trelevan*, 31 Wis. 147; *Bowers v. Chambers*, 53 Miss. 259; *Doe ex dem. Hooper v. Clayton*, 81 Ala. 391, 2 So. 24.

The other assignments of error it is not necessary to specifically notice nor the defenses of champerty and the alleged illegal organization of the plaintiff in error.

Judgment affirmed.

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*MINNEAPOLIS & ST. LOUIS RAILWAY [332]
et al., Plffs. in Err.,
v.

HENRY A. GARDNER.

(See S. C. Reporter's ed. 332-345.)

Corporations—new company formed by consolidation—granting it the rights, privileges, and immunities of constituent corporations.

1. A new corporation was formed by the consolidation of railroad companies under Minn. Spec. Laws 1881, chap. 113, providing for the manner of consolidation, the name of the new company,—which might be "the name of either corporation party thereto or any other name,"—the transfer of the property or the old corporations, the retirement of their stock and the issue of new stock, and for compensating the stockholders of the old corporations who decline to convert their stock into the stock of the new company.
2. The grant to a consolidated railroad company by Minn. Spec. Laws 1881, chap. 113, of the franchises, exemptions, and immunities of the older company, does not include the exemption which the stockholders of the earlier company were given by mere implication, without any express provision therefor, even if such exemption could be granted by the legislature under the provision of the state Constitution of 1858, which imposes liability upon the shareholders of all such corporations.

[No. 160.]

Argued March 5, 1900. Decided April 9, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a decision affirming a judgment enforcing the liability of stockholders. *Affirmed.*

See same case below, 73 Minn. 517, 76 N. W. 282.

Statement by Mr. Justice **McKenna**:

*On the merits this case presents the question of the liability of the individual plaintiffs in error upon a judgment which was recovered by one Revilo F. Parshall against the Minneapolis & St. Louis Railway Company, and assigned to the defendant in error. [332]

A motion, however, is made to dismiss on the ground that this court has no jurisdiction.

The Minnesota Western Railway was incorporated by the territory of Minnesota, by an act of its legislature approved March 3, 1853. The usual powers of corporation

NOTE.—As to consolidation of corporations and its effect—see *Louisville, N. A. & C. R. Co. v. Boney (Ind.)* 3 L. R. A. 435, and note.

As to liability of a consolidated railroad company for debts of its predecessor—see *Chicago & I. Coal R. Co. v. Hall (Ind.)* 23 L. R. A. 231, and note.

As to rights and obligations of consolidated corporation—see note to *Cantillon v. Dubuque & N. W. R. Co. (Iowa)* 5 L. R. A. 726.

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were conferred, and the company was authorized to construct a railroad from and to certain points in the territory.

Power was reserved to alter or amend the act. There was no provision fixing the liability of stockholders. The act was several times amended, changing the route of the road in some particulars.

In 1858 the state of Minnesota was admitted into the Union, and its Constitution contained the following provision: "[333]*stockholder in any corporation shall be liable to the amount of the stock held or owned by him." Art. 10, § 3.

It was amended in 1872 so as to except the stockholders of corporations organized for carrying on any kind of manufacturing or mechanical business.

On February 4, 1870, the provision of the act of 1853, reserving the right to alter or amend the act, was repealed.

After the passage of the act of 1870 the company changed its name to the Minneapolis & St. Louis Railway Company.

No steps were taken towards construction or acquiring any line of railroad until 1869. The actual construction was commenced during the fall of 1870, since which time the said company or the consolidated company, hereafter mentioned, has operated and maintained a line of railway in the state.

By an act approved March 2, 1881, in addition to other powers conferred, the Minneapolis & St. Louis Railway Company, and any other railway companies in the construction of whose lines it has aided, or whose lines were at the time held under lease by it, were authorized to consolidate. The act provided for the manner of consolidation, the name of the new corporation,—which might be "the name of either corporation party thereto or any other name,"—the transfer of the properties of the old corporations, the retirement of their stock and the issue of new, and defined the purposes and powers of the new corporation. It is inserted in the margin.†

†Chapter 113, Special Laws 1881.

An Act to Amend an Act Entitled an Act to Amend an Act entitled An Act to Incorporate the Minnesota Western Railroad Company, Approved March Third (3d), One Thousand Eight Hundred and Fifty-three (1853), and the Acts Amendatory thereof, Approved February Fourth, One Thousand Eight Hundred and Seventy (1870).

Be it enacted by the Legislature of the State of Minnesota: Section 1. That the Act Entitled An Act to Amend an Act entitled An Act to Incorporate the Minnesota Western Railroad Company, approved March thlrd (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870), be amended by adding thereto the following section, to wit:

Section eight (8). The Minneapolis & St. Louis Railway Company, formerly known as the Minnesota Western Railroad Company, in addition to the powers already conferred upon it by the laws of the territory of Minnesota and of the state of Minnesota, is hereby authorized to make or acquire, from time to time, any extension of the lines of railway now owned or operated by it, or of those hereafter constructed

*The consolidation was made as provided[334] in the act by agreement between the Minneapolis Railway Company, the Minneapolis & Duluth Railroad Company, the Minnesota [335] & Iowa Railroad Company, and the Fort Wayne & Fort Ridgely Railroad Company,[336] and articles of incorporation were duly filed in pursuance of the act.

*The consolidated company thereafter entered upon, and until the 2d of November, 1894, enjoyed, the franchises, rights, property, and earnings of the constituent corporations.

The Minneapolis & Duluth Railroad Company was a Minnesota corporation, and the Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company were Iowa corporations; and the laws of the state of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts by embodying in the articles of incorporation an article or provision declaring the exemption. This was done.

On and prior to June 28, 1888, the Minneapolis & St. Louis Railway Company executed three mortgages, one of which was to the Central Trust Company of New York, dated June 1, 1881, to secure outstanding bonds of the aggregate par value of \$1,382,000, together with interest thereon, at the rate of 6 per cent per annum.

This mortgage was duly foreclosed, and the railroad properties, rights, and franchises covered by it duly sold, and the title confirmed by final decree to the assignee of the purchaser.

The defendant in error was a judgment creditor of the consolidated company, being assignee of a judgment recovered by *R. F. [338] Parshall, in the circuit court of the United States for the district of Minnesota, for personal injuries received by him from the railway company.

The individual plaintiffs in error were shareholders of that company, and each ac-

and operated by it according to law, into the states of Iowa, Missouri, Kansas, Nebraska, and Wisconsin, and into the territory of Dakota, or into one or more of the same. *Provided*, That authority shall exist or be given in or by the states or territory into which its lines are so extended to make or acquire and maintain such extensions.

Section nine (9). The said Minneapolis & St. Louis Railway Company shall have power to acquire, from time to time, by lease or purchase, or exchange of stock, or otherwise, any other railroad or railroads, whether within or without this state, whose lines connect with its own lines as they now exist or as they shall be extended, either directly or by means of intervening lines. Such acquisition shall be made upon such terms as shall be agreed upon by a contract in writing between the respective corporations. But the same shall not be consummated until first approved by two thirds in amount of the stockholders of each such corporation, either given at a regular or called meeting of such stockholders or by a consent expressed in writing. In either case a copy of such contract, together with the evidence of such consent of the stockholders, shall be filed in the office of the secretary of state.

quired his stock between November, 1884, and the date of the commencement of this suit, but was not a shareholder of either of the companies which formed the consolidated company.

The answer of the individual defendants denied liability under the Constitution and laws of the state of Minnesota, alleged the incorporation of the Minneapolis & St. Louis Railway Company prior to the adoption of the Constitution and statutes, and that it was incorporated in the year 1853, under and pursuant to the provisions of chapter 66 of the Special Laws enacted by the legislature of the territory of Minnesota, under and by the name of the Minnesota Western Railroad Company, which name was subsequently changed to the Minneapolis & St. Louis Railway Company, substantially as set forth in the first division of the complaint; that the liability of the stockholders of said Minnesota & St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf.

The trial court rendered judgment for the defendant in error, which was affirmed by the supreme court of the state (73 Minn. 517, 76 N. W. 282), and this writ of error was sued out.

On the appeal to the supreme court of the state it was assigned as error, among others, that the trial court erred in holding that the state Constitution, if applied to the defendant railway company, did not violate section 10, article 1, of the Constitution of the United States in that the provisions of section 3, article 10, impaired the obligation of the charter contract contained in chapter 66, Laws of 1853, territory of Minnesota. Also in holding that the constitutional provision of the state, if applied to defendant in error, is not in violation of the Fourteenth Amendment of the Constitution of the United States, in that the state, by and through the

provisions of section 3, article 10, assumed *to impair and destroy rights theretofore vested in the defendants (plaintiffs in error). [339]

Also in holding that the defendant railway company was not created until the passage of the act of 1881, that the legislature intended by the act to create, or did in fact create, a new corporation, or intended to or did abridge or modify the rights, privileges, or immunities theretofore possessed by the Minneapolis & St. Louis Railway Company; or if a new corporate entity was created, that it did not possess such rights, privileges, and immunities, including the exemption from double liability upon its stock created by the act of 1853, and also possessed by the other constituent corporations of the consolidation.

The assignments of error in this court claim that the supreme court of the state held, and erred in holding, the constitutional provision imposing liability on stockholders valid against plaintiffs in error, and not to be in violation of the contract created by the act of 1853, the benefits of which act were vested, continued, and perpetuated in the plaintiffs in error by the act of 1881, and not to be in violation of that provision of the Constitution of the United States, which prohibits any state from impairing the obligations of a contract, and not in violation of the Fourteenth Amendment of the Constitution of the United States, in that it assumes to impair and destroy rights vested by the act of 1853 and the act of 1881.

It is also claimed that the court held, and erred in holding, that the Constitution of the state, if enforced against plaintiffs in error, was not in violation of section 10, article 1, of the Constitution of the United States, and did not impair the obligations of the contract between the state and plaintiffs in error, embodied in the act of 1881.

Also that the consolidation of the several

Section ten (10). It shall and may be lawful for the said Minneapolis & St. Louis Railway Company to merge and consolidate its capital, franchises, and property with the capital stock, franchises, and property of any other railroad company or companies organized under the laws of this state or under the laws of any other state or territory of the United States, in the construction of whose lines the said Minneapolis & St. Louis Railway Company shall have aided, or whose lines of railroad are or shall, at the time of such consolidation, be held under lease by the said Minneapolis & St. Louis Railway Company. *Provided*, That the lines of railway of the companies or corporations so consolidating shall form a continuous line of railway with each other, or by means of any intervening railway, bridge, or ferry. But no such consolidation shall be made by the said company with any other railroad corporation, or the lessees, purchaser, or manager of any railroad corporation owning or controlling a parallel or competing line.

Such consolidations shall be made under the conditions, provisions, and restrictions and with the powers hereinafter mentioned and contained, that is to say:

First (1st). The directors of the company

proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, which agreement shall prescribe the terms and conditions thereof, and the mode of carrying the same into effect, the name of the new corporation, which may be the name of either corporation party thereto, or any other name, the number, names, and places of residence of the directors and other officers thereof, who shall be the directors and officers thereof for the first (1st) year. The amount of the capital stock of the new company, which shall not exceed the amount of twenty million (20,000,000) dollars, the number of shares into which such capital stock is to be divided (which stock may be divided into classes, with such preferences in respect to any of the classes as may be agreed upon), the amount or par value of each share, the manner of converting or exchanging the capital stock of each of the said companies so consolidating into or for that of the new corporation and the terms of such conversion, the manner of compensating stockholders in each of the old corporations who decline to convert their stock into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details

railroad corporations pursuant to the act of 1881 created a new corporation.

Mr. William Strauss argued the cause and, with *Messrs. Albert E. Clarke, W. W. Dudley, and L. T. Michener* filed a brief for plaintiffs in error:

If the consolidation agreement did not create a new corporation, the franchises, exemptions, privileges, and immunities of each constituent company were continued.

Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

If a new corporation was created by the consolidation, the franchises of the constituent corporations either passed to the new corporation or vested in the state, which could lawfully confer them upon the new corporation.

First Div. of St. Paul & P. R. Co. v. Par-cher, 14 Minn. 297, Gil. 224; *Green v. Knife Falls Boom Corp.* 35 Minn. 155, 27 N. W. 924; *Amcs v. Lake Superior & M. S. R. Co.* 21 Minn. 281; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *Huff v. Winona & St. P. R. Co.* 11 Minn. 180, Gil. 114.

The state may continue the immunities of the original corporations to the new one by reference to the original act.

Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; *The Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137.

It is for this court to determine, independently of the adjudications of the state court, whether there exists a contract within the protection of the Federal Constitution.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; *Wright v. Nagle*, 101 U.

S. 793, 25 L. ed. 922; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 256, 27 L. ed. 926, 3 Sup. Ct. Rep. 193.

If the adjudication of a Federal question is necessarily involved in the disposition of a case by a state court, it is not necessary that it should appear affirmatively in the record or in the opinion of the court that such a question was raised and decided.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

In order to preclude this court from taking jurisdiction, it must appear that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of there upon other grounds, broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

Mr. F. W. M. Cutcheon argued the cause and filed a brief for defendant in error:

The consolidated company was brought into existence under authority of the act of 1881. Its shareholders are therefore subjected to the liability imposed by the Minnesota Constitution.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357, Affirming 26 Ohio St. 86; *State v. Northern C. R. Co.* 44 Md. 131; *Charlotte, C. & A. R. Co. v. Gibbs*, 27 S. C. 385, 4 S. E. 49; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138, 12 S. W. 537; *Morawetz*,

as they shall deem necessary to perfect such new organization and the consolidation of such companies or railroads.

Second (2d). Such agreement of the directors shall not be deemed to be the agreement of the said old corporations until after it has been submitted to the stockholders of each of the said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty (30) days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders when their place of residence is known, and deposited in the postoffice, and published at least three (3) successive weeks in one newspaper in each of the cities, counties, or towns in which the said corporations have their principal office or business, and is sanctioned by such stockholders by a vote of at least two thirds in amount of the stockholders present at such meeting, either in person or by proxy, each share of the capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders, separately, it shall be deemed the agreement of the said old corporations.

Third (3d). If the holder of any stock in either of the corporations existing under the laws of this state and so consolidated at the time of making such consolidation shall be dissatisfied with the same, the consolidated company shall pay to such dissatisfied stockholder or stockholders the full actual value of his or their stock immediately prior to such consolidation, which value shall be assessed and fixed by three disinterested commissioners appointed for that

purpose by the supreme court of this state, upon the application of either party, made upon twenty (20) days' notice, but the said company shall not be compelled to pay for the stocks of such dissatisfied stockholder or stockholders unless he or they shall give written notice of such dissatisfaction to the president, secretary, or treasurer of the company whose stock shall be held by him or them, within three (3) months after such consolidation shall have been consented to by the requisite number of stockholders.

Section eleven (11). Upon the approval of such agreement and act of consolidation as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the secretary of state, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation, issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls, or assessments, if any, as may be mentioned in said consolidation agreement, and such new corporation shall possess all the powers, rights, and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the state.

Section twelve (12). Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions, and franchises of each of said corpora-

Priv. Corporations, §§ 944-47; Thompson, Corporations, § 5424; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

The intent of the constituent companies themselves to organize a new corporation distinct from, and independent of, the Minnesota Western Railroad Company, is evident from their action in taking advantage of all the powers conferred upon a consolidated company that had not been possessed by the Minnesota Western Railroad Company, and was emphasized by the adoption of a distinct name.

Fitz v. Minnesota C. R. Co. 11 Minn. 414, Gil. 304; *Huff v. Winona & St. P. R. Co.* 11 Minn. 180, Gil. 114; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *State v. Northern C. R. Co.* 44 Md. 131; *Charlotte, C. & A. R. Co. v. Gibbes*, 27 S. C. 385, 4 S. E. 49; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138, 12 S. W. 537; *Ames v. Lake Superior & M. S. R. Co.* 21 Minn. 241.

The fact that the act of 1881 was cast in the form of an act amendatory of the act incorporating the Minnesota Western Railroad company is only one item of evidence (and in this instance an extremely unimportant item) as to the intention of the legislature, and can have little weight in view of the plain and unambiguous language of the act itself.

Ames v. Lake Superior & M. S. R. Co. 21 Minn. 241.

[340] *Mr. Justice **McKenna**, after making the foregoing statement, delivered the opinion of the court:

To sustain the motion to dismiss for want

tions, parties to the same, and all the property, real, personal, and mixed, and all the debts due, on whatever account, to either of said corporations, as well as all the stock, subscriptions, and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed, and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise under the laws of this state, vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

Section thirteen (13). The rights of all creditors of and all the holders of liens upon the property of either of said corporations, parties to said agreement and act, shall remain and be preserved unimpaired, and shall be assumed and borne by the new corporation, and the respective corporations shall be deemed to continue in existence so far as necessary to preserve the same, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been originally incurred or constructed by it. No suit or action or other proceeding now pending before

of jurisdiction the defendant in error contends that the Federal question raised here was not that raised in the court below, and therefore cannot be entertained, and that, besides, there was a question, not Federal, decided by the court sufficient to support its judgment.

(1) No right under the Constitution of the United States was claimed in the answer. But the protection of section 10, article 1, and the Fourteenth Amendment of that instrument, was invoked in the assignment of errors on appeal to the supreme court and urged upon its consideration. It is true they claimed the law of 1853 as the contract, and not explicitly that of 1881. But they also claimed that the act of 1881 did not create a new corporation, and whether it did or not, that the act continued the immunity from liability for the corporate debts to the stock and stockholders of the consolidated corporation. We think this makes substantial identity between the Federal question in the supreme court of the state and in this court.

(2) But it is said the state court did not decide the Federal question, but decided that the act of 1881 created a new corporation, which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and that the court rested its judgment on that construction. The court said: "Whatever may be the liability of the several [constituent] corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." And again: "Other questions have been raised and discussed by the respective counsel, but a deci-

any court or tribunal in which either of said railroad companies is a party shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporation to final judgment, or such new corporation may be, by order of the court, on motion, substituted as a party; suits may be brought and maintained against such new corporation for all causes of action in the same manner as against other railroad corporations in this state.

Section fourteen (14). All the provisions of the general laws of this state, in regard to railroad corporations, shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this state. *Provided*, That, nevertheless, the privileges, franchises, exemptions, immunities, hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in such new corporation with the same effect as if originally granted thereto, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided.

Section two. This act shall take effect and be in force from and after its passage.

Approved this second day of March, A. D. 1881.

sion upon them by this court in this action is entirely unnecessary, and we express no opinion thereon." This was in effect to deny the existence of the contract claimed by plaintiffs in error. But it is the duty of this court to decide for itself the fact of contract and its impairment, and the motion to dismiss must therefore be denied.

[341] *The territorial act of 1853 by which the Minnesota Western Railroad was incorporated is claimed primarily to be the contract which is impaired. It gave immunity to the stockholders of that company from liability for the corporate debts, or rather did not impose such liability. It is claimed that the Constitution of the state of 1858 violated this contract. It imposes liability upon each shareholder of any corporation to the amount of stock held or owned by him. It is self-executing. *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 50 N. W. 1110.

The act of 1881 is also claimed as a contract which became binding on the state by the acceptance of its provisions by the several railroad companies, and is impaired by the application of the Constitution of the state.

If the Minnesota Western Railroad or its stockholders, or any of the other railroad companies or their stockholders, were parties to this suit, the questions presented would be simpler. But neither of the companies is party to the suit, nor are the stockholders parties. Their rights are asserted to be transferred to the plaintiffs in error by virtue of the act of 1881.

The argument is that prior to the adoption of the state Constitution the stockholders of the original corporation created by the act of 1853 were exempt from personal liability for corporate indebtedness; that prior to consolidation, under the act of 1881, the stockholders of the constituent companies were also exempt. It is hence contended that it is immaterial whether the Minneapolis Railroad Company is the original of that name chartered by the act of 1853, or a new corporation created by the consolidation. If it is identical, it is argued, with the original company, its stockholders are exempt because its charter contract is older than the Constitution of the state. If it is a new company, its stockholders are nevertheless exempt because it is the settled law in Minnesota that its legislature may transmit *existing* franchises, immunities, and exemptions vested in one corporation to a *new corporation*, although it could not grant new franchises of the same class to such corporation. And that the legislature has exercised this power and specifically vested in the consolidated company, first, all the franchises, privileges, and immunities of each of the [342] constituent companies; *and, second, the particular privileges, exemptions, and immunities granted to the Minnesota Western Railroad Company.

We think that there is no doubt whatever that the act of 1881 created a new corporation. It is so designated, not only expressly, but by distinction from the old corporations. The original Minneapolis & St. Louis

Railway Company was given power (§ 9) to acquire by lease or purchase other railroad lines or consolidate with certain other railroads. Section 10. It chose the latter, and the conditions of the consolidation are prescribed. The consolidation is to be accomplished by an agreement of the directors of the companies proposing to consolidate, and the agreement is to provide the terms and mode of carrying the same into effect, the name of "the *new* corporation, which may be the name of either corporation party thereto, or any other name," the number, names, and residences of the directors and other officers, the amount of capital stock and the number of shares into which it is to be divided, and the classes and par value, the manner of converting the stock of the consolidating companies into that of the *new* corporation, and the manner of compensating the stockholders of the *old* corporations who declined to convert their stock into the stock of the *new* corporations, and many other details.

Section 11 is as follows:

"Upon the approval of such agreement and act of consolidation, as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the secretary of state, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies shall be deemed and taken as lawful stock, and subject only to such further payments, calls, or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights, and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the state."

There can be no doubt, therefore, that a new corporation *was created with new stock-[343] holders. and the case is brought in close similarity to *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357. In that case, as in this, there was a consolidation of railroad companies, and it was held a new corporation was formed. In that case, as in this, one of the companies claimed a special right under its charter (the right to charge such tolls as it might deem "reasonable") and its transmission to the new corporation by the provision of the act authorizing consolidation, which declared: "And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations by the several acts incorporating the same, or relating thereto respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

The claim was rejected, Mr. Justice Swayne, speaking for the court, said:

"The legislature had provided for the consolidation. In each case, before it took place the original companies existed and were independent of each other. It could not occur

without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All—the old and the new—could not coexist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchises alone to be a corporation would have been unavailing for the purposes in view.

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter. *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354. It was therefore indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation,—no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant.

[344] The language was "brief and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases."

In the case at bar, however, the grant to the new corporation is claimed to be not only of the franchises of the constituent companies, but of their "exemptions,"—not only of the franchises of the original Minnesota & St. Louis Railway Company, but of its "exemptions and immunities." But what franchises, exemptions, and immunities? The designation is definite,—those of "each of said corporations," those "hitherto granted to the Minneapolis & St. Louis Railway Company,"—not those of or those granted to the stockholders of either company. And the distinction must be observed,—the distinction between a corporation and its stockholders. It is made in many cases. This court has recognized it for the purposes of taxation. To judge of the intention of the legislature, whether it is in accordance with or against the policy and provisions of the Constitution of the state, the distinction ought to be recognized. The exemption of stockholders from the payment of corporate debts or their liability to pay them (individual liability) is the concern of the stockholders and the corporate creditors.

We do not mean to say that such an exemption may not be secured by the charter of a corporation and protected to its stockholders by the Constitution of the United States from impairment by subsequent state legislation. But we do mean to say that in a state having a constitutional provision imposing liability on stockholders, if the legislature intended those of a new corporation created by it should be exempt it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation.

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The question is as to the intention of the legislature, and in ascertaining that intention it must be remembered that the act of 1853 did not grant immunity to the stockholders of the Minnesota Western Railroad from liability. The immunity resulted because liability was not imposed, and this legal right of "the stockholders of that corporation, we do not think, can be said to have been transmitted to the stockholders of the new corporation created by the act of 1881 by the grant to it of the "immunities heretofore granted to the Minneapolis & St. Louis Railway Company."

Besides, the grant of power to the new corporation had adequate purpose. As was said in *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, powers and faculties were necessary to be bestowed upon the new organization, and this could be done directly, as it was to a great extent, or by reference, and would be supposed to be done in subordination to constitutional restrictions. Nor does the provision of § 14, which makes the new corporation subject to the general laws of the state, except as to the privileges, franchises, exemptions, and immunities hitherto granted to the Minnesota & St. Louis Railway Company, conflict with the supposition. That provision had its explanation in the previous laws applying to that company. After its incorporation in 1853 the Minnesota Western did nothing, and nothing was done in pursuance of the purpose of its incorporation, until after the act of 1870 authorizing a change of its name to the Minnesota & St. Louis Railway Company. That act gave it new powers, authorized the creation and issuance of different classes of stock, and provided a means of taxation, and exempted it from all other taxation. But it is not necessary to extend the discussion farther.

We have not deemed it necessary to consider the effect of the constitutional provision as an amendment to the act of 1853, or the power of the legislature to pass the act of 1881 if it could be construed as contended for by plaintiffs in error. We construe it differently, and determine against their contention. In other words, we hold that the legislature did not intend by the act of 1881 to give immunity to the stockholders of the new corporation from the liability imposed by the Constitution of the state.

Judgment affirmed.

*RICHARD F. CAFFREY, as County Clerk [346] of Oklahoma County, Oklahoma Territory, *Plff. in Err. and Appt.*,

v.

TERRITORY OF OKLAHOMA on the relation of Harper S. Cunningham, Attorney General.

(See S. C. Reporter's ed. 346-349.)

Appeal—from territorial court—amount in

NOTE.—As to jurisdiction of Supreme Court to review territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

As to amount necessary to give United States Supreme Court jurisdiction—see note to *Schunk v. Moline, M. & S. Co.* 37 L. ed. U. S. 256.

controversy—decision as to duty of county clerk in respect to taxes.

A decision requiring a county clerk to comply with an order of a territorial board of equalization increasing the assessed valuation of the property in the county does not involve any pecuniary rights of the clerk, where it does not appear that he is a property owner or taxpayer of the county, but bases his resistance to the order upon his duty as an officer; and therefore such decision is not within the jurisdiction of the United States Supreme Court on appeal from or writ of error to the supreme court of the territory.

[No. 182.]

Argued March 13, 14, 1900. Decided April 9, 1900.

IN ERROR to and on APPEAL from the Supreme Court of the Territory of Oklahoma to review the judgment of that court granting a writ of mandamus and committing the defendant to jail for refusing to obey the writ. *Dismissed.*

The facts are stated in the opinion.

Mr. James R. Keaton argued the cause and filed a brief for plaintiff in error and appellant on motion to dismiss:

The value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected.

Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4.

Where an appeal or writ of error has been allowed by the lower court, and the proof in this court leaves the matter in doubt, a motion to dismiss for lack of jurisdictional amount will be denied.

Rector v. Lipscomb, 141 U. S. 557, 35 L. ed. 857, 12 Sup. Ct. Rep. 83; *Gage v. Pumpelly*, 108 U. S. 164, 27 L. ed. 668, 2 Sup. Ct. Rep. 390.

In the case at bar, however, the proof to show jurisdictional amount is overwhelming; consequently the court will encounter no difficulty on this question.

Micas v. Williams, 104 U. S. 556, 26 L. ed. 842.

Mr. John S. Flannery also argued the cause and, with *Messrs. James R. Keaton* and *Francis J. Kearful*, filed a brief for plaintiff in error and appellant.

Mr. Frederick C. Bryan argued the cause and, with *Messrs. Harper S. Cunningham* and *Charles Dick*, filed a brief for defendant in error and appellee.

[346] **Mr. Justice McKenna* delivered the opinion of the court:

This is an action of mandamus brought by the territory of Oklahoma on the relation of *Harper S. Cunningham*, attorney general of the territory, against *Richard F. Caffrey*, county clerk of Oklahoma county.

The territorial board of equalization, composed of the governor, *the territorial secretary, and the auditor, increased the assessed valuation of the property of Oklahoma county 24 per cent, and notified the

plaintiff in error and appellant thereof, as county clerk.

He refused to comply with the order, and this action was brought in the supreme court of the territory to compel compliance therewith.

An alternative writ of mandamus was issued, to which he made return and answer. In his return and answer he admitted that he had been duly notified of the order of the board of equalization, and had failed to comply with it, and alleged that it was illegal and void, because, first, the board had no jurisdiction or legal authority to make it; second, that it was not made for the purpose of equalizing the valuation of property, but for other and illegal purposes; that it was made arbitrarily, and without evidence other than the assessment roll; that the valuation of the property of Oklahoma county, as shown by the assessment roll, was fair and as high as the property of Pottawatomie county, which the board took as the basis of equalization; that a large part of the property whose valuation was increased consisted of money.

He also alleged that he was prevented from complying by an order of the board of county commissioners.

He prayed "that he be granted a hearing in behalf of the taxpayers of his county, in order that he may establish by competent proof the allegations of fact hereinbefore set out, and that upon a final hearing he have judgment against the relator for his costs in this behalf laid out and expended."

A motion was made by relator to quash the answer and return, which was granted, and on the 21st of September, 1898, judgment was entered granting a peremptory writ of mandamus against the plaintiff in error and appellant.

Declining to obey the writ, he was cited for contempt, and such proceedings were had on the citation that he was adjudged guilty, and committed to jail until he should comply with the writ, and the case was then brought here.

A motion is made to dismiss for want of jurisdiction in this court, which we think should be granted.

*It is provided by the act of March 3, 1885, [348] that no appeal or writ of error shall hereafter be allowed from any judgment or decree in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000, or unless the validity of a patent or a copyright is involved, or a treaty or statute of, or an authority exercised under, the United States, is drawn in question. 23 Stat. at L. 443, chap. 355.

There is controversy between the parties, respectively supported by affidavits, whether the effect of the order of the territorial board of equalization is to increase the taxes of the county \$3,179.27 or \$28,751.87. But whether it is one sum or the other, the plaintiff in error and appellant does not show that he has any interest in it. He does not allege that he is a property owner or a taxpayer of the county. He alleges he is its county clerk, and bases his resistance to

the order of the territorial board of equalization upon his duty as such officer.

However this may have justified his action, of which we express no opinion, or may have caused a dispute which the territorial court had jurisdiction to pass on and determine, it does not give us jurisdiction. To justify our taking jurisdiction there must be a controversy which involves pecuniary value exceeding \$5,000 to the party appealing. In other words, there must be a dispute which involves a sum in excess of \$5,000. and such sum, or property of its value, must be taken from him by the judgment which he seeks to review.

Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866, is in point. It was a suit in equity to restrain the issue of bonds by the city of Jacksonville, and was brought in the circuit court of the United States for the northern district of Florida. Colvin alleged that he was a taxpayer, and that the amount of taxes that would be assessed upon the property owned by him in the city would exceed \$2,000. This was denied, and the complainant then contended that not the amount of his taxes, but the amount of the bonds proposed to be issued (\$1,000,000), was the amount in controversy. The circuit court dismissed the case for want of jurisdiction, and this court sustained the ruling, saying by the Chief Justice that "the amount of the interest of *complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the circuit court was correct." *El Paso Water Co. v. El Paso*, 152 U. S. 157, 38 L. ed. 396, 14 Sup. Ct. Rep. 494, was cited and approved.

In the pending action the plaintiff in error and appellant has neither gained nor lost any money or money's worth by the judgment of the supreme court of the territory.

The writ of error and appeal are dismissed.

RICHARD F. CAFFREY, County Clerk, etc.,
Plff. in Err. and Appt.,
v.

TERRITORY OF OKLAHOMA *ex rel.* W. R. TAYLOR, County Attorney.

(See S. C. Reporter's ed. 349.)

[No. 274.]

IN ERROR to and APPEAL from the Supreme Court of the Territory of Oklahoma. *Dismissed.*

Counsel in this cause having stipulated that the same judgment shall be entered in this case as in No. 182 (177 U. S. 346. *ante*, 799, 20 Sup. Ct. Rep. 664), the writ of error and appeal are dismissed.
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E. F. BLACK, Appt.,

v.

WALTER P. JACKSON.

(See S. C. Reporter's ed. 349-365.)

Appeal—amount in controversy—right to jury in territorial court—injunction to establish title to land.

1. The value of land, and not simply the value of the right of present possession thereof, is the amount in controversy for the purpose of an appeal to the Supreme Court of the United States from the supreme court of a territory, when the case involves a claim of right to land of which the naked legal title remains in the United States.
2. A mandatory injunction to establish a right to the possession of land claimed as a homestead under the United States statutes cannot be granted by an Oklahoma court, under Okla. Stat. (1893) 764, § 3882, abolishing the distinction between actions at law and suits in equity, where no special grounds are shown for equitable relief, and there is a remedy at law by action of forcible detainer, and a jury trial is not waived, since there is a right to a jury trial in such case, by virtue of U. S. Const. 7th Amend.

[No. 107.]

Submitted February 1, 1900. Decided March 26, 1900.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decision affirming a judgment granting an injunction in an action relating to the possession of land claimed as a homestead. *Reversed.*

See same case below, 6 Okla. 751, 52 Pac. 406.

Statement by Mr. Justice **Harlan**:

*By a petition filed by Jackson against [350] Black in the district court of Kay county, Oklahoma territory, the following case was made:

On the 17th day of November, 1886, Jackson made a homestead entry upon the S. W. 1/4 sec. 26, T. 28, R. 2 east, I. M. The same land, prior to that date, had been embraced in a homestead entry made by Black, but that entry was finally held for cancelation

NOTE.—As to jurisdiction of Supreme Court to review territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

As to amount necessary to give United States Supreme Court jurisdiction—see note to *Schunk v. Moline, M. & S. Co.* 37 L. ed. U. S. 256.

As to right to trial by jury—see notes to *Eilenbecker v. Plymouth County Dist. Ct.* 33 L. ed. U. S. 801; *Gulf, C. & S. F. R. Co. v. Shane*, 39 L. ed. U. S. 727; *Perego v. Dodge*, 41 L. ed. U. S. 113; *Grand Rapids & I. R. Co. v. Sparrow* (C. C. W. D. Mich.) 1 L. R. A. 480; *Anderson v. O'Donnell* (S. C.) 1 L. R. A. 632.

As to right to trial by jury in Federal courts—see notes to *O'Connell v. Reed*, 5 C. C. A. 603; *Vany v. Peirce*, 26 C. C. A. 528.

As to mandatory injunctions—see *Moundsville v. Ohio River R. Co.* (W. Va.) 20 L. R. A. 161, and note.

by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review, and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west 80 acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed-wire fence and other [351] improvements attached *to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit.

The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right.

The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action, and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant, after excepting to that ruling, filed an amended answer.

In the first paragraph of the amended answer the defendant alleged that he had resided upon the land in question since about the 16th day of September, 1893, claiming a right thereto under the laws of the United States: that at the time of settlement thereon, and thereafter, he was a legally qualified homestead claimant; that he had done no act of any kind or nature since the 16th day of September, 1893, disqualifying him to hold the land as a homestead; that on the 31st day of October, 1895, he filed a homestead entry upon the land, and afterwards the plaintiff filed a contest against such entry upon the ground that his settlement as a homestead claimant was prior to that of defendant and prior to the filing of defendant's homestead entry; that it had been finally determined and decided by the Land Department of the United States that defendant's settlement upon and entry of the land was subsequent to that of plaintiff, and defendant's homestead entry was canceled, and plaintiff allowed to make homestead entry upon the sole ground that plaintiff's settlement was prior to the settlement and homestead entry of the defendant; that during the time he had resided upon the land, [352] defendant *had placed thereon lasting and valuable improvements, worth about \$500, claiming to be entitled to the benefit of the laws of the United States and of the territory of Oklahoma relating to occupying claimants; and that his rights "cannot be disposed of in a case in equity before the court only."

The second paragraph of the answer al-

leged that on the 16th day of September, 1893, and thereafter, the defendant was a native-born citizen of the United States, in all respects qualified to make homestead entry upon the land in question; that on that day, after 12 o'clock, central standard time (a signal for starting from the outer line of the Cherokee outlet being given), he ran from the 100-foot strip along the south line of the state of Kansas that had been measured, staked off, and reserved as a gathering place for those desiring to "run" for lands in the Cherokee outlet, and made all possible haste to secure and settle upon a suitable piece of land as a homestead; that there were many thousands of people along that line, more than could secure homes in the outlet, allowing 160 acres to each qualified entryman: that the plaintiff, not observing the law, the proclamation of the President, and the rules governing the opening of those lands to settlement, and for the purpose of gaining an unlawful and undue advantage of defendant and others seeking a home in the outlet, crossed the 100-foot reserve around the outer boundary of the lands prior to 12 o'clock noon, central standard time, September 16, 1893, and unlawfully and wrongfully entered upon the lands embraced within the outlet and within the 100-foot reservation known as the Chilocco reservation, and at the hour of noon, when the outlet was opened to settlement, started on the race for a home from the south line of that reservation and about 3½ miles south of the 100-foot reservation along the northern boundary of the Cherokee outlet, and thereby wrongfully, unlawfully, and unjustly started in the race for a home 3½ miles in advance of the defendant and others who observed the law of Congress opening the lands to settlement and the President's proclamation pursuant thereto; that plaintiff's prior settlement was wholly by reason of said advantage; that plaintiff filed in the United States land office at Perry, Oklahoma territory, a contest *against defendant's [353] homestead entry made upon the land described in the petition on the 31st day of October, 1893, and as grounds for the contest alleged and claimed that he, plaintiff, settled upon the land in question, claiming it as his homestead prior to the settlement and homestead entry of defendant; that upon the trial of such contest, it was conclusively proved and admitted by plaintiff that he had started upon the race from the south line of the Chilocco reservation as stated; that upon such trial the register and receiver of the land office at Perry, Oklahoma territory, found from the evidence that plaintiff had started upon the race from the point and in the manner mentioned, and also that his settlement upon and claim of the land was prior to that of defendant, and the qualification of the plaintiff to acquire a homestead on account of his having entered upon the land in violation of the act of Congress opening the same to settlement and the President's proclamation pursuant thereto was directly in issue between plaintiff and defendant in the contest case; but that the

register and receiver, although finding from the evidence and admissions of plaintiff that he had so entered upon said land, misunderstood and wrongfully interpreted and misapplied the law in relation to the qualification of plaintiff to take and hold the land as a homestead, and expressly found, as a matter of law, that plaintiff was not disqualified as "a sooner" by reason of having entered upon the land in the manner aforesaid.

[354] The answer also alleged that the defendant duly appealed from the decision of the register and receiver to the Commissioner of the General Land Office, presenting to that officer the same question with reference to the disqualification of plaintiff to acquire title to the land as a homestead, but that the Commissioner misapplied the law and wrongfully and unlawfully sustained the conclusion of the register and receiver in that regard; that the defendant then appealed to the Secretary of the Interior, to whom the same legal question was submitted, and the Secretary also misapplied the law in relation to the qualification of plaintiff and wrongfully and unlawfully sustained the findings of the Commissioner; that the defendant duly filed his motion for review in the case, in which the question as to the qualification of plaintiff was presented, and urged a reconsideration and reversal, but the Secretary, still misunderstanding and misapplying the law, wrongfully and unlawfully refused a review, and wrongfully and contrary to law canceled the homestead entry of defendant and permitted plaintiff to make homestead entry of the land, although plaintiff was at the time, and still is, wholly disqualified to acquire title to it based upon a prior settlement by reason of his having entered upon the Cherokee outlet in violation of law; that by reason of such disqualification the plaintiff could never acquire the title to the land, nor a greater estate therein than a trust estate for the sole benefit of the defendant; that defendant was lawfully entitled to reside upon the land as a homestead and acquire the title thereto by compliance with the laws of the United States and the rules of the Land Department; and that plaintiff, being disqualified to acquire title, should not be heard in this action to demand that defendant be ejected from the land and his home and improvements thereon.

The answer further alleged that if the defendant were ejected from the land and his home and improvements thereon the plaintiff would relinquish to the government of the United States for a valuable consideration all his claim to and interest in the land, and the same would "be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein; that said land, with the improvements thereon by this defendant, could be transferred in the manner aforesaid for the sum of \$6,000; that he has been by temporary order of this court restrained from exercising the right of possession and control over all of said land, with the exception of

about 5 acres occupied by his dwelling and improvements immediately surrounding the same, and that he is ready and willing to execute to the plaintiff a good and sufficient bond to compensate him for all loss of every kind or nature occasioned by defendant's occupancy and detention of said 5 acres and improvements, provided defendant is allowed to retain his possession thereof and so remain in position to assert his rights to all of said land as soon as he can possibly do so in accordance with law."

*The defendant prayed: First. That the plaintiff be not allowed to further maintain his action for the possession of the land or any part thereof. Second. That in the event that prayer was not granted, the plaintiff be denied the right to maintain his action to the extent of wholly ejecting the defendant from the 5 acres and his dwelling and improvements situated thereon until such time as the plaintiff acquired a patent to the land and the defendant was in a position to commence suit for the purpose of having plaintiff's title so acquired declared to be held in trust for him. [355]

The trial court sustained a demurrer to the answer, and, the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the purpose of removing therefrom his improvements, including buildings and fences, for which thirty days' time was given.

This judgment was affirmed in the supreme court of the territory. That court in its opinion held (using the words of the syllabus prepared by the court) that "where adverse claimants are residing upon a tract of land, and each claiming the same as a homestead by virtue of priority of settlement, and the Land Department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land." 6 Okla. 751, 52 Pac. 406.

Mr. John W. Shartel submitted the cause for appellant. Mr. S. H. Harris was with him on the brief.

The Code of Civil Procedure of the territory makes no distinction between an equitable right to possession and a legal right to possession. If plaintiff had a right to the possession of the land covered by his entry, and the defendant was wrongfully in possession of a portion of the premises, he should have brought ejectment, because facts which will support such an injunctive proceeding will equally support ejectment.

Duffey v. Rafferty, 15 Kan. 9; *Simpson v. Boring*, 16 Kan. 248; *Mooney v. Olsen*, 21 Kan. 697; *Hollenback v. Ess*, 31 Kan. 88, 1 Pac. 275.

Mr. Fred Beall submitted the cause for appellee:

Conceding the value of the land to exceed \$5,000, there is nothing in the record by which can be determined the value of the possession of the land, which was the matter in dispute.

Willis v. Eastern Trust & Bkg. Co. 167 U. S. 76, 42 L. ed. 83, 17 Sup. Ct. Rep. 1004.

The right asserted by Black is entirely speculative. His interest as alleged is too uncertain and contingent to give this court jurisdiction of his appeal.

South Carolina v. Seymour, 153 U. S. 353, sub nom. *United States ex rel. South Carolina v. Seymour*, 38 L. ed. 742, 14 Sup. Ct. Rep. 871, and cases cited; *Durham v. Seymour*, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; *Huntington v. Saunders*, 163 U. S. 319, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120.

The court had jurisdiction to issue a mandatory injunction.

Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357; *Sproat v. Durland*, 2 Okla. 25, 35 Pac. 682, 886; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; 2 Story, Eq. Jur. 3d ed. p. 261, § 959, and notes; 3 Pom. Eq. Jur. 2d ed. p. 2093, § 1359, and notes.

To exclude equity the remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299.

A proceeding by unlawful detainer could not give full relief against the wrongful acts of the defendant.

Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357.

[355] ***Mr. Justice Harlan**, after stating the facts, delivered the opinion of the court:

[356] 1. The final judgment of the supreme court of the territory *can be re-examined here if the value of the matter in dispute be sufficient to give this court jurisdiction. The defendant claimed to have acquired by his entry and settlement a vested interest in the entire land covered by his entry, and insisted that even if the plaintiff obtained a patent therefor the title would be held in trust for him. He proceeds in his defense upon the ground that after residing upon the land for the period designated in the statute he will be entitled under the law to a patent. It ought not to be assumed that he will put himself in such position that he cannot demand a patent. Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession. According to the weight of proof, the value of the land embraced by the homestead entry of Black is more than the sum required for our jurisdiction. 23 Stat. at L. 443, chap.

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355; 26 Stat. at L. 81, 86, chap. 182, § 9. Besides the demurrer admitted the averment in the answer to the effect that the land with the defendant's improvements thereon could be transferred in the manner stated in the answer for the sum of \$6,000. The motion to dismiss the appeal must therefore be overruled.

2. This case having been determined on demurrer to the answer, it must be taken as true that Black resided upon the land in dispute on and after September 16, 1893, claiming the right to do so in virtue of the laws of the United States and of a homestead entry made before the one made by Jackson. It appears that the Land Office recognized the prior right to be in Jackson. This action of the Land Office, Black contends, was erroneous in matter of law, and he has announced his purpose, in the event a patent is issued to Jackson, to institute appropriate judicial proceedings, the object of which will be to have it declared that the legal title is held in trust for him. He insists that although, in the absence of fraud, the courts will not go behind the facts found by the Land Department in any contest before it relating to the administration of the public lands, he is not concluded by the decision of that Department upon questions of law.

If parties are injuriously affected by any action of the Land *Department based upon an erroneous view of the law, the courts have power in some form to protect their rights against such illegal action. In *Cornelius v. Kessel*, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122, 124, this court said: "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the Department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." So, in *Sanford v. Sanford*, 139 U. S. 642, 647, 35 L. ed. 290, 291, 11 Sup. Ct.

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Rep. 666, 667, it was said that where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected"—citing *Quinby v. Conlan*, 104 U. S. 420, 426, 26 L. ed. 800, 802; *Baldwin v. Stark*, 107 U. S. 463, 465, 27 L. ed. 526, 2 Sup. Ct. Rep. 473.

[358] *As to Jackson's right to possession, it is clear that although successful in his contest with Black before the Land Office, no patent could issue to him under the original homestead law until after the expiration of five years from the date of his entry, and not then except upon proof that he, or if he be dead his widow, or if she be dead her heirs or devisees, prove "by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit [required by § 2290 of the Revised Statutes], and makes affidavit that no part of such land has been alienated, except as provided in § 2288, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." U. S. Rev. Stat. § 2291. But by the 3d section of the act of May 14, 1880, entitled "An Act for the Relief of Settlers on Public Lands," 21 Stat. at L. 140, chap. 89, it was provided "that any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

It thus appears that Jackson holds only an inchoate title to the land in dispute and that he may so conduct himself before making final proof and securing final certificate as to forfeit his right to obtain a patent based upon the decision of the Land Office.

By the decree below the defendant is enjoined from entering upon the premises in question or exercising any further control or possession over them, except to remove his improvements within thirty days after the decree. In his original answer the defendant claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only.

[359] *What circumstances under the laws of

Oklahoma will justify the use of a mandatory injunction for the purpose of ousting a person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt by the decisions of the supreme court of that territory. *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, 886; *Peckham v. Faught*, 2 Okla. 173, 37 Pac. 1085; *Reaves v. Oliver*, 3 Okla. 62, 41 Pac. 353; *Woodruff v. Wallace*, 3 Okla. 355, 41 Pac. 357; *Procter v. Stuart*, 4 Okla. 679, 46 Pac. 501; *Barnes v. Newton*, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; *Laughlin v. Fariss*, 7 Okla. 1, 50 Pac. 254; *Glover v. Swartz* (Okla.) 58 Pac. 943; *Brown v. Donnelly* (Okla.) 59 Pac. 975. Some of the decisions seem to restrict the right to such an injunction to cases in which the defendant was a mere trespasser upon the particular land in dispute without color or pretense of claim or title, while others recognize the appropriateness of that remedy where a plaintiff seeks possession after succeeding in a contest before the Land Office with one who at the initiation of such contest was in peaceable possession and in good faith contending for his right to such possession.

We think that the decision in *Laughlin v. Fariss*, 7 Okla. 1, 5-7, 9, 11, 50 Pac. 254, should be accepted as a correct exposition of the law of the territory. What was that case? One F. M. Fariss made a homestead entry on land, and received a certificate of cash entry. The interest so acquired was conveyed by deed to W. D. Fariss. Before F. M. Fariss made his final proof, Laughlin filed against him a contest on the ground of prior settlement. That contest finally came before the Secretary of the Interior for review, and was decided adversely to Laughlin. Subsequently, and before F. M. Fariss made his final proof, Laughlin filed another contest alleging that Fariss was disqualified to make a homestead entry by reason of having entered the Oklahoma country in violation of law. Fariss's assignee sued Laughlin, alleging that he was entitled to the sole and exclusive occupancy of the land, and asking that an injunction be awarded restraining Laughlin from cultivating or interfering with the land and removing him from the premises.

The questions presented to the supreme court of Oklahoma for decision in that case were: 1. Did the petition show that plaintiff had an equitable title to the tract of land in controversy? *2. If so, was that title a [360] sufficient basis for an action at law for the recovery of the possession of the land? 3. Should questions 1 and 2 be answered in the affirmative, then the inquiry was whether the petition contained a sufficient statement of facts to justify the relief sought and obtained?

The court answered the first question upon the authority of *Flanagan v. Forsythe*, 6 Okla. 225, 50 Pac. 152, in which it was held that "when a homestead entryman has complied with all the requirements of the Federal statutes applicable to the disposal of the tract of land occupied by him, and has

made his final proof, paid the amount of money required, and received final certificate therefor, he has a complete equitable title to said land, with the naked legal title only remaining in the government."

In answering the second question in the affirmative, the court referred to § 614 of the Territorial Code of Civil Procedure which provides: "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by § 127, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Okla. Stat. 1893, 864, title *Procedure—Civil*. Section 127, here referred to, provides that, "in any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it." The supreme court of the territory said: "It would seem that the language of this section is too plain to need the support of authority to show that an equitable title or estate in land is a sufficient basis for an action in the nature of ejectment, but if such were necessary it can be found in abundance by consulting the decisions of the supreme court of the state from which the statute was taken"—citing *Simpson v. Boring*, 16 Kan. 248; *Kansas P. R. Co. v. McBratney*, 12 Kan. 9; *Duffey v. Rafferty*, 15 Kan. 9; *State v. Stringfellow*, 2 Kan. 263; *Atchison, T. & S. F. R. Co. v. Pracht* (Kan.) 1 Pac. 319. The court added: "It is also apparent [361] that the allegations *contained in plaintiff's petition, regarding his title and right of possession, are amply sufficient to entitle him to maintain an action of forcible detainer for the possession of said tract of land. *Price v. Olds*, 9 Kan. 66; *Conaway v. Gore*, 27 Kan. 122."

The third question was answered in the negative, the court reaffirming the principle announced in *Richardson v. Penny*, 6 Okla. 328, 50 Pac. 231, in which it was said: "We still hold to the well, if not universally, established doctrine that, when a party has a plain and adequate remedy at law he cannot invoke the powers of a court of equity to issue its writ of injunction."

In the course of its opinion the court, having stated that it was conceded that the action of forcible entry and detainer would lie in a case like the one then before it, said: "This remedy by injunction, both mandatory and prohibitive in character, may and does sometimes become a very far-reaching and oppressive, as well as a speedy and effective, one, and should only be granted by courts of equity in cases where the applicants therefor bring themselves clearly within the well-defined and established rules authorizing the issuance of same; hence, such courts rarely deem it necessary or advisable to interfere in this manner, to aid a person endeavoring to recover the possession of real property"—citing *High on Injunctions*, 2d ed. §§ 354, 355, 360, and *Lacassagne v. Chapuis*, 144 U. S. 119, 124, 36 L. ed. 368, 370, 12 Sup. Ct. Rep. 659, 661. The rule, the court observed, was clearly and concisely stated by this court in *Lacassagne v. Chapuis*, in which it was said: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. . . . The plaintiff has a full, adequate, and complete remedy at law, and the case is not one for the jurisdiction of a court of equity."

The supreme court of the territory thus concluded its opinion *in *Laughlin v. Fariss*: [362] "We hold that the action of injunction will not lie to adjust possessory rights to a tract of land after the equitable title thereto has passed from the government of the United States and become vested in an individual, unless in a case which presents some recognized special ground therefor, which must be one other than that one party claims that he is the owner and entitled to the immediate possession thereof, and that the other party unlawfully and without any right whatever holds and detains such possession. We therefore conclude that the facts, stated by the plaintiff below in his amended petition, are not sufficient to entitle him to the interference of a court of equity."

In the decision in *Laughlin v. Fariss* all the justices of the supreme court of the territory concurred, including those who constituted the majority when the present case was decided. And we cannot find that that court has in any case withdrawn or qualified the ruling that an entryman, out of possession and having a decision by the Land Office in his favor, may proceed against his adversary in possession by an action of forcible detainer, and thus obtain possession without resorting to the extraordinary remedies used by courts of equity. According to the decisions of that court, Black, as between himself and his successful adversary, was in possession without color of title. Now, by the statutes of the territory, in the article relating to forcible entry and detainer, if it be found that lands and tenements after a lawful entry "are held unlawfully," then the justice "shall cause the party complaining to have restitution thereof;" and it is provided that proceedings under that article may be had in all cases "where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession." Okla. Stat. 1893, 919, 920, §§ 4805, 4806.

In the opinion in the present case the supreme court of the territory said nothing about defendant's contention that he was entitled to a trial by jury. Speaking by the same justice who in the court below deliv-

ered the opinion in the present case, the supreme court of the territory, in *Barnes v. Newton*, 5 Okla. 428, 432, 48 Pac. 190, 49 Pac. 1074, conceded that in a case between [363]contesting entrymen *the one who obtained the decision of the Land Office might avail himself of the statutory provisions relating to forcible entry and detainer, but that such a remedy was not sufficiently efficacious, for the reason that "by delays and appeals a party in possession of a homestead could keep his adversary out of possession of the land for years." But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. *Robinson v. Campbell*, 3 Wheat. 212, 223, 4 L. ed. 372, 376; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Van Norden v. Morton*, 99 U. S. 373, 25 L. ed. 453; *Smyth v. Ames*, 169 U. S. 467, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in "suits at common law" where the value in controversy exceeds \$20. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the territories of the United States. *Webster v. Reid*, 11 How. 437, 460, 13 L. ed. 761, 770; *American Pub. Co. v. Fisher*, 166 U. S. 464, 466, 41 L. ed. 1079, 1080, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717. So that a court of a territory authorized, as Oklahoma was, to pass laws not inconsistent with the Constitution of the United States (26 Stat. at L. 81, 84, chap. 182, § 6), could not proceed in a "common-law" action as if it were a suit in equity, and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity. And this evidently is in accordance with the statutes of Oklahoma providing that while the court must try issues of law, unless referred in the mode prescribed, "issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived or a reference be ordered." Okla. Stat. 1893, 809, § 4156.

In the case before us no special grounds are disclosed that would authorize the court to issue a mandatory injunction and determine without a jury the issue as to the right [364]of possession. *If it be said that the plaintiff's residence upon the land for a given time is necessary in order that he may earn a patent, the answer is that the defendant is not alleged to be in the actual possession of the entire land embraced by the plaintiff's entry. Nor does it appear that the plaintiff may not, without interference by the defendant, maintain a residence upon that part of the land which is not in the actual possession of

the defendant, and do all that may be requisite in order to earn a patent. We may also observe that it is not alleged that the defendant is doing any actual injury to the part of the land remaining in his possession. It does not appear that he has done anything except to continue in possession of that part. If Black prevents Jackson from taking possession of the 80 acres in question, he is entitled to bring his action of forcible detainer and to recover possession unless it appears that the Land Office erred, as matter of law, in deciding for him. It is not meant by this that an action of forcible detainer is the only remedy that can be adopted by the plaintiff.

As in Oklahoma the distinction between actions at law and suits in equity is abolished,—each action being called a civil action, whatever the nature of the relief asked (Okla. Stat. 1893, 764, § 3882),—we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury in respect of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode.

3. One of the defenses made by Black is that the plaintiff entered upon the land in violation of the act of March 1, 1889, 25 Stat. at L. 759, chap. 317, and of the act of March 2, 1889, 25 Stat. at L. 980, 1005, chap. 412, as well as of the proclamation of the President of March 23, 1889, 26 Stat. at L. 1544, 1546. The acts and proclamation referred to related to the lands obtained by the United States under the agreement with the Muscogee or Creek Nation of Indians in the Indian territory. The contention of the defendant is that the plaintiff by his conduct disqualified himself from acquiring any interest in the tract of land here in dispute which was part of the lands obtained from the Muscogee or *Creek Indians, and conse- [365]quently the Land Office erred, as matter of law, in its decision for the plaintiff. *Smith v. Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; *Payne v. Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337; *Calhoun v. Violet*, 173 U. S. 60, 62, 43 L. ed. 614, 615, 19 Sup. Ct. Rep. 324. No opinion was expressed on this question by the supreme court of the territory, and we need not now express an opinion. If the plaintiff should proceed against the defendant in some other mode than by injunction, the facts connected with his alleged unlawful entering upon the lands opened for settlement under the above acts and proclamation can all be proved, and any question arising out of them as to his disqualification to acquire any interest whatever in the land in dispute can then be determined.

We are of opinion that the case made out by the plaintiff was not such as to entitle him to a mandatory injunction, and that the court of original jurisdiction erred in determining the cause without a jury. The decree of the Supreme Court of the Territory is therefore reversed, and the cause is remanded with directions to set aside that decree

and for such further proceedings as will be consistent with law and this opinion.

Reversed.

J. C. POTTS, *Appt.*,
v.
THOMAS N. HOLLEN.

(See S. C. Reporter's ed. 365-370.)

Appeal—amount in controversy—right to jury trial.

1. A motion to dismiss an appeal from the supreme court of a territory on the ground that the amount in controversy is insufficient to give jurisdiction must be denied where there are affidavits showing that the land in question is of greater value than \$5,000, while the record contains an order made by the supreme court of the territory on the application for appeal, stating that more than that amount was involved in the action.
2. A mandatory injunction to establish a right to the possession of land claimed as a homestead under the United States statutes cannot be granted by an Oklahoma court, under Okla. Stat. (1893) 764, § 3882, abolishing the distinction between actions at law and suits in equity, where no special grounds are shown for equitable relief, and there is a remedy at law by action of forcible detainer, and a jury trial is not waived, since there is a right to a jury trial in such case, by virtue of U. S. Const. 7th Amend.

[No. 143.]

Submitted February 1, 1900. Decided March 26, 1900.

APPEAL from a decision of the Supreme Court of the Territory of Oklahoma affirming a judgment granting an injunction against interference with possession of land claimed as a homestead and ordering a party to remove therefrom. *Reversed.*

See same case below, 6 Okla. 696, 52 Pac. 917.

Statement by Mr. Justice **Harlan**:

This action was commenced by petition filed in the district court for Kay county, Oklahoma territory.

[366] The plaintiff Hollon, the appellee here, alleged that on the 13th day of October, 1893, he made a homestead entry of the southeast quarter of section 32, township 28 north, of range 3 east, 1. M., in Perry land district, Oklahoma territory, which land office had jurisdiction over that tract, and the officers of which had authority to make and allow such entry; that there was filed in that office at Perry a certified affidavit of contest by defendant Potts; that under the allegations of that contest the case went to a hearing, after which a decision was rendered in favor of plaintiff and the contest case was dismissed, from which decision defendant appealed, but not within the time required by law, to the Commissioner of the General Land Office, who affirmed the decision of the local land office; that the defendant filed an

amended contest affidavit before the Commissioner, which was rejected, and the motion for rehearing was denied; that the defendant appealed from the Commissioner's decision, and on the 9th day of June, 1896, the Secretary of the Interior passed upon the case and affirmed the action of the Commissioner; that all the proceedings before the Interior Department upon which the defendant was entitled to be heard with reference to such land contest had been had and the case was fully closed; that under and by virtue of his homestead entry the plaintiff was entitled to the exclusive use, benefit, and possession of all the southeast quarter of section 32, township 28 north, range 3 east; that under claim of right, based upon the contest so dismissed, defendant entered upon said quarter section and entered into possession of a part thereof, erecting or causing to be erected a house and other improvements thereon, and still maintained possession of a portion of the section under the protest and against the wishes of plaintiff and without claim or color of title thereto; that defendant at the time had pending before the Department of the Interior no contest or claim of right or title to said tract or piece of land; that defendant was insolvent and unable to respond in damages to the plaintiff, and her possession of and improvements upon the tract prevented the plaintiff from properly cultivating and using that portion of the land in her possession; that defendant threatened, by retaining the possession of a portion of the tract, to involve the plaintiff in many vexatious suits, to his great and irreparable damage and injury; that she had been in possession of a portion of the land since a short time after the opening of the Cherokee outlet; that the plaintiff had no adequate remedy at law; that the defendant had used, cultivated, and controlled about 25 acres of the land to plaintiff's damage in the sum of \$150; and that the rents and profits of the land so used by the defendant would amount to about \$150.

The relief asked was that the defendant, her agents and employees, be restrained from interfering with the plaintiff's possession, use, and occupancy of the land included in his homestead entry; that she be enjoined from cultivating, improving, or occupying any part of the tract; and that she be permitted, within a time to be fixed, to remove therefrom any improvements made by her prior to the plaintiff's homestead entry, and vacate the land on the order of the court.

The defendant in her answer admitted that "defendant [plaintiff] has the homestead entry in said land and that defendant filed a contest against said entry," but denied each and every other material allegation of the petitioner. The defendant also alleged that "she filed a contest against the said entry of the said Hollon, charging and alleging in substance that plaintiff was disqualified to enter and hold lands by reason of having entered the Cherokee outlet prior to 12 o'clock noon of September 16th, 1893, and run from the south side of the Chilocco reservation, which is 3½ miles south of the

[368] lines established in the President's proclamation; that said contest was rejected and defendant duly appealed, and while said cause was still pending defendant filed her amended affidavit of contest against said entry, a copy of which said contest is attached to plaintiff's petition, marked 'Exhibit C,' and hereby referred to and made a part of this answer. Defendant further alleges that within the time required by the rules of practice in the Land Department, to wit, July 22d, 1896, she filed a motion for a review of the Secretary's decision of June 9th, 1896, a copy of which said motion is hereto attached, marked 'Exhibit A,' and made a part hereof; and that said cause is *now and was pending at the commencement of this action in the Land Department of the United States."

The plaintiff filed a reply denying "each and every material allegation" in the defendant's answer.

To sustain the issues on his part the plaintiff introduced in evidence an official communication to the register and receiver at Perry, Oklahoma, from the Commissioner of the Land Office, dated November 24th, 1896, which showed that the defendant's motion for a review of the previous action taken in the contest case had been denied by the Land Department. That communication concluded: "The case is hereby closed, and you will advise said Potts that she may, if she elects, file a new contest against the entryman Hollon, incorporating the charge set out in her amended affidavit in due time the action taken, transmitting therewith evidence of notice hereof and of the decision of the Department." The plaintiff then testified in his own behalf, stating that he had the homestead entry on the land in dispute; that the defendant was residing on part of it, about 25 acres. The plaintiff having rested upon this proof, the defendant demurred to the evidence upon two grounds: (1) It did not sustain the allegations of the petition; (2) it did not show that the plaintiff had a cause of action. The demurrer was overruled, an exception to that action of the court being taken. The defendant stood upon the demurrer and introduced no evidence.

The trial court without a jury rendered judgment for the plaintiff, enjoining the defendant from interfering with his right to possess and control the land in question, "except that the defendant is hereby given the right to enter upon and harvest the fall wheat crop she has sown upon the land in dispute, and is to remove said wheat from said land within thirty days after the same is ripe and fit to cut;" and she was further enjoined and restrained "from removing or interfering [with] or injuring in any way any well of water that she may have placed upon said land, and all growing timber or trees that she may have placed upon said land, and any growing timber or trees that she may have planted."

The supreme court of the territory affirmed
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the judgment *of the inferior court. The [369] syllabus of its opinion, prepared by the court, is as follows: "Injunction—When properly granted.—A filed a homestead entry for a tract of government land. B initiated a contest, alleging that A was disqualified from entering the land. The contest was by the Land Department decided in favor of A. During the pendency of such contest B filed an amended affidavit of contest, alleging a different ground of disqualification upon the part of A. Shortly after B first instituted the first contest, B in some manner became possessed of about 25 acres of the land, and held such possession until after the final decision upon the first contest. Held, that upon the authority of *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, 886, A was entitled to an injunction restraining B from interfering with the possession of A, and requiring him to remove from the land in dispute." 6 Okla. 696, 52 Pac. 917.

From the judgment of the supreme court of the territory the defendant appealed to this court.

Mr. John W. Shartel submitted the cause for appellant. Mr. S. H. Harris was with him on the brief.

Mr. Fred Beall submitted the cause for appellees.

For contentions of counsel, see briefs as reported in *Black v. Jackson*, 177 U. S. 349, ante, 801, 20 Sup. Ct. Rep. 648.

*Mr. Justice Harlan, after stating the [369] case, delivered the opinion of the court:

The motion to dismiss the present appeal is denied. The land in question is shown to be of greater value than \$5,000. In addition to the affidavits filed on the subject of value, the record contains an order made by the supreme court of the territory on the application for appeal, stating that more than the above amount was involved in the action. This order we assume was based upon proof as to value.

One of the assignments of error is that the supreme court of the territory erred in holding that the trial court had jurisdiction of the subject of the action and the right to entertain the suit as a proceeding in equity and without a trial by jury.

For the reasons stated in the opinion in *Black v. Jackson*, just decided (177 U. S. 349, ante, 801, 20 Sup. Ct. Rep. 648, we adjudge that the issue of fact involving the right of possession of the premises in dispute could not properly be *determined without the aid [370] of a jury, unless a jury was waived. Without repeating what was said in that opinion, we also hold that the case made by the plaintiff was not such as to entitle him to a mandatory injunction.

The decree is reversed and cause remanded for such further proceedings as may be consistent with this opinion.

Reversed.

EDWARD B. WESLEY, *Appt.*,

v.

HOWARD P. EELLS.

*Specific performance—of contract for land
—title not marketable.*

(See S. C. Reporter's ed. 370-378.)

A contract to purchase land will not be specifically enforced against the vendee, when the title is not marketable and cannot be made so except by successful litigation to remove a mortgage from record,—especially when no affirmative action therefor can be taken because the mortgage is held by a state official on behalf of the state.

[No. 176.]

*Argued and Submitted March 9, 1900. De-
cided April 9, 1900.*

A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio dismissing a bill for specific performance of a contract for land. *Affirmed.*

See same case below, 90 Fed. Rep. 151.

The facts are stated in the opinion.

Mr. William H. Lyles argued the cause and filed a brief for appellant.

Mr. Arthur St. J. Newberry submitted the cause for appellee.

Mr. William A. Barber filed a brief as *Amicus Curie*.

[370] ***Mr. Justice Harlan**, delivered the opinion of the court:

This suit was brought in the circuit court of the United States for the northern district of Ohio by Wesley, a citizen of New York, against Eells, a citizen of Ohio.

[371] *The case made by the bill was as follows: The state of South Carolina, being the owner in fee of certain real estate situated in the city of Columbia in that state,—part of the property being known as Agricultural Hall,—caused the same to be sold at public auction, Wesley becoming the purchaser.

By the terms of sale the purchaser was required to pay in cash one third of the price, and to execute his bond and mortgage on the property to secure payment of the balance in two equal annual instalments, with interest from the date of purchase, the obligor to have the option of paying the whole or any part of the sum so secured before the maturity thereof.

At the instance of Wesley, the commissioners of the sinking fund of South Carolina executed a deed in fee simple for the property to one J. W. Alexander, who consented

NOTE.—That purchaser of real property is not compelled to take doubtful title—see *Close v. Stuyvesant* (Ill.) 3 L. R. A. 161 and note; *Townshend v. Goodfellow* (Minn.) 3 L. R. A. 739 and note; *Moore v. Williams* (N. Y.) 5 L. R. A. 654 and note.

As to when specific performance will be decreed and when refused—see notes to *Hepburn v. Dunlop*, 4 L. ed. U. S. 65; *Colson v. Thompson*, 4 L. ed. U. S. 253; *Brashler v. Gratz*, 5 L. ed. U. S. 323.

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to act as trustee for the plaintiff, the deed, however, not containing any declaration of the trust. Thereupon Alexander executed to the treasurer of the state his bond for the payment of the purchase price,—the mortgagor being accorded the privilege of paying before maturity the whole or any part of the money secured.

The mortgage not having then been filed for record, and Wesley having furnished to Alexander a sufficient amount of what is known as South Carolina revenue bond scrip, the latter tendered to the state treasurer of South Carolina in such scrip the principal and interest of the above bond. That officer had authority to receipt for the sum due on the bond and mortgage. The tender was refused by the state treasurer.

By the laws of South Carolina a tender in full of the amount due on a mortgage of real or personal property at any time when the mortgagor has the right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage, whether the amount be accepted or not, and whether the mortgagor keeps himself in a position to make good the tender or not.

Notwithstanding the tender, the state treasurer caused the above mortgage to be recorded in the proper office.

Subsequently, Alexander conveyed the premises in question to Wesley.

*The bill contains a statement of the [372] history of the above-mentioned revenue bond scrip and of the plaintiff's connection therewith. Reference was made to the act of the general assembly of South Carolina approved the 15th day of September, 1868, entitled "An Act to Authorize Additional Aid to the Blue Ridge Railroad Company in South Carolina," and to the act approved the 2d day of March, 1872, entitled "An Act to Relieve the State of South Carolina of all Liability for its Guaranty of the Bonds of the Blue Ridge Railroad Company by Providing for the Securing and Destruction of the Same," which provided for the issue of certificates of indebtedness styled revenue bond scrip, which should express that the sum mentioned therein was due by the state to bearer, and that the same would be received in payment of taxes and all other dues to the state, except special taxes levied to pay interest on the public debt. By the 4th section of the above act of 1872 the faith and funds of the state were pledged for the ultimate redemption of the revenue bond scrip, and county treasurers were required to receive the same in payment of all taxes levied by the state, except in payment of special taxes levied to pay interest on the public debt; and the state treasurer and all other public officers were required to receive the same in payment of all dues to the state.

The plaintiff had received from the state treasurer of South Carolina, under the circumstances detailed in the bill (which need not be repeated), a large amount of revenue bond scrip. He stated that he was the owner and holder of the scrip received by him, and charged in his bill that by the tender to the state treasurer the Alex-

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ander mortgage had been extinguished by operation of law.

The revenue bond scrip referred to was in the following form:

\$100. No. 21. \$100.

Revenue Bond Scrip.

THE STATE OF [Palmetto Tree] SOUTH CAROLINA.

COLUMBIA, S. C., March —, 1872.

[373] Receivable as one hundred dollars in payment of all taxes *and dues to the estate, except special tax levied to pay interest on public debt.

Niles G. Parker, State Treasurer.

One hundred dollars. One hundred dollars.

Such being Wesley's relations to the mortgaged property he made a written contract with Eells whereby he agreed, for the price of \$20,000, to be paid in cash, to convey to the latter in fee simple the premises in question, free from any valid lien or encumbrance whatever.

The plaintiff offered to deliver to Eells a deed for the premises in fee simple, and demanded payment of the purchase price. But Eells refused to receive the deed or to pay the price, alleging that the scrip tendered by Alexander were not valid obligations of South Carolina, and therefore did not constitute a legal tender of the amount due the state nor operate as an extinguishment of the mortgage.

The plaintiff brought into court and tendered a deed to Eells, and offered to agree that the plaintiff might retain so much of the price for the property as would protect it against any taxes that had accrued upon it.

The relief asked was a decree that the defendant should accept the deed tendered to him and pay the purchase price of the property, less any sum to meet the taxes assessed upon it.

The defendant admitted in his answer that there were no liens or encumbrances upon the property except the mortgage described in the bill and such taxes as were due thereon to the state and to the city of Columbia. But he alleged that the statute authorizing revenue bond scrip to be received in payment of dues to the state had been repealed, and county auditors and county treasurers forbidden to collect any taxes for the redemption of such scrip; that the act under which the scrip was issued was in violation of the Constitution of the United States, forbidding the states from emitting bills of credit, and also in violation of the Constitution of South Carolina, and such scrip was null and void.

[374] The defendant stated in his answer that he had always been, and was then, willing to perform his contract, provided he received *a full and perfect title to the premises, free from any valid lien, and was protected in the quiet and peaceable possession thereof.

The plaintiff filed a general replication, and the cause was submitted on the pleadings and certain documentary evidence showing the history of the revenue bond

scrip, the legislation of South Carolina, and certain decisions of the supreme court of that state.

The circuit court of the United States held that the bond scrip issued under the act of March 2d, 1872, were bills of credit and void; that the tender of scrip by Alexander to the state treasurer was therefore not a valid tender, and did not operate to extinguish the mortgage given by Alexander to the state; and that the Agricultural Hall property was still encumbered by the mortgage, and plaintiff could not give defendant a clear title to it. The bill was dismissed at the plaintiff's cost.

In the memorandum of evidence used by stipulation of the parties, reference was made to the case of *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770, 777. But the decision there has no bearing upon the present case. That was an action by Wesley to recover the possession of the property here in dispute,—the defendants being in possession only in their capacities as officers or agents of South Carolina, and insisting that the suit against them was, in legal effect, one against the state within the meaning of the Eleventh Amendment of the Constitution of the United States. "The settled doctrine of this court," it was said in that case, "wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state, simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf. . . . Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent." These extracts indicate the scope of the decision in *Tindal v. Wesley*, and make it clear that that decision does not determine any question now presented.

*The vital question in the present case is [375] whether the plaintiff was entitled to a decree for specific performance. The plaintiff bases his right to such a decree upon the ground that Alexander's tender of revenue bond scrip to the treasurer of South Carolina had the effect to extinguish the lien of the mortgage executed by him, and consequently that plaintiff's deed conveying the fee would give to Eells a good title. This view assumes that the revenue bond scrip tendered by Alexander to the state treasurer were legally receivable in payment of the amount on the Alexander bond and mortgage. But as will be seen from an examination of the cases of *State ex rel. Shiver v. Comptroller General*, 4 S. C. N. S. 185, and *Auditor v. Treasurer*, 4 S. C. N. S. 311, the supreme court of South Carolina has held that the revenue bond scrip issued under the act of March 2d, 1872, were bills of credit which the Constitution of the United States forbade the states to emit, and therefore were null and void. And in that view the

court below concurred. What then, will be the effect of a decree in the circuit court of the United States sitting in Ohio, requiring the defendant to pay the amount he agreed to pay and to take the deed tendered him by the plaintiff? What would the defendant get under such a decree in consideration of the amount paid by him for the property? He would get a deed from Wesley for premises covered by a mortgage of record which the highest court of the state in which the property is situated will presumably hold not to have been discharged by the tender of revenue bond scrip. And we do not perceive that Eells could by any affirmative action on his part bring the question of the validity of that tender before any court in South Carolina for adjudication. He could not sue the state against its consent, and no suit except one to which the state was a party would effectively reach such a question and release the property from the encumbrance created by the Alexander mortgage. So that, if compelled to take Wesley's deed, Eells would be powerless to have his title made clear of record, unless the state brought suit to foreclose the mortgage and thereby enabled him in defense to relitigate the question already concluded in the courts of that state by judicial decision. It is thus manifest that a decree for specific performance would put upon him a title that *was not at all marketable and could not become such except by successful litigation.

In *Hennessey v. Woolworth*, 128 U. S. 438, 442, 32 L. ed. 500, 501, 9 Sup. Ct. Rep. 109, 111, this court said: "Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case,"—citing *Willard v. Tayloe*, 8 Wall. 557, 567, 19 L. ed. 501, 504; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 357, 19 L. ed. 955, 961; 1 Story's Eq. Jur. § 742; *Seymour v. Delancey*, 6 Johns. Ch. 222, 224. To the same effect are *McCabe v. Matthews*, 155 U. S. 550, 553, 39 L. ed. 256, 257, 15 Sup. Ct. Rep. 190; *Rust v. Conrad*, 47 Mich. 449, 454, 41 Am. Rep. 720, 11 N. W. 265; *Petty v. Roberts*, 7 Bush, 411, 419; *Huntington v. Rogers*, 9 Ohio St. 511, 516. A court of equity will not compel specific performance if under all the circumstances it would be inequitable to do so. *Starnes v. Newsom*, 1 Tenn. Ch. 239, 244; *Parish v. Oldham*, 3 J. J. Marsh. 544, 546; *Clowes v. Higginson*, 1 Ves. & B. 524, 527.

Again, it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. *Morgan v. Morgan*, 2 Wheat. 290, 299, 301, 4 L. ed. 242, 244, 245; *Tiffin v. Shawhan*, 43 Ohio St. 178, 183, 1 N. E. 581. And, speaking generally, a title is to be deemed doubtful where a court of co-ordinate jurisdiction has decided adversely to it or to the principles

on which it rests. Fry, Spec. Perf. 3d ed. § 870, and authorities there cited. One of the grounds upon which a decree for specific performance was denied in *Hepburn v. Auld*, 5 Cranch, 262, 278, 3 L. ed. 96, 100, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

The principle is well illustrated in *Jeffries v. Jeffries*, 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objections to the title was that it was encumbered by conditions that would interfere with the enjoyment of the property. The supreme judicial court of Massachusetts there said: "Hence the propriety and the necessity of the rule in equity that a defendant in proceedings for specific performance shall *not be compelled [377] to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 523; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title." So, in *Lowry v. Muldrow*, 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, "courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits." Numerous other American cases announce the same rule.

The principle is also illustrated in many English cases. In *Parker v. Tootal*, 11 H. L. Cas. 143, 158, it was said to be an established rule of equity not to compel a purchaser to take a doubtful title. In *Rose v. Calland*, 5 Ves. Jr. 186, 188, which was a suit by devisees in trust to obtain the specific performance of an agreement entered into by the defendant for the purchase of an estate, certain reasons were given why the plaintiff could not make a sufficient title, one of which was that the court of exchequer, in *Nagle v. Edwards*, 3 Anstr. 702, had announced principles which, if followed, would prevent the defendant from obtaining such a title as he ought to have. The lord chancellor said: "If I was to send this case to the master, I should create a needless expense; for upon the case in the court of exchequer, *Nagle v. Edwards*, which I have looked into, my difficulty is this: Can I make a person take a title in the face of that decision? If I do, I decree him to enter into a lawsuit. . . . I desire to be understood as not entirely agreeing with the determination of the court of exchequer. But I should be in a strange situation in desiring a purchaser to take this title, because I think the point a pretty good one, though the court of exchequer have determined against it. It

[378] is telling him to try my opinion at his expense." So in *Price v. *Strange*, 6 Madd. & G. 159, 165, in which the vice chancellor said: "In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision." In *Pyrke v. Waddingham*, 10 Hare, 1, 8, it was held that the court will not compel a purchaser to take a title that "will expose him to litigation or hazard."

We are of opinion that the plaintiff's title is not such as a court of equity should compel the defendant to accept. He should not have been compelled to accept it, even if the court below had been of opinion that the revenue bond scrip tendered by Alexander were not bills of credit.

Upon the grounds stated, and without expressing any opinion upon the question whether the revenue bond scrip referred to were or were not bills of credit within the meaning of the Constitution of the United States, the decree below is affirmed.

Ex parte: In the Matter of the Application of RAMON BAEZ, Petitioner.

(See S. C. Reporter's ed. 378-390.)

Habeas corpus—denying leave to file petition—where writ would be ineffectual.

Leave to file a petition for the writ of habeas corpus and certiorari will not be granted where it is obvious that, before a return to the writ, can be made or any other action taken, the restraint of which the prisoner complains will be terminated.

[No. —, Original.]

Submitted March 26, 1900. Decided April 12, 1900.

MOTION for leave to file petition for writ of habeas corpus and certiorari. Denied.

Statement by Mr. Chief Justice Fuller:

On March 26 a motion was made for leave to file the following petition for the writ of habeas corpus and certiorari:

[379] "Your petitioner, Ramon Baez, by Tulio Larrinaga, for him *and in his behalf, respectfully shows that he is a native-born inhabitant of the island of Puerto Rico, formerly a dependency of the Kingdom of Spain, but at the time of the occurrences hereinafter narrated belonging to and forming a part of the territory of the United States of America.

"Your petitioner was also formerly a subject of His Imperial Majesty the King of Spain but since long prior to the occurrences herein complained of and ever since, to and including the present time, he has neither owned nor acknowledged allegiance to any other nation or sovereignty than that of the United States of America.

"Your petitioner represents unto this honorable court that he is wrongfully, improperly, unjustly, and illegally imprisoned and restrained of his liberty at Humacao, in and on said island of Puerto Rico, by one Samuel C. Bothwell, called and styled as and 177 U. S.

being the marshal of the United States provisional court for the department of Puerto Rico.

"By act of Congress approved April 25, 1898, it was declared that a state of war had existed and then existed between the United States of America and the Kingdom of Spain, and thereafter, in the course of the prosecution of such war, the military forces of the United States invaded and conquered the island of Puerto Rico and have ever since remained in possession and control thereof.

"December 10, 1898, a treaty of peace was signed at Paris, France, between the duly accredited representatives of the United States of America and Her Majesty the Queen Regent of Spain; and the same having been duly reported to the Senate of the United States, ratification thereof was advised by the Senate on February 6, 1899, and, having been ratified by the President of the United States on said date and subsequently by Her Majesty the Queen Regent of Spain, ratifications thereof were exchanged at Washington on the 11th day of April, 1899, and the treaty was proclaimed by the President of the United States on the same day.

"By said treaty it was provided, among other things, as follows:

"Art. II. Spain cedes to the United States the island of Porto *Rico and other islands [380] now under Spanish sovereignty in the West Indies.

"Art. XI. All Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong."

"Prior to the ratification of said treaty of peace and on or about the 12th day of August, 1898, a protocol or agreement between the United States and the Kingdom of Spain was signed at the city of Washington by the representatives of the two nations, under and by virtue of the terms of which a suspension of hostilities between said nations was declared by the President of the United States.

"By article IV. of the said protocol it was agreed that Spain should evacuate Porto Rico, and that commissioners should be appointed by the signatory powers for the purpose of arranging and carrying out the details of such evacuation.

"Thereafter an evacuation commission was appointed by the President of the United States, and a similar commission was appointed by the government of Spain, and the commissioners subsequently assembled in the city of San Juan, Porto Rico, and duly arranged the terms of such evacuation, which were accepted by the respective governments, and the evacuation and retirement of the Spanish forces from the island of

Puerto Rico occurred on the 18th day of October, 1898.

"Thereupon, and on said date, Major General John R. Brooke, commanding the forces of the United States, in compliance with the orders of the President, assumed the government of the said island of Porto Rico, and by General Order No. 1, of said date, established the military 'Department of Puerto Rico.'

"Said order, among other things, contained the following:

"The provincial and municipal laws, in so far as they affect the settlement of private rights of persons and property and provide for the punishment of crime, will be enforced unless they are incompatible with the changed conditions of Porto Rico, in which event they may be suspended by the department commander."

"Your petitioner further shows that after said 12th day of August, 1898, hostilities ceased to exist in the island of Porto Rico between the forces of the United States and of Spain, and that since the 11th day of April, 1899, war has ceased to exist between the nations, and also since the last-named date, if not prior thereto, there has been and is now a condition of peace existing throughout said island of Porto Rico, and there has been neither a state of war with any foreign power in the said island, nor has there been any internal or domestic rebellions, revolutions, or dissensions, nor any failure to recognize the authority and sovereignty of the United States.

"Since the occupation of Porto Rico by the United States authorities the civil courts of that island have been in session, exercising the same jurisdiction and in substantially the same form as during the Spanish occupation of the island, and such courts were exercising their ordinary civil and criminal jurisdiction during all of the times herein-after mentioned.

"On the 27th day of June, 1899, by General Order No. 88, of Brigadier General George W. Davis, United States Army, then commanding the department of Porto Rico, and the supreme military authority in said island, there was established a 'United States Provisional Court for the Department of Porto Rico.'

"Said General Order 88, among other things, provided as follows:

"Sec. II. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified."

"Sec. IV. The decisions of said courts shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts. . . .

"Sec. V. The provisional court shall consist of three judges, *one of whom shall be known as the law judge, and the other two

as associate judges, one United States district attorney, one marshal, one clerk, three deputy clerks, one stenographer and reporter, one interpreter, one bailiff and janitor, and one messenger. The law judge shall preside, and shall determine and decide all technical questions of law. A majority vote of the bench shall determine all questions of fact. The jury system may be introduced or dispensed with in any particular case in the discretion of the court.

"Sec. VI. The judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States.

"Sec. VII. The district attorney shall be authorized to present to the court information against all parties for violations of United States statutes and regulations. He shall also in like manner present informations for violations of orders issued by the department commander relating to civil matters, which may be referred to him from these headquarters. . . .

"Sec. VIII. In order to define more clearly certain branches of the criminal jurisdiction of the provisional court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

"1st. All offenses punishable under the statutory laws of the United States, such as those indicated in paragraph I. of this order.

"2d. Offenses committed by or against persons, foreigners or Americans, not residents of this department, but who may be traveling or temporarily sojourning therein, or against the property of nonresidents.

"3d. Offenses against the person or property of persons belonging to the army or navy, or those committed by persons belonging to the army or navy, not properly triable by military or naval courts; but not including minor police offenses.

"4th. Offenses committed by or against foreigners or by or against citizens of another state, district, or territory of the United States, residing in this department."

"Sec. XI. If any party litigant shall feel aggrieved by the judgment or decree of said court a stay of ninety days shall *be granted such party before the execution of such judgment or decree, upon the filing of a bond by him with sureties in an amount and with such conditions as the court may determine, for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree. But if at the end of said ninety days such process has not been issued by the Supreme Court execution shall forthwith issue."

"Sec. XVI. The court shall adopt an appropriate seal which shall be procured by the treasurer of the island. The clerk of the court shall have the custody of the seal for use in attesting legal documents in the usual manner.

"Sec. XVII. In accordance with the provisions of paragraph V. of this order the following appointments are announced to take effect July 1st, 1899:

[Here followed the designation of a "law judge;" a "provisional United States attorney;" two military officers as "associate judges;" and another as "clerk."]

"Private Samuel C. Bothwell, troop D, 5th U. S. cavalry, is detailed on special duty as marshal of the U. S. provisional court."

"By General Order 216 of said department, dated December 18, 1899, section XI. of General Order 88, hereinbefore set forth, was amended so as to read as follows:

"If any party litigant shall feel aggrieved by the judgment or decree of said court, a stay of ninety days shall be granted such party before the execution of such judgment or decree, upon the filing of a bond by him with sureties in an amount and with such conditions as the court may determine, for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree.

"For good cause, this court may extend the time of filing such application and record in the office of the clerk of the supreme or appellate court aforesaid.

[384] "The stay of execution granted by this court shall be in force until the final disposition of the case by the supreme or appellate court aforesaid, provided that the party availing himself of the provisions of this section shall not be guilty of negligence in prosecuting his application before the said supreme or appellate court."

"On the 21st day of September, 1899, by General Order 145 of said department, issued by Brigadier General George W. Davis, United States Army, as aforesaid, provision was made for the holding of municipal elections in said island of Porto Rico, and certain rules and regulations governing the right of the inhabitants to vote at such elections and the manner of exercising such suffrage were therein provided for, among others the following:

"Sec. V. An elector to vote at such elections shall possess the following qualifications:

"a. He must be a bona fide male resident of the municipality.

"b. He must be over twenty-one years of age.

"c. He must be a taxpayer of record at the date of his registration, or he must be able to read and write.

"d. He must have resided upon the island of Puerto Rico for two years next preceding the date of his registration, and for the last six months of said two years within the municipality where the election is held."

"Thereafter, by General Orders 160 of said department, issued October 12, 1899, General Orders 145 were amended so as to read in part as follows:

"Sec. VIII. He must be a taxpayer of record in the municipality in which he votes at the date of this order, or he must be able to read and write. Persons who pay insular or municipal taxes of any kind, in their own right or name, or in the name of their lawful wife or minor child, or the members of a
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firm, corporation, or copartnership paying taxes, and the heirs of an estate that pay taxes, are deemed taxpayers under the meaning of this clause. But administrators, guardians, trustees, agents, or other persons who pay taxes for other than themselves or their lawful family are not taxpayers within its meaning through such payment."

"Sec. XVI. Any person who fraudulently votes, or attempts *or offers to fraudulently vote, or attempts to influence or control others to fraudulently vote, at any public election, shall, upon conviction thereof, be subject to a fine not exceeding one hundred dollars, or to imprisonment at hard labor not exceeding three months, or to both such fine and imprisonment, in the discretion of the court."

"Thereafter, by special orders of the military authorities commanding the said department, an election was ordered to be held on the 31st day of October, 1899, in the city of Guayama, Porto Rico, for the election of the ordinary municipal officers of said city to fill the offices in the plan of civil government established by the military authority of the United States.

"Your petitioner represents that, being duly qualified in accordance with law and the general orders aforesaid, he voted at said election for the candidates of the party to which he belonged, and thereafter, on or about the 10th day of November, 1899, he was arrested and taken into custody by one Samuel C. Bothwell, marshal of said United States Provisional Court of the Department of Porto Rico, and brought before said provisional court, and was there charged by the district attorney thereof, in an information or complaint which was read to him, with having illegally voted at the said election in the city of Guayama heretofore mentioned.

"Your petitioner pleaded 'Not guilty' to said charge, and thereafter said United States provisional court proceeded to try him for said alleged offense, although your petitioner objected to the jurisdiction of said court and denied that he had committed any crime or offense cognizable by said court, and further objected on the ground that no presentment or information had been returned by a grand jury, and further that he was deprived of a trial by jury in said cause, a jury trial having been demanded by him and refused by said court.

"After hearing the evidence in said proceeding, said provisional court found your petitioner 'Guilty,' and sentenced him to imprisonment at hard labor in the jail at Humacao, Porto Rico, for a period of thirty days.

"Thereupon, in accordance with the provisions of section XI. of General Orders 88, as amended and heretofore referred to, *your petitioner applied for a stay of execution of ninety days, to permit him to make application to this honorable court for a writ of certiorari or other suitable process, to review the action, and to set aside the judgment of said provisional court."

"Such application was granted; and the time allowed under said section having ex-
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pired, your petitioner has been taken into custody by the said Samuel C. Bothwell, marshal as aforesaid, and is by him now unlawfully restrained of his liberty and compelled to perform infamous tasks.

"The proceedings of said United States provisional court are set forth at large in the duly certified copy of the transcript of the record in said court submitted herewith.

"Your petitioner further alleges that he is advised that said United States Provisional Court for the Department of Porto Rico had no jurisdiction or lawful authority under the Constitution and laws of the United States to cause the arrest of your petitioner or to proceed against him in manner and form aforesaid, and that said pretended process, arrest, order, trial, and judgment, and warrant whereby your petitioner was committed to the custody of said Samuel C. Bothwell, and whereby, in custody of said Samuel C. Bothwell, he is imprisoned and restrained of his liberty, as aforesaid, were and are, each and all of them, in violation of the Constitution of the United States and the just rights of your petitioner, and are without authority of law and void.

"Your petitioner further alleges that said United States provisional court had no jurisdiction to try him for the alleged offense with which he is charged for the reasons following, among others:

[The reasons were here set forth at length.]

"Your petitioner further avers that more than thirty other persons, residents of said island of Porto Rico, were apprehended and tried by said provisional court upon the same or similar charges to those preferred against him, and such persons were likewise found guilty and sentenced to undergo like punishment, but the sentences of the court in such other cases have been stayed pending the determination of your petitioner's application herein."

[387] * [Here followed the prayer.]

The petition was signed: "Ramon Baez, by Tulio Larrinaga;" and was verified as follows:

DISTRICT OF COLUMBIA, ss:

Tulio Larrinaga, being duly sworn, deposes and says:

That he is an inhabitant of Porto Rico and knows the petitioner, Ramon Baez;

He has read the foregoing petition by him subscribed and knows the contents thereof, and—

That the matters and things therein stated are true of his own knowledge except as to matters therein stated on information or belief, and as to those matters he believes them to be true.

Further, this petition is signed and verified by him for and on behalf of the said Ramon Baez for the reason that the petitioner is confined in the island of Porto Rico, and to delay this application by sending the same for the signature and affidavit of the petitioner himself would greatly re-

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tard, if not entirely defeat, the relief thereby sought to be obtained.

Tulio Larrinaga.

Subscribed and sworn to before a notary public March 24, A. D. 1900.

Mr. Frederic D. McKenney submitted the cause for petitioner. Messrs. Francis H. Dexter and Wayne MacVeagh were with him on the brief.

Solicitor-General Richards opposed.

*Mr. Chief Justice Fuller delivered the [387] opinion of the court:

Application to file this petition was made to the court on March 26, when, under pressure of the mass of business under advisement, we were about to take a recess until April 9, of which recess the bar had been previously advised.

No notice of the application having been given, on suggestion of counsel for the United States, leave was granted, according to the usual course, and in view of the conceded importance of the questions involved, to submit a brief in opposition within a *week, and [388] three days were allowed counsel for petitioner to reply. These briefs were subsequently duly filed.

It appears from the petition and accompanying papers that the alleged proceedings against petitioner were stayed at his instance, from December 11 until March 16, to enable him to apply to this court in the premises, but no such application was made. And it further appears that petitioner was not restrained of his liberty until up to March 16, and that such restraint was to continue for thirty days from that date, which would expire April 15.

The petition is not signed or verified by Baez, but on his behalf, and the affidavit does not state that the application is made by authority or at the request of Baez, or any facts showing that he was unable to make it, except the averment by affiant that "this petition is signed and verified by him for and on behalf of the said Ramon Baez for the reason that the petitioner is confined in the island of Porto Rico, and to delay this application by sending the same for the signature and affidavit of the petitioner himself would greatly retard, if not entirely defeat, the relief thereby sought to be obtained." The affidavit was sworn to on the 24th of March in the District of Columbia.

Assuming, however, that the application is made in accordance with the wishes of Baez, we should have been better satisfied if the delay in the presentation of the petition had been accounted for. The fact that on March 24 it was impracticable to send to Porto Rico to petitioner for him to act, does not explain why the assertion of his alleged rights was delayed so long, but rather shows that our interposition would be unavailing, if we took jurisdiction.

Section 756 of the Revised Statutes provides in relation to the writ of habeas corpus: "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty

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miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days." This section was taken almost literally from the habeas corpus act, chap. 2 of the 31st Car. II., which was designed to remedy procrastination *and trifling with the writ. Prior to that act the mode of compelling a return was by taking out an *alias*, and then a *pluries* writ, and thereafter issuing an attachment. A reasonable time has always been allowed for making the return, and it is not to be presumed that one will not be made. *Stockdale v. Hansard*, 8 Dowl. P. C. 474; *Mash's Case*, 2 W. Bl. 805. And see *United States v. Bollman*, 1 Cranch, C. C. 373, Fed. Cas. No. 14,622, where the circuit court of the District of Columbia refused to issue an attachment until three days had expired after the service of the writ. Hurd, *Habeas Corpus*, 2d ed. 236; Church, *Habeas Corpus*, 2d ed. § 126.

In this case, if the writ of habeas corpus had been issued April 9, the next court day after the petition for the writ was presented to this court, the imprisonment of petitioner would have expired six days after the issue of the writ, and fourteen days before the person having him in custody would be required to make his return, and, before the case could be heard upon the writ and return, the prisoner would no longer be in custody.

The grave questions of public and constitutional law sought to be brought into judgment by this application would have become merely moot questions so far as the decision thereof could affect any right or interest of the petitioner. And this would be so even if we issued the writ and attempted to deal with the prisoner by a preliminary order. Before he could be communicated with and brought before us he would be freed from restraint. *Re Callicot*, 8 Blatchf. 89, Fed. Cas. No. 2,323.

As was said in *Stockdale's Case*, we cannot presume that a return would not be made, and even if made at once, as it must be made from Porto Rico, it would nevertheless be too late for any action of ours to be effectual.

True, the issue of the writ might be waived by the government, or we could enter a rule and proceed in the absence of the prisoner and at once, by agreement (*Medley, Petitioner*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850), but the motion for leave to file has been resisted, and there has been no intimation of a disposition to speed the proceedings. Under these circumstances we cannot shut our eyes to the fact that before definite action could be had, the application would abate.

[390] *It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still, as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petition-
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er complains would have terminated, we are constrained to decline to grant leave to file the petition.

The situation was the same April 9, and these observations are applicable as of that date.

In arriving at this conclusion we are not to be understood as intimating in any degree an opinion on the question of jurisdiction or other questions pressed on our attention.

Leave denied.

PHILIP WERLEIN, *Plff. in Err.*,
v.
CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 390-403.)

Res judicata—denial of injunction against sale as a bar to suit to declare the sale void.

1. A city's claim that land which it holds by dedication for public use cannot be legally sold under a judgment against the city is conclusively defeated by a decision against the city in a suit for an injunction against the sale on the ground of its illegality, although in that suit the question of the effect of the dedication was not presented or considered.
2. A judgment against a city in an action to restrain an alleged illegal sale of its property under a judgment against the city is a bar to another action after the sale to declare the sale null and void, although in the meantime the city has discovered that it held the property for public use only, by virtue of a long prior dedication, and therefore claims now to hold it in a capacity different from that in which it formerly sued, since there is in truth no difference in the character of the title by which a municipality holds such property and that by which it holds other property.

[No. 189.]

Argued March 16, 1900. Decided April 16 1900.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment affirming a decision against the validity of a sale of city property under a judgment. *Reversed.*

See same case below, 50 La. Ann. 1251, 24 So. 232.

Statement by Mr. Justice **Peckham**:

*This action was commenced in March, [391] 1895, by the city of New Orleans in the civil district court for the parish of Orleans in the state of Louisiana, for the purpose of

NOTE.—As to conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. ed. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 75; *Johnson Co. v. Wharton*, 38 L. ed. U. S. 429; *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

recovering from the defendant below, Philip Werlein, a certain lot of land situated in that city and described in the petition, and of which he was in possession. The facts upon which the suit was brought are as follows:

In March, 1876, one John Klein, a citizen of the state of Mississippi, commenced an action against the city of New Orleans in the circuit court of the United States in the district of Louisiana, for the recovery of over \$89,000 and interest upon certain bonds issued by that city, and fully described in the plaintiff's petition. The city filed an answer denying all and singular the allegations contained in the plaintiff's petition. The case came on for hearing before the court without a jury, a jury being waived, and resulted in a judgment for the plaintiff against the city for the sum of \$89,000, with 6 per cent interest, as stated in the judgment which was entered on May 2, 1876. The plaintiff, in order to obtain satisfaction, issued a *feri facias* on the judgment to the marshal, who thereupon seized and took into his possession all the right, title, and interest of the city in and to the portion of ground described in the marshal's return to the writ (and being the premises in question), and advertised the property for sale. The city of New Orleans thereupon commenced an action against [392] Klein in the United States circuit court for the eastern district of Louisiana, to prevent him from selling the property under his judgment.

In its bill of complaint the city alleged the recovery of judgment by Klein against the city, that he had issued a writ of *feri facias* upon such judgment for the purpose of enforcing satisfaction of the same, and had seized under the writ the property already described, which was advertised to be sold on a day named in the bill, and that Klein had no right to issue the writ in that suit, or to cause the seizure, advertisement, or sale of the property thereunder, for the reasons and causes stated in the bill, which were, (1) that he had registered the judgment in the office of the administrator of public accounts for the city of New Orleans in accordance with an act of the legislature passed in the year 1870, and, therefore, had no right to issue any writ for the collection of the judgment against the city; (2) because Klein had assigned and transferred all his interest in the judgment before the writ was issued, to certain parties named; (3) that the writ upon which the property had been seized and advertised to be sold had issued for a larger sum than was due on the judgment; the city therefore prayed for an injunction restraining Klein, his attorneys and agents, from proceeding further in the advertisement and sale of the property under the writ; that the seizure of the property by the marshal might be adjudged to be illegal and void, and for general relief.

An order to show cause why an injunction *pendente lite* should not issue was granted, and upon a hearing it was ordered to issue.

The defendant Klein answered the bill, admitted the seizure of the property, and that

it was advertised for sale; also, that he had procured his judgment to be registered as alleged in the bill, but denied that he thereby lost or forfeited any other remedy for the enforcement of the judgment, especially that of an ordinary execution; admitted the assignment of his judgment, but alleged that it was only as a security or pledge, and denied that the writ issued for a larger sum than was due, and he therefore asked that the injunction *pendente lite* might be *dis-[393] solved, the perpetual injunction denied, and for such further relief as might be proper.

The case came on for hearing on bill and answer, and the court "ordered, adjudged, and decreed that the interlocutory injunction issued be dissolved, an injunction refused, and complainant's bill of complaint dismissed with costs." The judgment was signed June 19, 1878.

After the entry of the judgment dissolving the injunction and dismissing the bill, the marshal took proceedings to sell the property which he had seized, and on August 21, 1878, sold the same to Andrew C. Lewis, the highest bidder, through whom by several mesne conveyances the appellant claims title, and from the time of the above sale he or his grantors have been in possession.

The petition in the present suit, filed by the city, describes the premises in question, and alleges that the defendant, appellant herein, is in possession thereof, and unjustly claims title thereto, with the improvement thereon, valued in all at \$15,000. The city avers that the defendant is not and never was the owner of the property, and that his only alleged title thereto is derived through mesne conveyances from a sale made by the United States marshal to Andrew C. Lewis, as above stated. The city further alleges that the sale by the marshal to Lewis was absolutely null and void, and that no title or right whatever in or to the property passed by that sale to Lewis or through him to the defendant herein; that the property was dedicated to public use long prior to the date of the marshal's sale, by Bertrand and John Gravier, and that it forms part of the Place Gravier, in the Faubourg St. Mary in the city of New Orleans, and that the property was at the date of the marshal's sale, and has ever since been, unsusceptible to alienation or private ownership or of private possession, and that the defendant's possession is illegal and in bad faith. The petition further alleges that the city was invested by law with the administration and possession, for the public benefit, of all property in the city dedicated to public use and that it had the right to sue for the recovery of the possession of and to establish the title and right of use of the public to any such property, *and the petition therefore prayed that [394] the city might have judgment against the defendant, decreeing the property purchased at the sale to the property dedicated to public use, and recognizing plaintiff's right to the possession and administration of the same, and ordering the defendant to deliver to plaintiff possession of the property free from all encumbrances, and for costs.

The defendant answered the bill, and set up therein the recovery of the judgment of Klein against the city, the seizure of the property thereunder, the commencement of suit by the city to enjoin the sale of the property, and the judgment of the court thereon dismissing that bill and dissolving the injunction, and defendant therefore alleged that the right of Klein to proceed and sell the land described in the petition, under his execution, was in and by that judgment recognized, affirmed, and established, and such right was therefore *res judicata*.

Other defenses were set up denying that the land had in fact ever been dedicated to public use, or that it had ever been so used; also alleging that the city had regularly collected taxes upon the property ever since its purchase by Lewis (more than fifteen years), and that by reason of the facts the city was estopped from maintaining its action.

Upon these pleadings the parties went to trial, and the plaintiff, after giving evidence tending to prove its case, admitted that the defendant held a regular chain of title from and through Lewis, the purchaser of the land under the sale by the United States marshal, but denied the validity of such title. The defendant offered in evidence an exemplification of the proceedings and judgment in the suit brought to enjoin the sale by the marshal which offer was made for the purpose of proving the plea of *res judicata*. The plaintiff objected to the evidence on the ground that the cause of action involved in the suit was not identical with the cause of action in the suit on trial, because the sole and only issues decided in the other suit were whether John Klein, having registered his judgment against the city of New Orleans in the office of the comptroller, pursuant to a statute of the state, and having elected that method of collecting his judgment, had not waived his right to pursue any other [395] method of collection; also whether John Klein was the owner of the judgment, and, if so, whether he was estopped by having registered in the office of the comptroller a transfer of the same, and also whether the judgment was not subject to certain credits; whereas the issue involved in this case was whether the property upon which it is alleged the execution was levied and the property sold was legally subject to such seizure and sale; also that the thing demanded in the other suit was not the same thing demanded in this suit, the prayer in the other being for an injunction restraining Klein from selling the property in dispute, whereas the thing demanded in this case was a decree declaring the sale effected by Klein absolutely null and void. The court sustained the objection and refused to admit the evidence, and the defendant duly excepted.

Oral evidence was then given for the purpose of sustaining the other defenses set up by the defendant, and the trial having been concluded, the judge made a finding in favor of the complainant, and judgment was thereupon entered decreeing that the property described therein was property dedicated to public use, and that the right of the city to

the possession and administration of such property must be recognized, and the defendant was ordered to deliver possession of the property to the city free from all encumbrances.

An appeal was taken from the judgment to the supreme court of the state of Louisiana, where it was affirmed and the defendant below has brought the case here on writ of error.

Mr. Edwin T. Merrick argued the cause and filed a brief for plaintiff in error:

The final judgment of a court of competent jurisdiction is *res judicata* between the parties, their privies, assigns, and *ayantes causes*.

Fleitas v. Meraux, 47 La. Ann. 232, 16 So. 848; *Delabigarre v. Second Municipality*, 3 La. Ann. 230; *Johnson v. Weld*, 8 La. Ann. 126; *Heroman v. Louisiana Institute of Deaf and Dumb*, 34 La. Ann. 814; *McNeely v. Hyde*, 46 La. Ann. 1098, 15 So. 167; *Broussard v. Broussard*, 43 La. Ann. 924, 9 So. 910; *Dull v. Blackman*, 169 U. S. 248, 42 L. ed. 735, 18 Sup. Ct. Rep. 333; *New Orleans v. Citizens' Bank*, 167 U. S. 398, 42 L. ed. 211, 17 Sup. Ct. Rep. 905.

The sale being allowed to proceed and the city's injunction dismissed the property was legally sold. Not only what was set up by the city to stop the sale, but every question that might have been set up, was concluded by the decree.

Black, Judgments, § 731; *Davis v. Brown*, 94 U. S. 428, 24 L. ed. 206; *Stout v. Lye*, 103 U. S. 71, 26 L. ed. 430; *Hubbell v. United States*, 171 U. S. 209, 43 L. ed. 138, 18 Sup. Ct. Rep. 828; *Griffin v. Long Island R. Co.* 102 N. Y. 452, 7 N. E. 735; *Danaher v. Prentiss*, 22 Wis. 316; *Bates v. Spooner*, 45 Ind. 493.

The binding effect of *res judicata* cannot be impaired by the fact that the thing established by it involves a question of public order, and is afterwards found to be wholly untrue.

Lebrew's Succession, 31 La. Ann. 212.

Mr. R. A. Tichenor argued the cause and Mr. Samuel L. Gilmore filed a brief for defendant in error:

The city owns and can own property which is alienable, and to such property she has what we may style private title. If under a money judgment against the city, property dedicated to public use is erroneously seized as alienable property, to which the city has private title, the seizure in no way affects the public's interest in the property.

New Orleans v. Louisiana Constr. Co. 129 U. S. 45, 32 L. ed. 607, 9 Sup. Ct. Rep. 223.

The cause of action in the suit of *New Orleans v. Klein* (No. 8461 of the United States circuit court) was not the same as the cause of action in the present suit. The cause of action is the immediate foundation of the right which one claims to exercise. It is the immediate basis of the demand, and must not be confounded either with the various bases or simple means which produce

the cause, or with the right itself which is the object of the demand.

Slocomb v. De Lizardi, 21 La. Ann. 356.

The general expression often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action, is misleading. What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint.

Freeman, Judgments, pp. 441, 442, § 249.

[395] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

The defendant in error has made a motion to dismiss the writ of error on the ground of want of jurisdiction. We think it must be denied. The sole question in the case is in regard to the validity of the exception to the decision of the trial court *refusing to admit in evidence the judgment recovered in the United States circuit court in the action of the city of New Orleans against Klein.

[396] The defendant herein in his answer specially set up such judgment, and claimed that under and by virtue thereof the city was concluded from maintaining its action; the state court refused to give effect to the judgment, and the denial of this right was excepted to by the defendant, and was also assigned as error in the state supreme court. In such case we think a Federal question exists.

Pittsburgh, C. C. & L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 507, 43 L. ed. 528, 532. 19 Sup. Ct. Rep. 238, and cases there cited; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 184, 40 L. ed. 660, 664. 16 Sup. Ct. Rep. 471. Whether full faith and credit have been given the judgment of a Federal court by the courts of a state is a Federal question, and that question exists in this case.

Upon the merits we have simply to inquire whether the courts below erred in their decision refusing to admit in evidence the judgment in the chancery suit above mentioned.

The judgment in that suit was between the city as complainant and Klein as defendant, and it had reference to the proceedings of the marshal in the execution of his writ issued upon the judgment of Klein against the city. The defendant in this suit traces his title back to Lewis, who purchased upon the sale under the marshal's writ, and so when the defendant is sued in this action he stands as privy to one of the parties to the chancery suit and can claim the same rights in the judgment therein as an adjudication, which Lewis or Klein could have claimed if either were in possession of the property, and this suit had been brought against the one in possession.

The law in relation to the effect of a judgment between the same parties is well known, but its proper application to particular cases is sometimes quite difficult to determine. The following authorities treat of the subject very fully and exhaustively: *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; 820

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Delabigayre v. Second Municipality*, 3 La. Ann. 230; *Slocomb v. de Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740.

*In the first cited case, it was said that a [397] former judgment between the same parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Where the second action between the same parties is upon a different claim or demand, the judgment in the former action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

So, in *Davis v. Brown*, 94 U. S. 428, 24 L. ed. 207, Mr. Justice Field, in delivering the opinion of the court, said, in speaking of a prior judgment: "The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

In *New Orleans v. Citizens' Bank*, 167 U. S. at page 396, 42 L. ed. 211, 17 Sup. Ct. Rep. 913, Mr. Justice White, speaking for the court, said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

To the same effect is *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The same rule is substantially laid down in the cases above cited from the Louisiana reports.

Now, what was the demand and what was the thing adjudged in the chancery suit between the city of New Orleans and Klein? In that suit the city alleged that Klein had seized under a writ of fieri facias, in his action against the city, certain property which was described in the complainant's bill, which he threatened to sell, and which was advertised to be sold on a certain day, and the city alleged "that the said John Klein has no right to issue the said writ of pluries fieri facias *in said suit, or to cause [398] the seizure, advertisement, and sale of the said property thereunder," and it set forth in its bill the grounds (already stated) for such an allegation.

The sole cause of action was the apprehended and threatened sale of the property, which sale, the complainant alleged, would be illegal. All the other facts set up in the bill were but the grounds justifying and proving, as contended, the allegation that Klein had no right to sell the property, and

it was this illegality of the threatened sale that was the sole cause or foundation of the action; it was the matter in dispute and the subject of contest. If the property were not legally subject to seizure and sale, then it would clearly be an illegal sale if consummated, and that fact would be material in proof of the cause of action of the city.

Upon the trial the court adjudged that defendant had the right to sell the property, and it therefore dissolved the injunction and dismissed the bill, and judgment to that effect was duly signed and entered. This would seem to be a full and complete adjudication upon the right of defendant Klein to sell the property seized under his writ. That right would not exist if the property were not the subject of a legal sale. Whether or not it was thus subject was an inquiry which the court would have had jurisdiction to make had it been alleged in that suit.

It is, however, contended that as the city had only set up certain facts as the foundation of its action to prevent the alleged illegal sale of the property, the judgment only bound it as to those facts, and therefore it is now urged that the city in this action was at liberty to prove other facts which would also show that Klein had no right to sell the property, namely, that the property had long before the sale been dedicated to public use, and the city therefore had no right to alienate it, nor had anyone the right to sell it upon an execution issued on a judgment against the city.

It is not disputed that, if there were no question of a prior judgment in this case, proof that the land had been properly and duly dedicated for a public square to the public use, and therefore had been withdrawn from commerce, would furnish a defense to the claim by any person of a right to sell the [399] property *under an execution upon a judgment against the city. *New Orleans v. United States*, 10 Pet. 662, 731, 736, 9 L. ed. 573, 600, 602; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *Police Jury v. McCormack*, 32 La. Ann. 624; *Kline v. Parish of Ascension*, 33 La. Ann. 562; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80.

Assuming the law to be as thus stated, the question in this case is, What effect has this judgment under discussion upon the rights of the parties?

The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit. The city would have had the right to set that fact up in its bill and to have proved it on the trial, and, if proved, it would have been foundation for a judgment enjoining the sale of the property; but the fact would have been nothing more than evidence of the right of the city to obtain the injunction asked for in the chancery suit, and we think it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property.

The threatened sale might have been illegal for a number of reasons, based upon widely divergent facts, but whatever those reasons were, the facts upon which they rested were open to proof in the chancery action, and if the city desired the benefit of them, they should have been alleged and proved. It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. Suppose the city had only set up the fact of the registry of the judgment as a ground for enjoining the sale, and after a trial on that issue it had been beaten and judgment had gone against it, could the city after that have commenced another suit for the same purpose, and set up as a ground for the alleged illegality of the sale the assignment of the judgment by Klein? In such second action would not the judgment in the prior action conclude the city? If not, then on being beaten on a trial of that issue the city could commence still another action *based on the [400] allegation that the judgment had been paid. Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal could be maintained *seriatim*, and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case. And yet all these different grounds would simply form evidence upon which the original cause of action was based, namely, the alleged illegality of the apprehended sale. They would form simply separate facts upon which the cause of action might rest. There is no difference in the nature of the ground now urged in this case from the other grounds actually set up in the chancery suit.

It is true that in the chancery suit the thing demanded was an injunction restraining Klein from selling the property, while in this suit it is a decree declaring the sale effected by Klein absolutely null and void. But the two demands, though different in terms, are in substance the same, and are founded upon the same cause of action, *viz.*, the total illegality of the sale, whether threatened or accomplished. The demand in the later action is simply altered to conform to the fact that there had been a sale of the property, while the demand in the former suit was based upon the fact that there had not been a sale, and the relief demanded was an injunction to prevent such sale. In substance and effect the thing demanded is the same in both cases.

It is contended, however, that the ground now urged for the illegality of the sale, namely, a long prior dedication of the property to public use, is of a totally different nature from the grounds which were set up in the chancery suit; that the city there appeared in a different capacity from that in which it now appears, and that it was therefore unnecessary to allege or prove this ground in that suit, and that a judgment in the former suit in favor of the right of Klein to sell this property does not conclude the city from proving that he had no such right by reason of the character of the property sold. Although the city has been more than

fifteen years in discovering this defense, yet, nevertheless, it is now argued that a judgment against the city in the chancery suit [401] being a judgment against *it in a different capacity from that in which it appears in this action as a trustee for the public, the rule applies in such a case as it sometimes does in the case of a judgment against A B, in relation to property held by him as executor or as trustee, which would be no evidence for or against A B in his individual and personal capacity. *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 69. Although there are exceptions even to that rule. *Morton v. Packwood*, 3 La. Ann. 167; *Fouché v. Harison*, 78 Ga. 360, 3 S. E. 330.

We think there is no double capacity in this case, and that the city appears in the same character and capacity in both these suits, and that in this suit it is bound by the judgment in the chancery suit.

The title to land which has been dedicated to public use, as for a highway or public square in a city, is in the city as trustee for the public, and it has been held, in the case of such a dedication of land in a proposed city, to be thereafter built, that the fee will remain in abeyance until the proper grantee or city comes *in esse*, when it will vest in such city. A dedication to the public may exist where there is no city or town or corporate entity to take as grantee, and in such case, while the fee may remain in the individual who dedicates the land, he will be estopped from setting it up as against the public who may be interested in the use of the land according to its dedication. Nevertheless, when a dedication is made in an existing city, the city takes title as trustee. These statements are borne out by the following cases: *Pawlet v. Clark*, 9 Cranch, 292, 3 L. ed. 735; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. ed. 521; *Cincinnati v. White*, 6 Pet. 431, 435, 436, 8 L. ed. 452, 455; *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573; *Police Jury v. Foulhouze*, 30 La. Ann. 64.

Although the city holds property of such nature in trust for the public, that fact does not distinguish it from the character or capacity in which the city holds its other property, so as to bring the case within the meaning of the rule that a judgment against a man as an administrator does not bind him as an individual. The city holds all property which it owns, as trustee for the public, although certain classes or kinds of property, such as the public streets, the public squares, [402] the courthouse, *and the jail, cannot be taken on execution against it, for reasons which are plain to be seen. Such property is so necessary for the present and daily use of the city as the representative of the public, as well as for the use of the public itself, that to allow it to be taken on execution against the city would interfere so substantially with the immediate wants and rights of the public whose trustee the city is, and also with the due performance of the duties which are imposed upon the city by virtue of its incorporation, that it ought not to be tolerated. Other property which the city might hold, not being so situated, might

be taken on execution against it, but it nevertheless holds that very property, as trustee. It holds it for the purpose of discharging in a general way the duties which it owes to the public, that is, to the inhabitants of the city. The citizens or inhabitants of a city, not the common council or local legislature, constitute the "corporation" of the city. 1 Dillon, Mun. Corp. 3d ed. § 40. The corporation, as such, has no human wants to be supplied. It cannot eat or drink or wear clothing or live in houses. It must as to all its property be the representative or trustee of somebody or of some aggregation of persons, and it must therefore hold its property for the same use, call that use either public or private. It is a use for the benefit of individuals. A municipal corporation is the trustee of the inhabitants of that corporation, and it holds all its property in a general and substantial, although not in a strictly technical, sense in trust for them. They are the people of the state inhabiting that particular subdivision of its territory, a fluctuating class constantly passing out of the scope of the trust by removal and death and as constantly renewed by fresh accretions of population. The property which a municipal corporation holds is for their use, and is held for their benefit. Any of the property held by a city does not belong to the mayor, or to any or all of the members of the common council, nor to the common people as individual property. If any of those functionaries should appropriate the property or its avails to his own use, he would be guilty of embezzlement, and if one of the people not clothed with official station should do the like, he would be guilty of larceny. So we see *that whatever property a municipal cor- [403] poration holds, it holds it in trust for its inhabitants, in other words, for the public, and the only difference in the trust existing in the case of a public highway or a public square, and other cases, is that in the one case the property cannot be taken in execution against the city, while in other cases it may be. The right of the city is less absolute in the one case than in the other, but it owns all the property in the same capacity and character as a corporation, and in trust for the inhabitants thereof. Views similar to these have been heretofore substantially expressed by the late Judge Denio, in speaking for the court of appeals of New York in *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248.

From these considerations we are of opinion that there is no difference in the character of the title by which a municipal corporation holds these two classes of property, but there is simply a difference in the power which such corporation can exercise over its property in the two cases. That difference arises from the peculiar nature of the use of the property, which in the one case requires it to be inalienable and not liable for the debts of the city, while in the other case it is open both to alienation and to sale under execution. In each case the character or capacity in which the city in fact holds the title is the same.

We therefore think the former judgment should have been admitted in evidence upon the trial of this action. By that judgment it conclusively appears that this property was legally sold upon the execution on Klein's judgment and that the purchaser at the sale obtained a title which was good. This title the plaintiff in error now owns, and it must prevail against the claim of the city.

The judgment of the Supreme Court of Louisiana must be reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court, and it is so ordered.

Mr. Justice **McKenna** did not hear the argument, and took no part in the decision of this case.

[404] AMERICAN EXPRESS COMPANY, *Plff.*
in *Err.*,
v.

FRED A. MAYNARD, Attorney General of the State of Michigan, *ex rel.* GEORGE F. MOORE *et al.*

(See S. C. Reporter's ed. 404-419.)

Mandamus—as a suit—Federal question as to construction of act of Congress—war revenue tax—charge by express company for cost of stamp.

1. A proceeding for a mandamus is a "suit" within the meaning of U. S. Rev. Stat. § 709, relating to the jurisdiction of the United States Supreme Court on writ of error to state courts.
2. A question as to the construction to be placed on the act of Congress of June 13, 1898, known as the war revenue act, with respect to the right of an express company to shift the burden of the stamp tax upon shippers, constitutes a Federal question for the purpose of a writ of error to a state court from the Supreme Court of the United States.
3. An express company is not forbidden by the act of Congress of June 13, 1898, known as the war revenue act, from adding to its rates an amount sufficient to cover the cost of the stamp required to be affixed to a receipt issued to the shipper, and thereby shifting the burden of the tax upon the shipper, if the rate as increased thereby is not unreasonable.

[No. 220.]

Argued November 9, 1899. Decided April 16, 1900.

IN ERROR to the Supreme Court of the State of Michigan to review a decision affirming a judgment ordering a mandamus to compel an express company to receive

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question: when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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packages and issue a receipt therefor with a revenue stamp duly canceled, without adding the cost of the stamp to the rate charged for transportation. *Reversed.*

See same case below, 118 Mich. 682, 77 N. W. 317.

Statement by Mr. Justice **White**:

The Attorney General of the State of Michigan on the relation of George F. Moore and others commenced proceedings in the circuit court of Wayne county, Michigan, against the American Express Company. The company was described as "a joint-stock association organized and existing under the laws of the state of New York and having its principal business office located in the city of New York, in said state." It was averred that the company complied with the requirements of certain statutes of the state of Michigan, and had obtained the necessary certificate authorizing it to carry on an express business in that state, and in order to conduct such business had a large number of agents and offices in the state. The petition then alleged that on June the 13th, 1898, the Congress of the United States passed an act commonly designated as the "war revenue act," by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a one-cent stamp. After referring to the text of the act of Congress on the above subject, it was alleged that by the provisions of the law in question the primary and absolute duty was imposed upon express companies to provide the receipt, and to affix and cancel the one-cent stamp as required by law. The following averments were then made:

"That by reason of a desire of the respondent (the express company) to avoid the payment of the stamp tax, so called, and to impose such obligation on the shipper, the respondent *herein refuses to accept any goods [405] for transportation unless such shipper attaches the stamp to the said bill of lading, manifest, or other evidence of receipt and forwarding for each shipment, or furnishes the money or means for that purpose to the said company, and that the said company thereby not only avoids its duty under said act of Congress to pay and bear its proportion of the revenues to meet war expenditures as provided by said act, but violates its duty as a common carrier to receive, accept, and deliver such goods, wares, and merchandise so offered and tendered to it for that purpose."

A number of instances were specified where it was averred the express company on the tender to it of packages for transportation as a common carrier had refused to receive the same and to issue receipts therefor "unless a stamp of the value of one cent was paid or provided" by the shipper. It was charged that the conduct of the express company was in violation of the obligations imposed upon it by the act of Congress in question, and constituted a refusal to perform its duty as a common carrier. The prayer was

for a mandamus commanding the company to receive packages for transportation by express, and issue a receipt with stamp duly canceled thereon, without seeking to compel shippers who might tender packages for carriage either to pay for the one-cent stamp or to provide the means for so doing.

[406] The answer of the express company admitted that it required persons who tendered packages for carriage, by express, either to pay or provide the means for defraying the cost of the one-cent stamp, but denied that its conduct in so doing was a violation of the act of Congress by which the one-cent tax on express receipts was imposed. On the contrary, it was averred that the act of Congress, when properly construed, although imposing the absolute duty to issue a receipt for every package as therein provided, left the question of who should pay for the stamp free for adjustment between the shipper and the express company. By the act of Congress, it was asserted, the express company had, therefore, the right or privilege of insisting that those who offered packages to be carried by express should either furnish the one-cent stamp or provide the means of paying for it. It was, moreover, alleged that the company had in effect but increased its rates on each shipment by adding to the previous rates the sum of the stamp tax. And it was averred that this increase the company was not forbidden to make, by the act of Congress imposing the one-cent stamp tax, and that the rate as increased by exacting that the one-cent stamp should be furnished or that its value be paid for by the shipper was just and reasonable, and was not in conflict with the act of Congress. The answer was in effect demurred to as not stating a defense. The case was submitted for decision on petition and answer. The court ordered the mandamus to issue substantially as prayed for. The cause was then removed by writ of certiorari to the supreme court of the state of Michigan, where the judgment of the trial court was affirmed. 118 Mich. 682, 77 N. W. 317. By an allowance of a writ of error the judgment of the supreme court of this state is before us for review.

Mr. Lewis Cass Ledyard argued the cause and filed a brief for plaintiff in error.

Mr. C. E. Warner argued the cause and filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

[406] ***Mr. Justice White**, after making the foregoing statement, delivered the opinion of the court:

We will first dispose of the claim that this court is without jurisdiction to review the judgment, and that hence the writ of error should be dismissed. The contention is based upon the following: (1) That the proceeding below, being for a mandamus, was not a "suit" within the meaning of that term as employed in § 709 of the Revised Statutes; and (2) because no Federal ques-

tion is involved, and no such question was below decided.

The first proposition is not tenable. *McPherson v. Blacker*, 146 U. S. 1, 24, 36 L. ed. 869, 873, 13 Sup. Ct. Rep. 3; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271.

The second is likewise without merit. From the summary of the pleadings just made, in the statement of the case, it is apparent that the issue between the parties involved an assertion on the one side that the act of Congress imposed on the express company the absolute duty of furnishing the receipt, of affixing the stamp thereto, and canceling the same. The argument was that it was hence a violation of the duty, imposed upon the express company by the act of Congress, for the company either to demand the stamp or the amount thereof from the shipper, and that it was also a violation of the act of Congress for the express company to increase its rates to the extent necessary to accomplish the result of securing the reimbursement of the amount of the one-cent stamp tax. On the other hand, the defense of the express company was that under the act of Congress it had the right, privilege, or immunity (which it specially set up and claimed) of demanding the payment of the one cent or of increasing its rates to the extent that the tax imposed a burden upon it, provided only the rates charged were just and reasonable. The question thus presented was in substance the only one decided by the supreme court of the state. In stating the issues arising for its decision, the court said: "The main question in the case relates to the construction to be placed upon the act in question," that is, the act of Congress. After a review of the provisions of the statute it was decided that under it the express company could not in any event or by any means transfer the burden of the tax in question. Considering the right of the express company to increase its rates to the extent necessary to secure the payment of the tax by the shipper, the court said:

"It is contended, however, that the company has the right to make new regulations and establish new rates to meet all this burden. It is contended that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shipper the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act."

The foregoing reasoning was supplemented by comment upon the fact that the increase of rate resulting from the charge of one cent on each package was made without reference to the distance each package was to be carried. We do not, however, understand the remarks on this subject as implying that the *court below decided that the rate as increased by the one cent was intrinsically unreasonable without regard to the provisions of the act of Congress, but only that the rate as so increased was unreasonable, because

an attempt on the part of the express company to shift the burden of the tax imposed upon it by the act of Congress, and hence was by legal inference forbidden by that act. No other view is possible when the state of the record is considered. As we have seen, the controversy was submitted on petition and answer. It is nowhere, however, averred in the petition that the rates, with or without the addition of the tax, were intrinsically unjust and unreasonable; while in the answer, following an averment as to the enactment of the stamp act and its resulting effects, it was averred as follows:

"Respondent therefore decided to raise, and did raise, its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation."

As, therefore, upon the submission of the cause upon the pleadings, there was no controversy as to the intrinsic reasonableness of the increased rates, it follows that if we were to hold that the court below had decided that the increased rates were unreasonable in themselves, we would conclude that the court below had so held, although it was substantially admitted on the record by both parties that the increase of rates was just and reasonable, if not forbidden by the act of Congress. But such action cannot be attributed consistently with reason and justice. This being the state of the case, the Federal question presented is wholly unaffected by what was said by the court on the subject of the right of the corporation to increase its charges by the amount of the tax. As there was no allegation that the rates existing prior to the imposition of the one-cent stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for

[409] each package *the exact amount of the increased cost for transporting the package, occasioned as to each package, by the specific imposition on each by the act of Congress of the one-cent stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method. And no other view is, in reason, possible when the averments of the answer are borne in mind. It hence results that the Federal question, although changed in form of statement, remains in substance the same. In the changed form it is as follows: Did the act of Congress deprive the express company of the right to shift the burden of the tax by increasing the rate by the exact amount distinctly and separately imposed by the act

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upon each shipment, and hence render the charge unreasonable, which would be in itself reasonable, except for the hypothesis that the act of Congress renders all efforts to shift the tax illegal.

It follows that the case as made by the pleadings, and which was decided below, involved a right, privilege, or immunity under the act of Congress, which was specially set up and claimed by the express company, to contract with the shippers for the payment of the tax provided by the act of Congress, or to increase its rate, within the limit of reasonableness, to the extent of such tax, which right, privilege, or immunity was denied and held to be without merit by the court below. There is therefore jurisdiction. Rev. Stat. 709, chap. 11.

The controversy which is contained in the merits of the cause is resolvable into three questions: First. Does the act of Congress impose upon the express company the duty of making a receipt for a package tendered to it, and does it, also, forbid the express company from requiring the shipper to furnish the stamp to be affixed to the receipt, or of supplying the means of paying for the same? Second. If the act of Congress does impose such duty on the express company, and does inhibit it from requiring that the shipper furnish the stamp or the means of paying for it, does the act further forbid the express company *from seeking to cast the bur- [410] den on the shipper by an increase of rates? Third. And, as a corollary of the second proposition, does an increase of rate by an express company which is otherwise just and reasonable become unlawful, under the act of Congress, because such increase is made with the purpose of shifting the burden of the one-cent tax from its own shoulders to that of the shipper?

The first proposition is unnecessary to be considered, since, even although it be conceded that the act of Congress imposes on the express company the duty of paying the one-cent stamp tax, this admission would not be at all decisive of the cause unless also it be ascertained under the second proposition, that the act of Congress also forbids the express company from shifting the burden of the tax by means of an increase of rates. And no necessity for passing on the first proposition arises from the mere fact that the decision of the second proposition requires a consideration of the provisions of the statute which it would be necessary to take into view if the first proposition was under consideration.

It is also to be observed that the second and third propositions, which involve, the one the right to shift the burden of the tax by exacting that the one cent be provided, and the other the power to increase rates within the limits of the requirement that the charges as increased be reasonable, both depend upon the same considerations.

Indeed, the question into which all the issues are ultimately resolvable is whether the right exists to shift the burden, of course ever circumscribed by the duty of not exceeding reasonable rates. If it does not,

that is, upon the hypothesis that it not only can be, but is, forbidden, then it must result that all methods adopted to attain the prohibited result are void. On the contrary, if the right to seek to shift the burden obtains, then the substantial result of what is done becomes the criterion, and the mere fact that the motive, announced, for a reasonable increase of rates, is declared to be a shifting of the burden, cannot prevent the exercise of the lawful right.

[114] The special provisions of the law upon which the case turns are the first paragraph of § 6 and the express and freight *clause of Schedule A, forming a part of § 25. 30 Stat. at L. 451, 459, chap. 448.

The paragraph of § 6 referred to is as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Now, there is nothing in the provisions just quoted which, by the widest conjecture, can be construed as expressly forbidding the person upon which the taxes are cast from shifting the same by contract or by any other lawful means. An inference to the contrary arises from the fact that the duty is imposed in the alternative on "any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued."

The language of the express and freight clause of Schedule A is as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of [412] lading *shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided,

shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The argument is that as it is made the duty of the express company to make and issue "a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment, . . . and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum and to each duplicate thereof, a stamp of the value of one cent;" therefore, the obligation is imposed absolutely on the express company, not only to make and furnish the receipt, but to issue it with the stamp duly canceled. But as we have said, though the correctness of the claim be, *arguendo*, taken for granted, such concession does not suffice to dispose of the essential issues. They are that by the statute the express company is forbidden from shifting the burden by an increase of rates, although such increased rates be in themselves reasonable. As no express provisions sustaining the propositions are found in the law, they must rest solely upon the general assumption that because it is concluded that the law has cast upon the express company the duty of paying the one-cent stamp tax, there is hence to be implied a prohibition restraining the express company from shifting the burden by means of an increase of rates within the limits of what is reasonable. In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on whom it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes *is naturally presumed to effectuate. [413] Indeed, it seems almost impossible to suppose that a purpose of such a character could have been contemplated, as the widest conjecture would not be adequate to foreshadow the far-reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax

is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant, therefore, from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract, and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would deny the existence of all rights of property. And this becomes more especially demonstrable when the nature of a stamp tax is taken into consideration. A stamp duty is embraced within the purview of those taxes which are denominated indirect, and one of the natural characteristics of which is, although it may not be essential, that they are susceptible of being shifted from the person upon whom in the first instance the duty [414] of "payment is laid. We are thus invoked by construction to add to the statute a provision forbidding all attempts to shift the burden of the stamp tax when the nature of the indirect taxation which the statute creates suggests a contrary inference. And, in this connection, although we have already called attention to the consequences which must generally result from the application of the doctrine contended for, it will not be inappropriate to refer to certain of the provisions of the act now under consideration, which more aptly serve to make particularly manifest the consequences indicated. Thus, perfumery, patent medicines, and many other articles are required by the statute to be stamped by the owner before sale. The logical result of the doctrine referred to would be that the price of the articles so made amenable to a stamp tax could not be increased, so as to shift the cost of the stamp upon the consumer. Yet it is apparent that such a construction of the statute would be both unnatural and strained.

The argument is not strengthened by the contention that as the law has imposed the stamp tax on the carrier, public policy forbids that the carrier should be allowed to escape his share of the public burdens by shifting the tax to others who are presumed to have discharged their due share of taxes. This argument of public policy if applied to a carrier would be equally applicable to all the other stamp taxes which the law imposes. Nor is the fact that the express company is a common carrier and engaged in a business in which the public has an interest, and which is subject to regulation, of importance in determining the correctness of the proposition relied upon. The mere fact that the

stamp duty is imposed upon a common carrier does not divest such tax of one of its usual characteristics or justly imply that the carrier is in consequence of the law deprived of its lawful right to fix reasonable rates. Unquestionably a carrier is subject to the requirement of reasonable rates, but as we have seen, no question of the intrinsic unreasonableness of the rates charged arises on this record or is at issue in this cause. As previously pointed out, to decide, as a matter of law, that rates are essentially unreasonable from the mere fact that their enforcement will operate to shift the "burden" [415] of a stamp tax would be in effect but to hold that the act of Congress by the mere fact of imposing a stamp tax forbids all attempts to shift it, and consequently that the carrier is deprived by the law of the right to fix rates, even although the limit of reasonable rates be not transcended. This reduces the contention back to the unsound proposition which we have already examined and disposed of.

There is a special provision of the law which grants affirmatively the right to add the tax to the cost of an instrument, and hence it is urged this express authority in one case is pregnant with the denial of a right to do so in other cases. The clause in the statute referred to is found in a paragraph of Schedule A, whereby a stamp tax is imposed on "bill of exchange (inland), draft, certificate of deposit drawing interest or order for the payment of any sum of money . . ."

The second and concluding sentence of the paragraph reads as follows:

"And from and after the first day of July, eighteen hundred and ninety-eight, the provisions of this paragraph shall apply as well to original domestic money orders issued by the government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for."

Without the provision last quoted, authority would have been wanting to increase the cost of a government money order, by adding the sum of the tax imposed upon such order to the charge therefor, because the charge for a money order was fixed by law. This at once explains the necessity for conferring authority to add to the cost of the money order the amount of the stamp tax. Instead, therefore, of giving rise to the suggestion that the right to shift the burden of other stamp taxes was taken away in all cases where there was liberty and power to contract, the provision relied on is persuasive to the contrary. For, clearly, the express authority conferred to do that which the law otherwise forbade in consequence of the want of power in a government official, cannot with reason be held to imply a prohibition against doing that which was not forbidden by law. The argument, in effect, amounts to this and nothing more; "that, because it" [416] was imperatively necessary to confer a power upon a government officer which, owing to statutory restriction, he otherwise would not have possessed, therefore the legal

deduction must be drawn that freedom of contract as between those who had the right to contract was destroyed.

But it is asserted that the war revenue act of 1898 was modeled upon the act of July the 1st, 1862, providing internal revenue tax (12 Stat. at L. 432, chap. 119), and as the act of 1862 plainly manifested the purpose of Congress to impose a stamp tax on express companies and to forbid them from shifting the burden arising from such tax, therefore the act under consideration should be construed as having the same effect. The fact that the present act was modeled upon the act of 1862 is undoubted (see § 94 of the act of 1862, 12 Stat. at L. 475, chap. 119), but the text of the act of 1862 expressed no restraint upon the power of shifting by contract or by an increase of rates within the limit of the requirement that they should be reasonable. It follows that testing the present act by that of 1862 throws no additional light upon the controversy. The claim that the act of 1862 contained a prohibition against shifting is thus inferred. By the act of 1862 a stated per centum of tax was imposed upon the gross receipts of railroads, steamboats, and ferryboats, as well as toll bridges. Section 80, 12 Stat. at L. 468, chap. 119. After providing for the levy and collection of the taxes in question, the following proviso was applied to the section by which the taxes just referred to were levied: "Provided, That all such persons, companies, and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company which may have paid or be liable to pay such fare to the contrary notwithstanding."

This express authority to shift the burden of the tax on gross receipts, it is claimed under the rule of *inclusio unius*, justifies the implication that the power to shift did not exist as to taxes imposed by other portions of the act of 1862, to which the proviso did not apply.

[417] In passing it is worthy of remark that by the act of March 3, *1863 (12 Stat. at L. 713, chap. 74), it was enacted (§ 10) that on and after the 1st day of April, 1863, "any person or persons, firms, companies, or corporations, carrying on an express business shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to pay a duty of two per centum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules, and penalties as are prescribed in § 80 of the act to which this is an amendment." In other words, when in 1863 the stamp tax relating to express companies was abrogated and a tax on gross receipts substituted therefor, the express companies were authorized to add the result of the gross receipt tax to their charges, any law or contract to the contrary. But the implication deduced from the authority conferred by the statute of 1862 to shift the burden of the tax on gross receipts levied on railroads, etc., by an increase of

charges, is unsound. Indeed, the proviso in question, when properly construed, gives rise to an inference contrary to the one sought to be drawn from it.

The tax imposed under the section in question was not in form a stamp tax, but on gross receipts, and the proviso referred to may, from abundance of caution, have been inserted to leave no room for the assumption that a tax thereby imposed was a direct tax, and not subject to be shifted. Besides, the whole context manifests the purpose not to declare a rule in violation of public policy as to particular corporations, but to enable such corporations to possess the power to shift the tax by increasing its charges, even although contracts or restrictions previously imposed might otherwise prevent.

The right to shift by an increase of rates within what is reasonable can only be held to be illegal upon the assumption that public policy forbids it. If such be taken to have been the principle of public policy embodied in the act of 1862, that act must be held to have repudiated, by the proviso to § 80, the very public policy by the light of which it is contended the act must be interpreted. If there was a rule of public policy giving rise to the assumption that stamp taxes relating to express companies could not be shifted, it becomes impossible in reason to understand why, when the taxation was changed *by the [418] act of 1863 from a stamp tax to one on gross receipts, the express companies should have been brought within the proviso to § 80 of the act of 1862. Clearly, if the rule of public policy which is relied on existed it would have been as cogently applicable to the one form of tax as to the other.

In the *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146, the court was called upon to notice a state law conferring a right to charge over by an increase of rates the sum of tax imposed. In considering the subject (pp. 273, 274, 21 L. ed. 161), it was said:

"The provision is as follows: 'Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact

are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority."

Other contentions as to the construction of the act based upon various other provisions have been pressed with great earnestness, but we deem it unnecessary to consider them, as the foregoing considerations dispose of the case. It follows that the court below erred in holding that by the act of Congress the express company was forbidden from shifting the burden of the stamp tax by an increase of rates which were not in [419] themselves unreasonable. *The judgment below rendered *must*, therefore, be reversed, and the case be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

Mr. Justice **Harlan** and Mr. Justice **McKenna** dissenting:

We are of opinion that the act of Congress imposed upon the express company the duty, not only of affixing at its own expense the required stamp upon any receipt issued by it to a shipper, but of canceling such stamp—thus giving to the shipper a receipt that could, when necessary, be used as evidence. Whether the company, having issued a receipt duly stamped and canceled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion.

WILLIAM CRAWFORD, *Appt.*,
v.

WILLIAM L. HUBBELL, as Treasurer of
the Adams Express Company.

(See S. C. Reporter's ed. 419-421.)

War revenue tax—stamp on express company's receipt—shifting burden on shipper.

An express company is not forbidden by the act of Congress of June 13, 1898, known as the war revenue act, from adding to its rates an amount sufficient to cover the cost of the stamp required to be affixed to a receipt issued to the shipper, and thereby shifting the burden of the tax upon the shipper, if the rate as increased thereby is not unreasonable.

[No. 248.]

Argued November 8, 9, 1899. Decided April 16, 1900.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to the right of an express company to shift the burden of the war revenue stamp tax upon shippers. Answers in favor of such right.

The facts are stated in the opinion.

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Mr. **Frederic R. Kellogg** and **Allan L. McDermott** argued the cause and, with *Messrs. Dill, Seymour, & Baldwin* and *Mr. James B. Dill*, filed a brief for appellant.

Mr. *Harvey L. Christie* by leave of court filed a brief in behalf of Hamilton-Brown Shoe Co. and others.

Mr. **Charles Steele** argued the cause and, with *Messrs. William D. Guthrie* and *Theodore S. Beecher* filed a brief for appellee.

Mr. **Charles B. Alexander** argued the cause for appellee, and by leave of court filed a brief in behalf of Wells, Fargo & Co.

*Mr. Justice **White** delivered the opinion [420] of the court:

The certificate and the questions which arise from it are as follows:

"This cause came before this court on February 2, 1899, upon an appeal taken by the complainant to review a decree of the circuit court, southern district of New York, sitting in equity. Such decree dismissed the bill. As to a question of law arising upon said appeal this court desires the instruction of the Supreme Court for its proper decision.

"Statement of Facts.

"This suit is for an injunction to restrain the express company from refusing to accept express packages from complainant for transportation, except upon the condition that complainant either pay for or provide the war revenue stamp required to be affixed to each receipt in addition to its usual and ordinary charges for transportation as the same existed on and for a long time prior to July 1, 1898. The defendant company since July 1, 1898, has fixed rates of compensation which it offers to accept for services rendered by it, whereby, in addition to the amount of its charges as the same existed on and for a long time prior to July 1, 1898, it requires the shipper either to provide or pay for the cost of the stamp on the bill of lading or receipt required to be issued by the act of Congress of June 13, 1898, known as the 'War Revenue Act.' It has made known these charges to shippers, and particularly to complainant, and refuses to accept packages for transportation except upon payment thereof. The pleadings are annexed to this certificate.

"Questions Certified.

"Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"(1) Does the war revenue act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods accepted *by [421] the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

"(2) If the war revenue act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest, or other evi-

dence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest, or other evidence of receipt?

"In accordance with the provisions of § 6 of the act of March 3, 1891, establishing courts of appeal, etc., the foregoing questions of law are by the circuit court of appeals hereby certified to the Supreme Court."

The subject to which the certificate relates and the matter embraced in the questions submitted has been considered, and was passed on in an opinion this day announced in the case of *American Exp. Co. v. Maynard ex rel. Moore*, No. 220 of the docket of this term (177 U. S. 404, *ante*, 823, 20 Sup. Ct. Rep. 695).

For the reasons given in the opinion in the case just referred to, it is unnecessary to answer the first question submitted, and a negative answer to the second question is required; and it is so ordered.

ANDREW DOHERTY, *Plff. in Err.*,
v.

NORTHERN PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 421-435.)

Public lands—grant to railroads—location of terminus.

The right of the Northern Pacific Railway Company to select its eastern terminus at a point on Lake Superior, in the state of Minnesota or Wisconsin, which it actually exercised by the selection of Ashland, in Wisconsin, under the act of Congress of July 2, 1864, was not intentionally or by operation of law ended or determined by the company's compliance with the conditions sought to be imposed by the legislation of Minnesota and Wisconsin respecting branch-line connections, which the legislatures deemed desirable for local advantage, and which were imposed as conditions of the consent of those states to the construction of the road.

[No. 121.]

*Argued and Submitted January 26, 29, 1900.
Decided April 16, 1900.*

IN ERROR to the Supreme Court of the State of Wisconsin to review a decision reversing a judgment for the appointment of commissioners to appraise land taken for railroad purposes. *Affirmed.*

See same case below, 100 Wis. 39, 75 N. W. 1079.

Statement by Mr. Justice Shiras:

[422] *In the Superior court of Douglas county, Wisconsin, in November, 1896, Andrew Doherty filed a petition asking for the appointment of commissioners to appraise certain

real estate taken by the Northern Pacific Railway Company for a portion of its line passing through property alleged to belong to the petitioner.

The petition alleged that Doherty was and had been since November 8, 1882, the owner in fee simple of the north one half of the southwest quarter of section 4, township 47, range 11 west, in Douglas county, Wisconsin; that the Northern Pacific Railroad Company was a corporation duly authorized by the laws of the United States to construct and maintain a line of railway from a point on Lake Superior, in the states of Wisconsin or Minnesota, to some point on Puget sound, in the state of Washington; that some time during the year 1883 the said company had unlawfully laid its railroad track upon a portion of petitioner's land, and had unlawfully entered upon and appropriated the same, without the consent or authority of petitioner, and had been in possession thereof ever since until about August 31, 1896; that on or about the last-mentioned date all the property, effects, rights, and franchises of the Northern Pacific Railroad Company had been transferred and sold to and purchased by the Northern Pacific Railway Company, and said railroad has ever since been operated and owned by the said the Northern Pacific Railway Company, which the petition alleged to be a domestic corporation, duly authorized by its charter and the laws of the state of Wisconsin to maintain and operate the line of railway before mentioned; that neither the said Northern Pacific Railroad Company, nor its successor, the Northern Pacific Railway Company, has acquired title to said land, or made any attempt to acquire title thereto by purchase, eminent domain, or otherwise. The petition further alleged that the value of the land so taken and the damages occasioned by the taking thereof were less than \$5,000,000 and more than \$100,000. Wherefore an order was prayed that commissioners be appointed to ascertain and appraise the compensation to be made, etc.

*To this petition the Northern Pacific [423] Railway Company made answer asserting title by virtue of the grant of right of way by § 2 of the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, and of the purchase of the interest of the last-named company, etc.

The essential facts in the case were settled by a stipulation in writing, substantially as follows:

"On July 2, 1864, the land in question was public land of the United States. On November 8, 1882, the petitioner Doherty made a homestead entry thereof, and thereafter complied with the homestead laws and received a patent from the United States purporting to convey the lands February 6, 1890. In December, 1883, the Northern Pacific Railroad Company took possession of the strip in controversy, and constructed a railroad upon it, and remained in possession, operating the railroad, until August

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 724.

31, 1896, when all the property, rights, and franchises of said railroad company were sold to the appellant, the Northern Pacific Railway Company, a Wisconsin corporation, which is duly organized to operate said railroad, and has occupied said strip for railroad purposes. The Northern Pacific Railroad Company, of which the appellant is the successor in interest, was organized by and obtained its rights under an act of Congress approved July 2, 1864, and entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line, from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route.' By the 1st section of this act a corporation created thereby was authorized to lay out and construct a continuous railroad and telegraph line, beginning at a point on Lake Superior in the state of Minnesota or Wisconsin; thence westerly upon the most eligible route as shall be determined by said company within the United States and north of the forty-fifth degree of latitude to some point on Puget sound. By the 2d and 3d sections of the same act the right of way through the public lands of the United States was granted to said railroad company, its successors, and assigns, for the construction of the line, and it was also provided that if its route should be found to be upon the same general line as the route of [424] another railroad which *owned a previous land grant from the United States, the amount of said previous land grant should be deducted from the amount granted by this act, provided that the railroad owning the previous grant might assign its interest to the Northern Pacific Railroad Company, or might consolidate, confederate, and associate with said company upon the terms named in the 1st section of the act. The lands granted to the Northern Pacific Railroad Company by the act amounted to ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a 10-mile indemnity limit, and by resolution of Congress, May 31, 1870, an additional indemnity belt 10 miles in width was created on each side of the line. This act was accepted by the company within the time required by law. The act also required the company to procure legislative consent of the states through which it was to run before its construction, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent. The Minnesota act, providing that if the eastern terminus of the road should be located east of the eastern boundary of Minnesota, then that the company should construct or cause to be constructed a railroad from its main line to the navigable waters of Lake Superior at some point within the state of Minnesota.

"In 1870 the company located its general route from the mouth of the Montreal river in Wisconsin, across Wisconsin and Minnesota to a point on the Red River of the North near Fargo, and transmitted a map showing this location August 13, 1870, to the Secretary of the Interior. This map

showed the proposed general route to commence at the mouth of the Montreal river, thence a little south of west upon a direct line to a point directly south of and about 6 miles distant from the south end of Chequamegon bay; thence a little north of west upon a direct line crossing the state boundary between Wisconsin and Minnesota, at or near the point where the St. Louis river becomes such boundary. Upon receipt of this map the Secretary of the Interior transmitted it to the Land Commissioner, with instructions to withdraw from sale, homestead, and pre-emption all odd-numbered sections of land within 20 *miles of the line [425] within both states. This order was complied with by the Land Commissioner by directions given to the district land officers at Bayfield, Wisconsin. Such withdrawals were made and the price of the even-numbered sections was raised to \$2.50 per acre, and thereafter large quantities of such land were sold by the government at the rate of \$2.50 per acre. In 1882 a map of definite location of said railroad from a point upon the St. Paul & Duluth Railroad, now called 'Thompson Junction,' eastward to a point in section 15, township 47, N., of range 2 W., in the state of Wisconsin, was prepared and approved by the directors and certified and forwarded to the Secretary of the Interior. The line of definite location laid down on this map followed substantially the line of general location upon the prior map, but it turned to the north and touched Superior, and also Ashland, and stopped some 10 miles west of the mouth of the Montreal river. Upon receipt of this map of definite location the Land Commissioner, by direction of the Secretary of the Interior, adjusted the land grant in accordance with it, and prepared diagrams showing the limits of the grant and indemnity belts, and transmitted such diagrams to the district land officers with the proper directions as to the withdrawal of lands, which were complied with.

"August 2, 1884, the directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at the city of Ashland, which resolution was duly certified and transmitted to the Commissioner of the General Land Office, December 3, 1884. Thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, with instructions to adjust the grant on this basis. The point so fixed is on the line of definite location of July 6, 1882, but about 12 miles west of the east end of that line. The Northern Pacific Railroad Company constructed a continuous line of railroad from the city of Ashland to Puget sound, in all respects in accordance with its act of incorporation, and the whole line has been duly accepted by the President of the United States, as provided in that act. That portion of the road extending east from Thompson Junction was *con- [426] structed upon the line of definite location shown in the map of 1882, and was con-

structed during the years 1881, 1882, 1883, and 1884.

"The 1st section extended from Thompson Junction to Superior, and was examined and reported favorably upon by commissioners in 1882, and the recommendations were approved by the President, September 16, 1882; the 2d section, extending from Superior to the Brule river, was constructed in the latter part of 1883, and crossed the land in question here, and was approved in like manner January 31, 1884; the 3d section extends from the Brule river to Ashland, and was approved in like manner February, 1885. It appears further that, March 6, 1865, one Joshua Perham, then the president of the Northern Pacific Railroad Company, transmitted to the office of the Land Commissioner a map purporting to show the proposed general route of the Northern Pacific Railroad. Upon this map there appeared two lines from a point in the present state of North Dakota eastward, one terminating upon Lake Superior at or near Duluth, and the other extending into Wisconsin some distance south of Lake Superior, and terminating at the mouth of the Montreal river, this last-named line being apparently partially obliterated by a wavy red line. This map was accompanied by a letter from Perham, stating that it shows the general line of the Northern Pacific Railroad from a point on Lake Superior in Wisconsin to a point on Puget sound. The Secretary of the Interior transmitted this map to the Land Commissioner, suggesting the withdrawal of the lands along the line, but the Land Commissioner soon afterward transmitted a letter to the Secretary of the Interior recommending that the map be rejected, for the reason that the same did not comply with the rules of the land department, which recommendation was approved by the Secretary. There is nothing to explain the apparent alteration of this map, nor to show when it was made, and it is not shown that the directors of the company ever authorized the making or filing of the map, but it appears that the president of the company had no power to make or file it.

[427] "By act approved May 5, 1864, Congress granted ten sections of land per mile to the state of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior. In the same year the legislature of Minnesota conferred this grant upon the Lake Superior & Mississippi Railroad Company, a Minnesota corporation, and afterwards known as the St. Paul & Duluth Railroad Company. On January 1, 1872, this company had constructed and was operating a railroad from St. Paul to Duluth, by way of Thompson Junction, which is upon the St. Louis river, and is the point from which the Northern Pacific Railroad Company started to build its line westward. On the last-named date the Northern Pacific Railroad Company purchased a one-half interest in that part of this road extending from Thompson Junction to Duluth, for the sum of \$500,000, and received a deed therefor.

On the same day the two companies made a written agreement providing for the operation of trains and the maintaining of the road. On May 1, 1872, the Northern Pacific Railroad Company and the Lake Superior & Mississippi Railroad Company made a further agreement, by which the lines of the Lake Superior & Mississippi Railroad were leased to the Northern Pacific Railroad for an annual rental, the land grant of the Lake Superior & Mississippi Railroad being expressly excepted from the operation of the lease. Pursuant to this lease the Northern Pacific Railroad Company operated the entire railroad thus leased, from May 1, 1872, until February 1, 1874, when it surrendered the lines leased and relinquished all its interests under the lease, but surrendered no rights under the deed. On the 12th of May, 1874, the Northern Pacific Railroad Company and the Lake Superior & Mississippi Company made an agreement for the operation of the line from Thompson Junction to Duluth.

"It further appears that, by act approved May 5, 1864, the United States granted lands to the state of Wisconsin to aid in the construction of a railroad from Bayfield to Superior, but no road was constructed under this grant."

The superior court of Douglas county sustained the petition, and appointed commissioners as prayed for. An appeal was taken to the supreme court of Wisconsin, which court, on June 23, 1898, reversed the order of the superior court, and remanded the cause to that court with directions to dismiss the petition. *Northern P. R. Co. v. Doherty*, 100 Wis. 39, 75 N. W. 1079. [428]

Thereupon the cause was brought here by a writ of error allowed by the Chief Justice of the supreme court of Wisconsin.

Mr. M. S. Bright submitted the cause for plaintiff in error. Messrs. Crownhart & Foley were with him on the brief.

In fixing a terminus and building its line to Lake Superior, the Northern Pacific Railroad Company had no rights other than those contained in the granting act, and the terms of the act are to be construed most strongly against the company.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

The right to construct from "a point on Lake Superior" cannot be construed as authorizing a company to lay out its road skirting for miles the shore of the lake, so as practically to monopolize the use of the waters and harbors thereof and the land adjacent thereto.

Prosser v. Northern P. R. Co. 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528.

It is well settled that where authority is given a chartered company to do an act, that power is exhausted when once exercised, unless it clearly appears that it was intended the exercise thereof should be continuous.

East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

The rule seems to be without exception, 177 U. S.

that where authority to locate a railroad is given to a company, when that location is made the power is exhausted, and the company cannot thereafter change that location at will.

Hudson & D. Canal Co. v. New York & E. R. Co. 9 Paige, 328; *State v. Norwalk & D. Turnp. Co.* 10 Conn. 157; *Mason v. Brooklyn City & N. R. Co.* 35 Barb. 374; *People v. New York & H. R. Co.* 45 Barb. 73; *Van Wyck v. Knevals*, 106 U. S. 366, 27 L. ed. 203, 1 Sup. Ct. Rep. 336; *Pierce, Railroads*, 254, 255.

Messrs. **James B. Kerr** and **C. W. Bunn** argued the cause and filed a brief for defendant in error:

Congress, having failed to fix the point on Lake Superior from which the road should run, must be held to have intended to confer upon the corporation the power to fix the point.

Fall River Iron Works Co. v. Old Colony & F. River R. Co. 5 Allen, 221; *Parke's Appeal*, 64 Pa. 137; *United States v. Northern P. R. Co.* 41 Fed. Rep. 842.

When the plaintiff established its terminus on Lake Superior it had full authority to touch the shore a second time, if the adoption of the most eligible route from such terminus to Puget sound required it.

Boston & P. R. Corp. v. Midland R. Co. 1 Gray, 340; *Parke's Appeal*, 64 Pa. 137; *Kansas City, L. & S. K. R. Co. v. Atty. Gen.* 118 U. S. 682, *sub nom. Kansas Cty, L. & S. K. R. Co. v. Brewster*, 30 L. ed. 281, 7 Sup. Ct. Rep. 66.

Such transactions as were had between the Northern Pacific Railroad Company and the Lake Superior & Mississippi Railroad Company, which left each company existing as a separate and distinct corporation, and did not affect in the slightest degree their interests in their respective land grants, cannot be held to be a consolidation within the meaning of the act.

2 Morawetz Priv. Corp. § 939; *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 125; *Clearwater v. Meredith*, 1 Wall. 25, *sub nom. Ferguson v. Meredith*, 17 L. ed. 604; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185.

Authority to build and construct a line between given points carries with it by necessary implication the authority to purchase a line already constructed between those points.

Branch v. Jesup, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. Rep. 495.

Power to build or acquire by purchase a half interest in the road from Thomson Junction to Duluth, to be operated as a branch line or feeder to the transcontinental road, is a clear incident of the general power conferred by the charter.

Green Bay & M. R. Co. v. Union S. B. Co. 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. Rep. 221; *Re Omaha Bridge Cases*, 10 U. S. App. 98, 51 Fed. Rep. 309, 2 C. C. A. 174.

The filing of a map of definite location, followed by the resolution of the board of
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directors establishing the point of beginning at Ashland, must be conclusive.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Walden v. Knevals*, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898.

The acceptance of the map of definite location vested the grant of right of way, and is conclusive.

Walden v. Knevals, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

*Mr. Justice **Shiras** delivered the opinion[428] of the court:

It is conceded that Doherty, the plaintiff in error, owns the southwest quarter of section 4, township 47 north, of range of 11 west, in Douglas county, Wisconsin, having made a homestead entry thereof November 8, 1882, and obtained a patent therefor February 6, 1890.

The Northern Pacific Railway Company, the defendant in error, claims a right of way 400 feet in width over and across this quarter section, and has constructed and is operating its railroad thereon. It is not claimed that this right of way was acquired by purchase or condemnation, but it is claimed by virtue of the terms of the act of Congress, approved July 2, 1864, incorporating the Northern Pacific Railroad Company, and granting to it, among other rights and privileges, a right of way through the public lands of the United States. This act authorized the corporation, thereby created, to construct a railroad "beginning at a point on Lake Superior in the state of Minnesota or Wisconsin" westward to "some point on Puget sound," and the controlling question in this case is whether the eastern terminus of the railroad constructed under the act is at Duluth, Minnesota, or at Ashland, Wisconsin. If at Duluth, then the company acquired no right of way over any public land in Wisconsin; but if at Ashland, then it did acquire a right of way over public lands in Wisconsin, including the land in question.

*It is conceded that on August 2, 1884, the[429] directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at Ashland; that this resolution was transmitted to the Commissioner of the General Land Office; that thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, Wisconsin, with instructions to adjust the grant on this basis; that a continuous line of railroad from Ashland to Puget sound in all respects in accordance with the act of incorporation, and as depicted upon its map of definite location, has been constructed, and has been accepted as such by the President of the United States. Such concessions would seem to warrant a conclusion that the defendant in error is en-

titled, as matter of right, to maintain and operate its road upon a right of way over the land in dispute, and we are led to inquire why it is that such a conclusion is disputed.

And, first, it is claimed by the plaintiff in error that the Northern Pacific Railroad Company definitely located its eastern terminus at Duluth, January 1, 1872, when it purchased one half of the track and right of way of the Lake Superior & Mississippi Railroad Company from Thompson Junction to Duluth, and made a contract for operation of the line in common.

In reply to this claim the company denies that, by purchasing an interest in the line from Thompson Junction to Duluth, it was ever intended by the company to make Duluth the eastern terminus, or that the arrangement with the Lake Superior & Mississippi Railroad operated, as a matter of law, to fix and determine Duluth as the eastern terminus; and attention is called to the fact that it is provided in the act of July 2, 1864, that before the Northern Pacific Railroad Company could commence the construction of its road it should obtain the consent of the legislature of any state through which any portion of its line might pass. Such consent was obtained from the states of Wisconsin and Minnesota; and in the act of the latter state, granting consent, it was in terms provided "that should the company elect to make the eastern terminus of said line east of the eastern boundary of the state of Minnesota, [430] then, and in *that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the state of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights, and privileges are hereby granted to said company as they have or may have to construct said main line in the state of Minnesota."

Evidently it was not intended by the legislature of Minnesota by this enactment to compel the railroad company to make its eastern terminus within the limits of that state. Indeed, the act recognizes the right of the company to elect to make its eastern terminus east of the limits of Minnesota.

It was, then, in compliance with the condition imposed by Minnesota, namely, that in case the railroad company elected to make its eastern terminus in Wisconsin, that the arrangement was made whereby the line from Thompson Junction on the main line to Duluth became, as to one half thereof, the property of the Northern Pacific Railroad Company.

We agree with the supreme court of Wisconsin in so regarding this transaction, and also in its holding that the arrangement between the Lake Superior & Mississippi Railroad Company and the Northern Pacific Railroad Company did not constitute a consolidation of the companies in any legal sense, so as to make the short line between Thompson Junction and Duluth a part of the trunk line contemplated by Congress.

When, in August, 1870, the company located its proposed general route, and when

its map of such location was approved by the Secretary of the Interior, showing its eastern terminus to be in Wisconsin, it became obligatory on the company to comply with the condition imposed, in that event, to construct a branch line to Lake Superior within the limits of Minnesota, and hence the agreement with the Lake Superior & Mississippi Railroad Company.

It is next contended by the plaintiff in error that, even if Duluth is not to be regarded as the eastern terminus of the company's road, yet that when afterwards, in constructing its road eastward from Thompson Junction, the company's road reached the city of Superior, the latter thereby became the *point [431] on Lake Superior which was to be regarded as the eastern terminus; that the city of Superior was the first point at which the Northern Pacific Railroad Company connected with Lake Superior by its own road, and it thereby became the initial point contemplated by the granting act.

In connection with this proposition it is necessary to take notice of certain legislation of the state of Wisconsin.

By an act approved April 10, 1865, the legislature of that state gave its consent, unconditionally, to the Northern Pacific Railroad Company to build and maintain its road within the state limits. Stat. 1865, chap. 465.

On March 25, 1872, the legislature passed an amending act, whereby the consent previously given to the Northern Pacific Railroad Company to construct and operate its road in the state of Wisconsin was made subject to certain conditions, among which were that the company should build and operate a line of railroad running from the junction of the said main line of the Northern Pacific Railroad Company with the Lake Superior & Minnesota Railroad to the bay of Superior, and should build and maintain at the latter point docks and piers suitable for the transfer of passengers and freight between the railroad and lake-going craft; and that until such connecting road and docks were constructed, it should not be lawful for the company to construct or maintain any other railroad in Wisconsin. Stat. 1872, chap. 139.

To comply with this legislation it was necessary for the company to alter the line of its road as defined by its map of general route, so that the same might touch the lake at the bay of Superior. But it does not follow that thereby the company abandoned its right to itself select the point of its eastern terminus. This and the similar legislation of Minnesota were not intended or regarded as taking away from the company its rights and powers under the act of Congress. They only imposed, whether lawfully or otherwise, certain conditions respecting branch line connections which the legislatures deemed desirable for local advantage.

Some reliance is placed upon two decisions of the Secretary of the Interior—the first rendered November 13, 1895, and *reported [432] in volume 21, U. S. Land Dec. 412: the second

and, rendered August 27, 1896, and reported in volume 23, U. S. Land Dec. 204.

Those decisions were made by the Secretary in disposing of a list of indemnity selections filed by the Northern Pacific Railway Company, based on losses of lands within the place limits lying east of the city of Superior. The opinion of the Secretary was that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget Sound, it had authority to touch the lake at only one point, and that, notwithstanding it filed a map of definite location from Thompson Junction to Ashland, the fact that the line so located and constructed touched the lake at the city of Superior precluded the company from extending its line eastward from that point. In his later decision the Secretary concluded that the transaction between the Lake Superior & Mississippi Railroad Company and the Northern Pacific Railroad Company was, in legal effect, a consolidation of the two corporations, and that, therefore, the eastern terminus of the Northern Pacific Railroad was definitely fixed at Duluth.

We do not care to repeat the considerations already advanced going to show that, in our opinion, the right of the railroad company, under the act of July 2, 1864, to select its eastern terminus at a point on Lake Superior in the state of Minnesota or Wisconsin, was not intentionally, or by operation of law, ended or determined by the company's compliance with the conditions sought to be imposed by the legislation of Minnesota and Wisconsin. The views of the supreme court of Wisconsin on this subject may be properly quoted: "On March 6, 1865, one Josiah Perham, then president of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map appear two lines from a point in North Dakota to Lake Superior, one ending at Duluth and one at the mouth of the Montreal river. This latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had

[433] no authority to make or file this *map, and that the directors never authorized it; and further, that on June 22, 1865, the map was rejected by the Land Commissioner and Secretary of the Interior because it did not comply with the rules and regulations of the land department. No further action was ever taken upon it, and it seems too plain to require argument that it can cut no figure in the case. All the subsequent maps made and filed by the corporation, as well as its recorded acts, show the clear intention to make the eastern terminus of the road in Wisconsin. In 1870 a map of general route was filed, showing the eastern terminus to be at the mouth of the Montreal river; upon receipt of which the odd-numbered sections of land within 20 miles of the line were withdrawn from sale, homestead, and pre-emption entry within the states of Minnesota and Wisconsin, and the price of land in the even-numbered sections was raised to \$2.50 per acre, and large quantities sold by the United States at that price. In 1882 a map of definite location of the line from Thompson Junction eastward to a point in section 15, town 47, range 2 west of the fourth P. M. was filed in the land office at Washington. This line passed through Ashland and terminated a few miles east of that city. This map was approved, and the land grant adjusted in accordance therewith by the department. In August, 1884, the board of directors of the company, by formal resolution, fixed the eastern terminus of the road at Ashland, and a certified copy of the resolution was filed in the General Land Office in December, 1884, whereupon the Land Commissioner made a diagram showing the eastern terminus so fixed, and adjusted the grant in accordance therewith.

"The portion of the road extending eastward from Thompson Junction to Ashland was constructed in the years 1881, 1882, 1883, and 1884, and was examined in three sections by commissioners appointed by the President of the United States, as provided by the act of incorporation. The commissioners reported favorably upon all of these sections, and their recommendations were approved by the President, the last approval being dated February 6, 1885.

"All of these deliberate acts of the department and executive *officers are brushed aside by Secretary Smith on the ground that the terminus of the road had been unalterably fixed at Duluth by the action of the Northern Pacific Company in 1872. As we do not agree with the Secretary's premise we cannot agree with his conclusion, and therefore hold that the terminus of the road is at Ashland, and hence that the railroad company had a right of way across the petitioner's land by virtue of the provisions of the act of incorporation."

Northern P. R. Co. v. Doherty, 100 Wis. 39, 75 N. W. 1079. [434]

In a bill filed in the circuit court of the United States for the district of Minnesota by the United States against the Northern Pacific Railroad Company, the Northern Pacific Railway Company and others sought to have canceled and annulled a patent granted by the United States, on April 22, 1895, to the Northern Pacific Railroad Company, for lot 5 of section 29, township 54 north, of range 13 west, in the county of St. Louis and state of Minnesota, a tract of land situated more than 10 miles east of Duluth, which the bill averred to be the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864. The bill alleged that the patent had been granted through inadvertence and mistake, and under an "erroneous impression and mistaken belief that said tract of land was lying and being within the limits of the aforesaid grant to the Northern Pacific Railroad Company."

The case was so proceeded in, on bill, answer, and an agreed statement of facts, that on February 20, 1899, the bill of complainant was dismissed for want of equity; and this decree was, on appeal to the circuit court of appeals for the eighth circuit, on July 10, 1899, by that court affirmed.

v. *Northern P. R. Co.* 95 Fed. Rep. 865, 37 C. C. A. 290.

The controversy in that case involved the same questions as those we have been considering in the present case of *Doherty*, and the conclusions reached were that the land department committed no error of law when it held that the Northern Pacific Railroad Company had authority under its charter to locate its eastern terminus at Ashland, and made no mistake of fact when it found that [435] the Northern Pacific Railroad Company *had actually selected Ashland as its eastern terminus. The facts and reasoning relied on by the respective parties were, in the main, the same with those that were relied on in the case in the supreme court of Wisconsin, now under review in this court.

The judgment of the Supreme Court of Wisconsin is affirmed.

Mr. Justice **McKenna** did not take part in the decision of the case.

UNITED STATES, *Appt.*,

v.

NORTHERN PACIFIC RAILROAD COMPANY, Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, Receivers.

(See S. C. Reporter's ed. 435-442.)

Public lands—railroad grants—question of forfeiture.

1. The question of the forfeiture of a railroad grant for noncompletion within the time limited by the grant is not put in issue in a suit to annul a patent on the sole ground that it was issued under a mistaken belief as to the location of a terminus, by an allegation in the answer that it was "duly" and "in all respects" constructed in accordance with the law.
2. Land granted to a railroad company does not, *ipso facto*, revert to the United States by mere failure to complete the road within the period prescribed by Congress in the grant; but, to effect a forfeiture, some act is essential on the part of the government evincing an intention to take advantage of such failure.

[No. 408.]

Argued January 26, 29, 1900. Decided April 16, 1900.

APPPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decision by the Circuit Court dismissing for want of equity a bill to cancel a patent for lands. *Affirmed.*

See same case below, 95 Fed. Rep. 864, 37 C. C. A. 290.

Statement by Mr. Justice **Shiras**:

[436] *In July, 1898, the United States, by the Attorney General, filed in the circuit court of the United States for the district of Minnesota a bill of complaint against the North-

ern Pacific Railroad Company and others. The object of the suit was to procure the cancelation and annulment of a certain patent granted to the Northern Pacific Railroad Company by the United States on April 22, 1895, for a tract of land lying and being more than 10 miles east of Duluth, in the state of Minnesota, and which patent was alleged by the bill to have been inadvertently and mistakenly issued. The case was disposed of on bill, answer, and a stipulation of facts. The circuit court dismissed the case for want of equity, and the cause was taken on appeal to the circuit court of appeals for the eighth circuit, where the decree of the circuit court was, on July 10, 1899, affirmed. An appeal was thereupon allowed to this court.

Mr. **Charles W. Russell** argued the cause and filed a brief for appellant.

Messrs. James B. Kerr and **C. W. Bunn** argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion and in the briefs as reported in *Doherty v. Northern P. R. Co.* 177 U. S. 421, *ante*, 830, 20 Sup. Ct. Rep. 677.

*Mr. Justice **Shiras** delivered the opinion [436] of the court:

This cause was heard in this court in connection with that of *Doherty v. Northern P. R. Co.* No. 121 of the present term. [177 U. S. 421, *ante*, 830, 20 Sup. Ct. Rep. 677.] That case came here on a writ of error to the supreme court of the state of Wisconsin. The present one is on appeal from the circuit court of appeals from the eighth circuit.

The important questions of fact and of law were substantially the same in the two cases, and so were the reasoning and conclusions of the respective courts below. In a judgment just entered by this court, the judgment of the supreme court of Wisconsin was affirmed, for reasons given in the opinion, a reference to which is deemed to be a sufficient disposition of the questions common to the two cases.

*But in the present case there has been [437] raised and argued a proposition not considered in the supreme court of Wisconsin, and which is entitled to our attention. Briefly stated, it is that, even if it be conceded that the eastern terminus of the Northern Pacific Railroad Company was lawfully fixed at Ashland, Wisconsin, yet that the land grant of the company had lapsed before any map of definite location of the railroad east of Duluth, Minnesota, had been filed in the land department; that the company could not lawfully extend the construction of its railroad, so as to entitle it to land under its land grant, after the time limited by act of Congress for the completion of the railroad had fully expired; and that, consequently, the patent to the land described in the bill, being land east of Duluth, was granted mistakenly and improperly.

This contention is based on the language of § 8 of the incorporating act, which is as

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follows: That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six." The time of completion was subsequently extended to July 4, 1880. 13 Stat. at L. 370, chap. 217 (15 Stat. at L. 255).

It is always safe, in approaching a question of this kind, to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented.

On inspection, it appears that the case made by the bill is, that the eastern terminus of the Northern Pacific Railroad became, was, and now is at the city of Duluth, state of Minnesota; that the land in question, being part and parcel of the public lands of the United States, is more than 10 miles east of the said eastern terminus and not, therefore, within the limits of the grant to said company; that the patent granted to the said company on April 22, 1895, was issued [438] "through *mistake and inadvertence, and under the erroneous impression and mistaken belief that said tract of land was within the limits of the said grant to the Northern Pacific Railroad Company;" and the relief prayed for is that said tract of land be restored to the complainant; that the defendant be required to reconvey all of said tract of land; and that said patent issued by the ministerial officers of the government, so far as the tract of land described in the bill is concerned, be canceled and annulled; and for such other and further relief as may be just and equitable.

It is true that, in the narrative part of the bill, the 8th section of the incorporating act is quoted, and also there is set forth the several transactions whereby it is alleged Duluth became established as the eastern terminus of the company's road, but there is no intimation that it was the purpose of the bill to have a forfeiture of the company's rights and property judicially ascertained and declared. Indeed, the obvious purpose of the suit was to have the question of the proper terminus of the company's road determined; and it seems a fair deduction from the averments and prayers of the bill that, if that terminus was found to be at Ashland, then the complainant would not be entitled to any relief.

It is argued on behalf of the government that, even if the bill did not point to a forfeiture as part of the proof that the land had been mistakenly patented, yet that as the defendants, in their answer, had set up,

as part of their defense, that the road had been "duly," and "in all respects," constructed in accordance with the law, thereby entitling them to the land in dispute, the issue was thereby widened so as to include the question of forfeiture. We think the court of appeals properly disposed of this argument when it said: "It is nothing but a suit to avoid a patent to a single tract of land on the sole ground that the land department erroneously found the eastern terminus of the road to be at Ashland when it was at Duluth. No forfeiture of any of the rights and privileges of the company on account of the delay in the construction of its railroad has been prayed, no issue of forfeiture has been tendered or made by the pleadings, and that question is not here for consideration. It is a *general rule that questions that are [439] not within the issue presented by the pleadings may not be determined by the courts, much less may so important a question as the forfeiture of the rights of a corporation to thousands of miles of railroad and thousands of acres of land under a congressional grant. Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it." [95 Fed. Rep. 879, 37 C. C. A. 305.]

Again, it is contended that when a statutory grant contains on the face of the law a provision that each and every grant, right, and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of the company, even if acquiesced in and approved by executive officers of the government, in disregard of the forfeiture, are unauthorized, *ultra vires*, and forbidden.

In other words, if we understand the position, it is claimed that under § 8 of the act of July 2, 1864, noncompletion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the government; and courts must so hold on the simple statement of the fact of noncompliance within the limit. We do not understand this to be a correct statement of the law. In *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, this court was called upon to consider the legal import of such a provision in the act of Congress of June 3, 1856, granting public lands to the state of Wisconsin to aid in the construction of railroads in said state. After providing that the lands should be sold, from time to time, as the construction of the railroad progressed, until the road was completed, it was enacted that "if said road is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

No part of the road having been built at the expiration of the period limited in the grant, it was claimed that the lands reverted

to the United States. It was held by the circuit court of the United States for the district of Minnesota that such lands did not *ipso facto* revert to the United States by [440] mere failure to build the road within the period prescribed by Congress, and that to effect a forfeiture some act on the part of the government evincing an intention to take advantage of such failure was essential; and, on error, that ruling was affirmed by this court, and the following statement of the law was made by Mr. Justice Field in giving the opinion of the court:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office found was necessary to determine the estate; but, as said by this court in a late case (*United States v. Repentigny*, 5 Wall. 268, 18 L. ed. 646), 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'

"In the present case no action has been taken, either by legislative or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In July, 1866, Congress granted unto the California & Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had

[441] forfeited and lost its right under the *grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown, "that in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title

to the land." *Schulenberg v. Harriman; Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336, are then cited, and likewise *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 473, 29 L. ed. 448, 6 Sup. Ct. Rep. 125, where it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained. This being so, and that terminus having been found to be at Ashland, it follows that the courts below committed no error in dismissing the bill of complaint.

This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department in recognizing the rights of the railroad company as continuing in full force after the expiration *of the time [442] named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within the time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. It is not, as put by the counsel of the government in his able brief, the case of a waiver presumed from mere nonaction, but from nonaction in the special circumstances disclosed.

As the evidence and conceded facts failed to show any mistake, fraud, or error, in fact or in law, in the action of the land department in accepting the location of the eastern terminus made by the company, and in issuing the patent in question, the bill was properly dismissed, and the decree of the Circuit Court of Appeals is affirmed.

Mr. Justice McKenna did not take part in the decision of the case.

[442] *SETH CARTER, *Plff. in Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 442-449.)

Civil rights—constitutional right to have negroes on grand jury—motion to dismiss indictment.

1. The exclusion of all persons of the African race from a grand jury which finds an indictment against a negro in a state court, when they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of U. S. Const. 14th Amend., whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state.
2. A motion to quash an indictment against a negro because it was found by a grand jury from which all persons of the African race had been excluded because of their race or

color, when made before arraignment, and when there had been no opportunity to challenge the array because the grand jury had been impaneled before the offense was committed, was a proper and timely mode of presenting the fundamental objection to such indictment, under the Constitution and laws of the United States, because of such exclusion, although the state statute does not provide for quashing an indictment on such ground.

3. An omission in a bill of exceptions, of the names of witnesses whom the accused intended to call, and of any statement of their testimony on a certain subject, cannot deprive him of the benefit of his exception to the wrongful refusal of the court to hear any evidence whatever on that subject.

[No. 193.]

Submitted March 16, 1900. Decided April 16, 1900.

NOTE.—As to qualifications of grand jurors—see *State v. Russell* (Iowa) 28 L. R. A. 204, and note.

Negroes as grand jurors.

All statutes discriminating against negroes in the formation of a grand jury are contrary to the 13th and 14th Amendments to the United States Constitution. *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (hab. corp.); *Com. v. Johnson*, 78 Ky. 509 (obj. of judge criminally prosecuted); *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567 (mo. qu.); *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625 (mo. set aside).

But the equal protection of the laws is not denied to colored persons by a state constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers which can be used to the abridgement of the right of colored persons to vote and serve on grand or petit juries, where it is not shown that the actual administration of such constitution and statutes was evil, but only that evil was possible under them. *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583 (mo. qu.).

And the selection of grand jurors from the registry list of qualified voters, as required by Miss. Const. § 264, does not operate as an unlawful discrimination against negroes with respect to their right to sit on grand juries, although the educational qualifications required of electors may exclude from the elective franchise a greater number of colored than of white persons. *Dixon v. State*, 74 Miss. 271, 20 So. 839 (mo. qu.).

A motion to quash an indictment, made after arrest and before arraignment, on the ground that, in the organization of the grand jury, negroes were discriminated against in that none were selected by the jury commissioners, is proper and timely, where the accused had no opportunity to challenge the array because the grand jury had been impaneled prior to the commission of the offense. *Carter v. State*, 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508.

But after plea of not guilty and petition for removal of cause to the Federal court, a plea in abatement on this ground was too late. *Cooper v. State*, 64 Md. 40, 20 Atl. 986 (pl. abate.).

And habeas corpus on this ground was denied in a Federal court where proper objections were not made in the state court, as there was
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a remedy by review. *Re Wood*, 140 U. S. 278, *sub. nom.* *Wood v. Brush*, 35 L. ed. 505, 11 Sup. Ct. Rep. 738 (hab. corp.).

A prisoner is not entitled to his discharge on habeas corpus because he is a negro and citizens of his race were not summoned for qualification as grand jurors, where the state law directs the jury commissioners to select the jurors impartially from all citizens having the requisite qualifications as voters, and does not discriminate against men of the African race. *Ex parte Murray*, 66 Fed. Rep. 297.

And the removal of the prosecution of a colored person from the state to a Federal court cannot be had because the jury commissioners or other subordinate officers have, without authority derived from the Constitution or laws of the state, excluded colored citizens from the grand jury because of their race. *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

And a denial in a state court of the right to show that persons of the race of the accused were arbitrarily excluded by the sheriff from the panel of grand and petit jurors solely because of their race does not defeat the jurisdiction of that court so as to warrant a writ of habeas corpus. *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

The court said "his proper remedy was . . . to carry the case to the highest court of the state having jurisdiction to review that judgment, thence upon writ of error to this court if the final judgment of such state court denied any right, privilege, or immunity specially claimed and which was secured to him by the Constitution of the United States."

Under Ala. Code, §§ 4087, 4187, providing that no objection for disqualification can be made except that the grand jury were not drawn in the presence of the officer, an objection that negroes were excluded would not avail. *Boulo v. State*, 51 Ala. 18 (pl. abate.).

And where a party waives his right to object, he cannot object by habeas corpus. *Haggard v. Com.* 79 Ky. 366 (hab. corp.).

An objection that part of the grand jury were negroes was insufficient under Miss. Code, § 499, art. 131, providing that impaneling the grand jury is conclusive evidence of competency except for fraud. *Lee v. State*, 45 Misc. 114 (pl. abate.).

And a white man cannot complain that negroes were not on the panel. *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203 (obj.).

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a decision refusing to quash an indictment against a negro which was found by a grand jury from which all persons of his race were excluded. *Reversed.*

See same case below, 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508.

The facts are stated in the opinion.

Messrs. Wilford H. Smith and E. M. Hewlett submitted the cause for plaintiff in error:

The trial court was bound to permit the introduction of any evidence bearing upon the question or tending to prove the issue, in order that this court may be enabled to say whether or not the issue is established from the proof appearing in the record.

Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

It will open wide the door to judicial oppression, to permit the state courts in this way to nullify the amendments to the Constitution and overturn the decisions of this tribunal upholding and giving expression to the rights of negroes to the equal protection of the laws, by arbitrarily refusing to allow the introduction of proof in support of motions, or other pleadings, calling the attention of this court to injustices and wrongs upon their rights under the Federal Constitution, in the administration of state laws.

Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. T. S. Smith submitted the cause for defendant in error:

It is not to be understood that the approval by the trial court of the bill of exceptions as tendered by the accused, and an order to file the same, is an admission by the court that everything contained therein is true as a matter of fact.

Smith v. State, 4 Tex. App. 630.

[443] **Mr. Justice Gray* delivered the opinion of the court:

At November term, 1897, of the criminal district court, held at the city of Galveston, for the county of Galveston and state of Texas, the grand jury, on November 26, 1897, returned an indictment against Seth Carter for the murder on November 24, 1897, of Bertha Brantley, both being of the negro race.

The record states that at March term, 1898, when the case was called for trial, the **[444]** defendant, in open court, and before he *had been arraigned or had pleaded to the indictment, presented and read to the court a motion to quash the indictment.

The motion to quash was signed and sworn to by the defendant, and was in these words: "And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners, appointed to select the grand jury which found and presented said indictment, select-

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ed no person or persons of color or of African descent, known as 'negroes', to serve on said grand jury; but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as 'negroes', because of their race and color; and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as 'negroes,' although consisting of and constituting about one fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a 'negro,' and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify."

The record further shows that the court overruled the motion, and to that ruling the defendant excepted in open court; that the defendant was then arraigned and pleaded not guilty, and was tried and convicted by a jury, and adjudged guilty, by the court, of murder in the first degree; and that a bill of exceptions was tendered by him, and was by the presiding judge approved, allowed, and ordered to be made part of the record, which stated that, "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in *support of the said mo- **[445]** tion and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion,—to which action of the court the defendant then and there excepted."

The defendant appealed to the court of Criminal Appeals of the state of Texas (being the highest court of the state in which a decision in the case could be had (which affirmed the judgment, and denied a motion for a rehearing. The opinions delivered by that court upon affirming the judgment, and upon denying the motion for a rehearing, are set out in the record, and are reported in 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508. The defendant sued out this writ of error.

The Code of Criminal Procedure of the state of Texas contains the following provisions:

"Art. 397. Any person, before the grand jury have been impaneled, may challenge the array of jurors, or any person presented as a grand juror; and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge."

"Art. 559. A motion to set aside an indictment" "shall be based on one or more of the following causes, and no other: 1. That it appears by the records of the court that the indictment was not found by at least nine grand jurors." "2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same."

"Art. 561. The only special pleas which can be heard for the defendant are: 1. That he has been before convicted legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offense. 2. That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular."

The court of criminal appeals, in its first opinion affirming the judgment of the trial court, disposed of the objection to the grand jury by holding that, by the very terms of article 523, "the fact that people of African

[446] descent were not drawn by the *commissioners to serve as jurors upon the grand jury is not a ground for setting aside an indictment;" and that the appellant had not undertaken to bring himself within the purview of article 397, as to which the court said: "If there were any objections to the grand jury, or any member of it, they should have been exercised by challenge, either to the array or to a particular member of said body. . . . The question of challenge to the array or to a particular juror is not suggested, nor is it shown that he was debarred this right. It is too late, after indictment found, to question the manner of impaneling a grand jury." 39 Tex. Crim. Rep. 348, 349, 46 S. W. 237.

In the opinion delivered on denying the motion for a rehearing, the court substantially abandoned as untenable the positions taken in its first opinion; and admitted that "in this particular case no opportunity was afforded appellant to challenge the array, because the grand jury which returned the bill against him had been impaneled prior to the commission of this offense," and consequently that a motion to quash the indictment, made after his arrest under it, and before his arraignment, was a proper and timely mode of presenting a fundamental objection under the Constitution and laws of the United States, although no such objection was mentioned in the statutes of the state. And the reasons assigned for denying the rehearing were that "the motion to quash was based simply on the affidavit of appellant," and "the question was presented to the court without any evidence whatever in support of it;" that "in this case the motion to quash was not predicated on the record, but involved extraneous matters, and before the court would be authorized to act, there must be some proof of the allegations contained in the motion;" that "the motion was but a mere tender of the issue, unaccompanied by any supporting testimony;" that "it names no witness or person by whom it was pro-

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posed to prove the allegations of the motion;" and that "the bare recitation" (in the bill of exceptions) "that the court refused to hear evidence in support of said motion is without meaning, because in fact no testimony was tendered by appellant." 39 Tex. Crim. Rep. 354-357, 48 S. W. 510, 511.

The rules of law which must govern this case are clearly established by previous decisions of this court.

*Whenever by any action of a state, [447] whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. ed. 567, 574; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar. *United States v. Gale*, 109 U. S. 65, 67, 27 L. ed. 857, 858, 3 Sup. Ct. Rep. 1.

The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the state, must be supported by evidence on the part of the defendant. *Smith v. Mississippi*, 162 U. S. 592, 601, 40 L. ed. 1082, 1085, 16 Sup. Ct. Rep. 900; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. *Neal v. Delaware*, 103 U. S. 370, 396, 397, 26 L. ed. 567, 574; *Mitchell v. Clark*, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375.

In the case at bar, as may be inferred from the dates appearing in the record, and as is distinctly stated in the opinion delivered by the court below on denying a rehearing, the grand jury had been impaneled before the commission of the offense for which the defendant was indicted. He therefore never had any opportunity to challenge the array of the grand jury, and was entitled to present the objection on which he relied by motion to quash.

The defendant's motion to quash the indictment was presented to the court before he had been arraigned, or had pleaded to *the [448] indictment. The motion, besides stating

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that the defendant was of the African race, fully and specifically alleged, with almost the precision of a plea in abatement, that the jury commissioners appointed to select the grand jury selected no persons of African descent to serve on the grand jury, but, on the contrary, excluded from the list all such persons because of their race and color; that the grand jury was composed exclusively of persons of the white race, while all persons of the African race, although constituting about one fourth of the registered voters in the county, and although otherwise well qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and had been so excluded from serving on any jury in that court for a great many years; and that this was a discrimination against the defendant, and a denial to him of the equal protection of the laws, and of his civil rights guaranteed to him by the Constitution and laws of the United States. And the motion concluded with the statement: "All of which the defendant is ready to verify."

The bill of exceptions tendered by the defendant, and allowed by the presiding judge, and made part of the record by his order, explicitly states that "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion,—to which action of the court the defendant then and there excepted."

It thus clearly appears by the record that the defendant, having duly and distinctly alleged, in his motion to quash, that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment, asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain that allegation; and that the court refused to hear any evidence upon the subject, and overruled the motion, without investigating whether the allegation was true or false.

[449] The defendant having offered to introduce witnesses to prove the allegations in the motion to quash, and the court having declined to hear any evidence upon the subject, it is quite clear that the omission of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever. And the assumption, in the final opinion of the state court, that no evidence was tendered by the defendant in support of the allegations in the motion to quash, is plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court.

The necessary conclusion is that the defendant has been denied a right duly set up and claimed by him under the Constitution

and laws of the United States; and therefore the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

GREAT SOUTHERN FIRE PROOF HOTEL
COMPANY, *Petitioner*,

v.

BENJAMIN F. JONES *et al.* and Sosman
& Landis.

(See S. C. Reporter's ed. 449-458.)

*Federal courts—diverse citizenship—limited
partnership as a citizen.*

1. A limited-partnership association created under Pa. Laws 1874, p. 271, although it may be called a quasi-corporation and is declared by the state statute to be a citizen of the state, is not, like a corporation created under the laws of the state, to be deemed a citizen of that state, within the meaning of the clause of the Federal Constitution which extends the judicial powers of the United States to controversies between citizens of different states.
2. The citizenship of the individual members of a limited partnership association created by the laws of Pennsylvania must be alleged in a suit by that association in a Federal court, where jurisdiction depends upon diverse citizenship of the parties.

[No. 210.]

Argued March 21, 22, 1900. Decided April 9, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision reversing a decree of the Circuit Court of the United States dismissing the bill. *Reversed.*

See same case below, 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108.

The facts are stated in the opinion.

Messrs. John E. Sater and D. F. Pugh argued the cause and filed a brief for petitioner.

Mr. Talfourd P. Linn argued the cause and, with *Messrs. Outhwaite, Linn & Thurman*, and *Mr. John D. McKennan*, filed a brief for respondents.

Mr. Louis G. Addison argued the cause and, with *Mr. George K. Nash*, filed a brief for respondents Sosman & Landis.

**Mr. Justice Harlan* delivered the opinion [450] of the court:

The bill in this suit, commenced in the circuit court of the United States for the southern district of Ohio, eastern division, describes the plaintiffs Benjamin F. Jones,

NOTE.—As to diverse citizenship as ground for Federal jurisdiction—see notes to *Roberts v. Lewis*, 36 L. ed. U. S. 579; *Seddon v. Virginia, T. & C. Steel & Iron Co.* (C. C. W. D. Va.) 1 L. R. A. 108; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association organized under an act of the general assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An Act Authorizing the Formation of Partnership Associations in Which the Capital Subscribed Shall Alone be Responsible for the Debts of the Association, except under Certain Circumstances,'" and who "Have Their Office and Principal Place of Business in the City of Pittsburgh," and which association is "a Citizen of the State of Pennsylvania." Pa. Laws 1874, p. 271.

The defendant first named in the bill is the Great Southern Fire Proof Hotel Company, a corporation of the state of Ohio; and some of the defendants are corporations and citizens of states other than the state of Pennsylvania.

The remaining defendants are thus described in the bill:

"Taylor, Beall, & Company is a partnership doing business in *the city of Columbus and state of Ohio, the individual partners thereof being William D. Taylor, James P. Beall, and William J. Keever."

"Sturgeon, Ford, & Company is a partnership doing business in the city of Columbus and state of Ohio, the individual partners thereof being unknown to your orators."

"Meacham & Wright is a partnership doing business in the city of Columbus and state of Ohio, the individual partners thereof being Floras D. Meacham and Frank S. Wright."

"Sosman & Landis is a partnership of Chicago, Illinois, doing business in the state of Ohio, the names of the individual partners thereof being unknown to your orators."

"Dundon & Bergin is a partnership doing business in the city of Columbus, state of Ohio, the individual partners thereof being Thomas J. Dundon and Matthew J. Bergin."

"H. C. Johnson & Company is a partnership doing business in the state of Ohio, the names of the individual partners thereof being unknown to your orators."

"Schoedinger, Fearn, & Company is a partnership doing business in the state of Ohio, the individual partners thereof being F. O. Schoedinger, W. A. Fearn, and J. R. Dickson."

"L. Hiltgartner & Sons is a partnership doing business in the city of Columbus, state of Ohio, the names of the individual partners thereof being unknown to your orators."

The nature of the case made by the bill is as follows:

By written agreement between Jones & Laughlins, Limited, and W. J. McClain, dated December 13, 1894, the former agreed, upon certain terms, to furnish structural steel for use in the erection of the Great Southern Hotel at Columbus, for the construction of which McClain had previously contracted with the Great Southern Fire Proof Hotel Company. Under the above contract Jones & Laughlins, Limited, shipped and furnished to McClain structural steel of the value of

\$43,296.74. All of that sum was paid by McClain except \$11,410.02, which was due to the plaintiffs with interest from January 23, 1896.

On the 11th day of August, 1896, McClain executed a deed of assignment for the benefit of his creditors. And on the 21st day of April, 1896, within four months after the above materials *were delivered to McClain, Jones & Laughlins, Limited, filed with the recorder of Franklin county, Ohio, an affidavit containing an itemized statement of the amount and value of such materials. The object of the filing was to conform to the provisions of §§ 3184 (as amended April 13th, 1894, 91 Ohio Laws, 135), and 3185 of the Revised Statutes of Ohio, both sections relating to mechanic's liens, and thereby obtain, in behalf of Jones & Laughlins, Limited, for the amount due them, a lien upon the hotel and the opera house connected with it, as well as upon the land on which they stood.

After stating that the defendants each claim to have some interest in the property in question as lienholders or otherwise, the exact nature and extent of which was unknown to the plaintiff, the relief asked was: 1. That the defendants be required to answer and fully set forth their respective interests in the property, and failing to do so that they be barred from asserting any claim thereto. 2. That a receiver be appointed to collect rents. 3. That the plaintiff's demand be declared a valid and subsisting lien on the property. 4. That all the liens be marshalled, the premises sold, and the proceeds distributed.

The Great Southern Fire Proof Hotel Company demurred generally to the bill as insufficient.

The defendants Sosman & Landis filed their answer and cross bill, claiming a lien upon the property for a balance due under a contract made between them and McClain pursuant to which they furnished scenery, stage work, and fixtures for the improvements contemplated by the contract between McClain and the hotel company. To that cross bill a demurrer was also filed.

The cause was heard in the circuit court upon the demurrers, the only question argued being the constitutionality of the Ohio statute of April 13, 1894. That court sustained the demurrers, and dismissed the bill and cross bill upon the ground that the provisions of the mechanic's lien law of Ohio, under which the plaintiffs and cross plaintiffs proceeded, were unconstitutional. 79 Fed. Rep. 477.

Upon appeal to the circuit court of appeals the decree of *the circuit court was reversed—the former court holding that the statute of Ohio in question was not void. 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108. The hotel company then applied for and obtained this writ of certiorari.

The bill rests the jurisdiction of the circuit court upon the ground of the diverse citizenship of the parties. But was the case as presented by the record one of which the circuit court of the United States could take

cognizance by reason of diversity of citizenship? When this question was suggested at the argument counsel responded that no objection had been urged to the jurisdiction of that court. But the failure of parties to urge objections of that character cannot relieve this court from the duty of ascertaining from the record whether the circuit court could properly take jurisdiction of this suit. In *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, 511, the court, after observing that the jurisdiction of a circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record (*Grace v. American Cent. Ins. Co.* 109 U. S. 278, 283, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207; *Robertson v. Coase*, 97 U. S. 646, 24 L. ed. 1057), said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. ed. 229, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the circuit court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he invoked. This case [454] was cited with approval by Chief *Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885." These rules have been recognized and applied in numerous cases.†

We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the circuit court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized. In *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. ed. 451, 452, which was an action brought by citizens of Ohio in the circuit court of the United States for the district of Indiana, the

declaration described the defendant as the "Lafayette Insurance Company, a citizen of the state of Indiana." This court said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation; or if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed." The case of *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426, 428, is decisive of the present question. That was an action in the circuit court of the United States by the United States Express Company. This court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen *of that state. [455] But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is not a corporation, but a joint-stock company—that is, a mere partnership. And although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court. The company may have been organized under the laws of the state of New York, and may be doing business in that state, and yet all the members of it may not be citizens of that state. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some state other than Illinois. *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 283, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207, and authorities there cited. For these reasons we are of opinion that the record does not show a case of which the circuit court could take jurisdiction."

The case of *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 351, 19 L. ed. 457, 460, to which attention is called by a sup-

†*Hancock v. Holbrook*, 112 U. S. 229, 231, 28 L. ed. 714, 715, 5 Sup. Ct. Rep. 115; *Thayer v. Life Asso. of America*, 112 U. S. 717, 720, 28 L. ed. 864, 865, 5 Sup. Ct. Rep. 355; *Ayers v. Watson*, 113 U. S. 594, 598, 28 L. ed. 1093, 1094, 5 Sup. Ct. Rep. 641; *King Bridge Co. v. Otoc County*, 120 U. S. 225, 226, 30 L. ed. 623, 624, 7 Sup. Ct. Rep. 552; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Morris v. Gilmer*, 129 U. S. 315, 325, 32 L. ed. 690, 693, 9 Sup. Ct. Rep. 289; *Chapman v. Barney*, 129 U. S. 677, 681, 32 L. ed. 800,

801, 9 Sup. Ct. Rep. 426; *Stevens v. Nichols*, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; *Graves v. Corbin*, 132 U. S. 571, 590, 33 L. ed. 462, 468, 10 Sup. Ct. Rep. 196; *Parker v. Ormsby*, 141 U. S. 81, 83, 35 L. ed. 654, 655, 11 Sup. Ct. Rep. 912; *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 689, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533; *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 53, 57, 39 L. ed. 894, 895, 15 Sup. Ct. Rep. 725; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 98, 42 L. ed. 672, 675, 18 Sup. Ct. Rep. 264.

plementary brief, does not announce a different rule. The declaration in that case, singularly enough, described the defendant company as a "foreign corporation, formed under and created by the laws of the state of New York." Looking at the allegations of the pleadings, and there being no evidence to the contrary, this court held that the averment as to the citizenship of the defendant was sufficient, observing "It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the state of New York. The obvious meaning of this allegation is that the defendant is a citizen of the state of New York."

[456] It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. 1 Brightly's Purdon's Digest, Pa. (12th ed.) 1088, title *Joint Stock Companies*, § 16. But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the state creating the corporation. *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 11 L. ed. 353; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *National S. S. Co. v. Tugman*, 106 U. S. 118, 120, 27 L. ed. 87, 88, 1 Sup. Ct. Rep. 58. The rule that for purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation was to be deemed a citizen of the state creating it, has been so long recognized and applied that it is not now to be questioned. No such rule, however, has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a circuit court of the United States as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.

Nor can we accede to the suggestion that this question of jurisdiction is affected by the clause of the Constitution of Pennsylvania providing that the term "corporations," as used in article XVI. of that instrument, "shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships." Pa. Const. art. XVI. § 13. The only effect of that clause is to place the joint-stock companies or associations referred to under the restrictions imposed by that article upon corporations; and not to invest them with all the attributes of corporations.

We have not been referred to any case in the supreme court of Pennsylvania which distinctly places limited partnership associations, created under the statutes of that state, on the basis of corporations. "Such
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an association," that court said in *Oak Ridge Coal Co. v. Rogers*, 108 Pa. 147, 150, "is not technically a corporation. Yet it has many of the characteristics of one," and "it may not be improper to call such an association a quasi-corporation." In *Hill v. Stetler*, 127 Pa. 145, 161, 13 Atl. 306, 17 Atl. 887, referring to the act of June 2, 1874, the court said that it provided for the *crea- [457] tion of "a new artificial person to be called a joint-stock association, having some of the characteristics of a partnership and some of a corporation."

In *Carter v. Producers' Oil Co.* 182 Pa. 551, 573, 574, 38 Atl. 571, 576, which involved the validity of a rule adopted by a limited partnership association organized under the Pennsylvania statute of June 2, 1874, and its supplements, and which rule prohibited any person who acquired the capital stock of a member from exercising the privileges of a member, unless he was elected as such, the court said: "We cannot assent to the plaintiff's claim that the defendant company is a corporation and restricted, in the adoption of by-laws, rules, and regulations for its government, to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the power with which the statutes have invested it."

That a limited partnership association created under the Pennsylvania statute may be described as a "quasi corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

We have not overlooked the case of *Andrews Bros. Co. v. Youngstown Coke Co.* 58 U. S. App. 444, 86 Fed. Rep. 585, 30 C. C. A. 293, in which the circuit court of appeals for the sixth circuit, speaking by Judge Lurton, held that limited partnership associations organized under the Pennsylvania statute were corporations within the jurisdictional requirement of diverse citizenship. For the reasons stated, we are unable to concur in the view taken by that court.

We therefore adjudge that as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit.

*Another question as to jurisdiction arises [458] on the record. The citizenship of the members of the several partnerships that are named as defendants does not appear from the pleadings or otherwise. An allegation as to the state in which those firms were doing business is not sufficient to show the citizenship of the individual partners. The relief sought is the marshaling of all the lien
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debts on the hotel and the opera house of the Great Southern Fire Proof Hotel Company, the sale of the property, and the distribution of the proceeds among the parties according to their respective rights. As no allusion was made to this latter at the argument before us, we do not now express any opinion upon the question whether the citizenship of the individuals composing the defendant partnerships doing business in Ohio is material to the jurisdiction of the circuit court. We leave that to be determined by the court below, if an application be made to amend the pleadings as to the citizenship of the parties.

Without considering the merits of the case, we are constrained to reverse the judgments of the circuit court of appeals and of the circuit court, and remand the cause for further proceedings consistent with this opinion.

Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties. If the amendment shows a case within the jurisdiction of the circuit court, the parties should be permitted to proceed to a final hearing; otherwise, the bill should be dismissed at the plaintiffs' costs without prejudice to another suit in a court of competent jurisdiction.

Reversed.

[459]*JOHN T. BOSKE, Sheriff of Kenton County, Kentucky, Appt.,
v.

DAVID N. COMINGORE.

(See S. C. Reporter's ed. 459-470.)

Appeal—Federal question—use of papers in custody of internal revenue collector—order by state court for their production—validity of Treasury regulations prohibiting it—protection of collector—habeas corpus to release him from custody of state court.

1. The question whether or not the Constitution of the United States allows regulations of the Treasury Department adopted by merely executive officers to be regarded as having the force of law is one that involves the construction or application of the Constitution of the United States, within the meaning of the provision of the act of Congress of March 3, 1891, with respect to appeals to be taken from the district or circuit courts direct to the Supreme Court of the United States.
2. The detention in prison by state authorities, of an officer of the revenue service of

NOTE.—As to jurisdiction of Federal courts on habeas corpus—see *Re Huse*, 25 C. C. A. 1, and note.

As to jurisdiction of United States courts to issue writs of habeas corpus—see note to *Re Rehnitz* (C. C. S. D. N. Y.) 4 L. R. A. 236.

As to power of Federal courts to issue writ of habeas corpus—see note to *Tinsley v. Anderson*, 43 L. ed. U. S. 92.

As to when habeas corpus will be issued—see notes to *United States v. Hamilton*, 1 L. ed. U. S. 490; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; *Pearce v. Texas*, 39 L. ed. U. S. 164.

the United States, whose presence at his post of duty is important to the public interests, presents such a case of urgency as will warrant the interference by writ of habeas corpus from a Federal court, even before final action by the state court, to determine whether or not the imprisonment is in violation of the Constitution or laws of the United States.

3. Regulations of the Treasury Department prohibiting a collector of internal revenue from producing records in his office, or copies thereof, in a state court, are within the power conferred upon the Secretary of the Treasury by U. S. Rev. Stat. § 161; and therefore an attempt of a state court to punish him for obeying such regulations will be in violation of his rights under the Constitution and laws of the United States, against which he will be protected by the Federal courts.

[No. 370.]

Submitted January 8, 1900. Decided April 9, 1900.

APPEAL from final order of the District Court of the United States for the District of Kentucky discharging an internal revenue collector from the custody of a sheriff. *Affirmed.*

See same case below, 96 Fed. Rep. 552.

The facts are stated in the opinion.

Messrs. John G. Carlisle, Henry M. Winslow and William S. Taylor submitted the cause for appellant. Messrs. Russell & Winslow and Winslow & Winslow were with them on the brief.

A habeas corpus proceeding is not proper to determine a question like the one arising in this case.

Hirsch v. Pomerooy, 57 U. S. App. 165, 87 Fed. Rep. 1005, 31 C. C. A. 350; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. See also *Ex parte Crouch*, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96, and cases cited.

An internal revenue collector is not justified in refusing to produce, in obedience to a *subpoena duces tecum* issued by a state court, the application or return made by the person who desires to pay the tax imposed by the statutes of the United States upon persons engaged in the retail liquor business, either by the nature of such documents or by alleged instructions from the Commissioner of Internal Revenue not to produce such papers for use in evidence in the state courts.

Re Hirsch, 74 Fed. Rep. 928.

The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.

United States v. Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. ed. 491.

Messrs. Henry M. Winslow, Clifton J. Pratt, and Winslow & Winslow filed a reply brief for appellant.

Assistant Attorney General Boyd submitted the cause for appellee:

Regulations made by the Secretary of the
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Treasury under § 251 of the Revised Statutes, not inconsistent with law, and fairly within its scope and purpose, and not infringing upon any existing legal rights of individuals have the force of law.

United States v. Hutton, 10 Ben. 268, Fed. Cas. No. 15,433; 15 Ops. Atty. Gen. 128.

Regulations made by the Commissioner, pursuant to the statutory authority, with the approval of the Secretary of the Treasury, in respect to the assessment and collection of internal taxes, have the force of statutes.

Re Huttman, 70 Fed. Rep. 699; *Re Weeks*, 82 Fed. Rep. 729; *Gratiot v. United States*, 4 How. 80, 11 L. ed. 884; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *United States v. Barrows*, 1 Abb. U. S. 351, Fed. Cas. No. 14,529; *United States v. Eliason*, 13 Pet. 291, 10 L. ed. 968.

The Federal government cannot dictate as to evidence in state courts, but it cannot be required to provide evidence for them; and the state has no right to Federal instruments of purely Federal character for proof, unless they are left within its reach, and these are not, but are put without that reach.

Re Weeks, 82 Fed. Rep. 732.

[460] *Mr. Justice Harlan delivered the opinion of the court:

This is an appeal from a final order of the district court of the United States for the district of Kentucky discharging appellee, United States internal revenue collector for the sixth collection district in Kentucky, from the custody of the appellant as sheriff of Kenton county in that commonwealth.

The discharge was upon the ground that the imprisonment and detention of the appellee were in violation of the Constitution and laws of the United States. That ruling presents the only question to be considered.

Under date of April 15, 1898, the Commissioners of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated certain regulations for the government of collectors of internal revenue, as follows:

"All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby pro-

[461]hibited from giving out any special tax *records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to *subpœnas duces tecum* or otherwise. Whenever such *subpœnas* shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy, and not to be permitted. As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a state court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

These Treasury regulations being in force, a proceeding was *instituted in the county [462] court of Carroll county, Kentucky—a court of limited jurisdiction—in the name of the commonwealth against Elias Block & Sons, for the purpose of ascertaining the amount and value of a large amount of whisky which, it was alleged, the defendants had in their bonded warehouses for a named period, but had not listed for taxation, and of enforcing the assessment and payment of state and county taxes thereon. Ky. Stat. § 4241.

In the progress of that proceeding the commonwealth of Kentucky, represented by the auditor's agent, took the deposition of Comingore, collector of internal revenue. In answer to questions propounded to him, the collector stated that Block & Sons, owners of a distillery, made monthly reports to his office of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises from 1887 on; that the defendants made application from time to time for permission to withdraw liquors from bond; and that such reports, commencing October 1, 1885, and ending July 1, 1897, were on the files of his office, but not under his control except as collector. He was then asked to file copies of those reports and make them part of his deposition. This he declined to do, "under § 3167 of the

Revised Statutes of the United States and the rulings of the department." That section reads: "§ 3167. If any collector or deputy collector, or any inspector or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of a manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the government." Being asked what rulings of the department he referred to other than § 3167 of the Revised Statutes, he said: "The department does not permit the giving out of anything contained in internal revenue returns or documents by a collector, storekeeper, or any other officer of a collection

[463] district *for purposes other than those which the statutes of the United States contemplate." That ruling, he said, was made by the Secretary of the Treasury through the Commissioner of Internal Revenue.

In consequence of the refusal of the collector to file and make part of his deposition copies of the above reports of the defendants, the notary public before whom his deposition was taken adjudged him to be in contempt, and ordered him to pay to the commonwealth a fine of \$5, and to be confined in the county jail for six hours, or until he was willing to furnish the copies called for, or permit access to the records of his office in order that information might be obtained to be used as evidence in the above case.

The matter having been reported by the notary public to the Carroll county court, as required by § 538 of the Kentucky Civil Code of Practice, that court made the following order:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained, and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky and also such facts as are stated in the reports made to said office by certain officers known as 'United States storekeepers,' and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquor on hand at the distillery of the defendants on the 15th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made or permit the plaintiff, its agent or attorneys, to make true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents

or attorneys to compare said copies with the originals and verify the same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and *for this [464] purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky. It is further adjudged that the action of the notary public, W. A. Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the commonwealth of Kentucky recover of said D. N. Comingore the sum of \$5 as a fine, and that he be taken by the sheriff of Kenton county, Ky., and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows: 'Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.' Also with the following request: 'Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895, and 1896.'"

This action of the county court having been brought to the attention of the collector, he still refused to give the copies called for or to allow access to or inspection of the records of his office for the purposes indicated by the questions propounded to him. He was thereupon again held by the notary public to be in contempt, and the petition states, that officer adjudged that "the commonwealth of Kentucky recover of your petitioner the sum of \$5 as a fine, and that he be taken by the sheriff or some constable of Kenton county, and confined in the jail of said county for the space of six hours, or until he shall signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector *of internal reve-

[465] nue of the United States for the sixth district of Kentucky, or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of *The Commonwealth of Kentucky v. Block et al.* in said county court," etc.

Having been taken into custody by the sheriff under this order, the collector sued out a writ of habeas corpus, and was discharged from custody by the order of the United States district court for the Kentucky district.

1. In the brief of the Assistant Attorney General some doubt is expressed whether we can take cognizance of this case upon appeal from the district court. Prior to the passage of the act of March 3, 1891, establishing the circuit court of appeals, an appeal from the final judgment of a district court on an application for a writ of habeas corpus by or on behalf of one alleged to be restrained of his liberty in violation of the Constitution or any law of the United States went first to the circuit court. U. S. Rev. Stat. § 763. But by the above act of 1891 it was provided that appeals or writs of error may be taken from the district courts or from the circuit courts direct to this court in certain cases, among others, "in any case that involves the construction or application of the Constitution of the United States." 26 Stat. at L. 826, 828, chap. 517, § 5. The present case belongs to that class. The appellee, who was discharged upon habeas corpus, invoked the protection of the Constitution against his being restrained of his liberty by the appellant resting under an order of commitment issued by an inferior state court; and the judgment of the district court proceeded upon the ground that the proceedings against him were inconsistent with the laws of the United States and with regulations of the Treasury Department legally prescribed under those laws. Throughout, the contention of the appellant has been that the Constitution forbade the giving of the force of law to those regulations adopted by merely executive officers. We think the case is properly here on appeal as one involving the construction and application of the Constitution of the United States.

[466] 2. Of the power of the district court to discharge the appellee *if he was held in custody in violation of the Constitution of the United States, no doubt can be entertained. It is true that in *Ex parte Royall*, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734, it was said that, although a court of the United States had power to discharge one held in custody by state authorities in violation of the Constitution of the United States, it was not bound to interpose immediately upon application being made for the writ, but should exercise the discretion with which it was invested "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." Hence, the general rule that the courts of the United States should not interfere by habeas corpus with the custody by state authorities of one claiming to be held in violation of the Constitution or laws of the United States, until after final action by the state courts in the case in which such custody exists. *Ex parte Royall*, above cited; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30, and authorities there cited; *Whitten v. Tom-*

linson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297, and authorities there cited. But to this general rule there are exceptions which are thus indicated in *Ex parte Royall*: "When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

The present case was one of urgency, in that the appellee was an *officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the department to which he belonged. The district court therefore did not err in determining the question of constitutional law raised by the application for a writ of habeas corpus, and rendering final judgment.

3. We come, then, to inquire whether the imprisonment of the appellee was in violation of the Constitution or laws of the United States. This question was fully examined in the elaborate and able opinion of Judge Evans of the district court. 96 Fed. Rep. 552.

The commitment of the appellee was because of a refusal to file with his deposition copies of certain reports made to him by Block & Sons, distillers, of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises during a specified period. Manifestly, he could not have filed the copies called for without violating regulations formally promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. If these regulations were such as the Secretary could legally prescribe, then, it must be conceded, the state authorities were without jurisdiction to compel the collector to violate them.

The Commissioner of Internal Revenue is an officer in the department of the Treasury. U. S. Rev. Stat. § 319. And the Secretary of the Treasury, as the head of an executive department of the government, was authorized "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and pres-

ervation of the records, papers, and property appertaining to it." U. S. Rev. Stat. § 161.

[468] Now the reports or copies of reports in the possession of the collector—for not producing copies of which he was adjudged to be imprisoned—were records and papers appertaining to the business of the Treasury Department and belonging to the United States. The Secretary was authorized by statute to "make regulations, not inconsistent with law, for the custody, use, and preservation of such records, papers, and property. The Constitution gives Congress power to make all laws necessary and proper for carrying into execution the powers vested by that instrument in the government of the United States or in any department or officer thereof. Const. art. 1, § 8. That power was exerted by Congress when it authorized the Secretary of the Treasury to provide by regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. The regulations in question may not have been absolutely or indispensably necessary to accomplish the objects indicated by the statute. But that is not the test to be applied when we are determining whether an act of Congress transcends the powers conferred upon it by the Constitution. Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to "those alone without which the power would be nugatory;" for, "all means which are appropriate, which are plainly adapted" to the end authorized to be attained, "which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." *McCulloch v. Maryland*, 4 Wheat. 316, 415, 421, 423, 4 L. ed. 579, 603, 605. In the more recent case of *Logan v. United States*, 144 U. S. 263, 283, 293, 36 L. ed. 429, 435, 439, 12 Sup. Ct. Rep. 617, 622, 626, this court, referring to the above constitutional provision, said that, "in the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." Again: "Every right created by, arising under, or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in [469] *the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

Can it be said that to invest the Secretary of the Treasury with authority to prescribe

regulations not inconsistent with law for the conduct of the business of his department, and to provide for the custody, use, and preservation of the records, papers, and property appertaining to it, was not a means appropriate and plainly adapted to the successful administration of the affairs of that department? Manifestly not. The bare statement of the proposition suggests this conclusion, and extended argument to support it is unnecessary.

This brings us to the question whether it was inconsistent with law for the Secretary to adopt a regulation declaring that all records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control "for purposes relating to the collection of the revenues of the United States only," and that collectors "have no control of them, and no discretion with regard to permitting the use of them for any other purpose."

There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public despite the wishes of the department. That cannot be admitted. The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue *laws, to furnish information as [470] to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under § 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except

to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

In our opinion the Secretary, under the regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.

The judgment of the District Court is affirmed.

[471] *THOMAS M. ADAMS and E. C. Means, Administrators, with the Will Annexed, of Thomas W. Means, *Petitioners*,
v.

BENJAMIN R. COWEN, Evan F. Williams, and A. S. Frazer, Trustees.

(See S. C. Reporter's ed. 471-485.)

Wills—construction of—advancement as a gift—receipt for legacy without consideration.

1. Moneys advanced by testator to a son during his lifetime and after the will was made, whatever the amount, and whether charged on his books or not, cannot be deducted from the share of such son under a will reciting that he has made advances to children, which are charged to them on his books, and may make further advances which may be charged on his books to their respective accounts, and that he desires that equal provision made for each shall be in addition to the "advances made or that may hereafter be made," and that "said advances made and that may hereafter be made be treated, not as advances, but as gifts, not in any manner to be accounted for."
2. A receipt acknowledging payment of a legacy which is not paid, except by the cancellation of an alleged debt of the legatee to the testator for advances which, by the will, were to be treated as a gift to the son, will not be upheld when it was obtained by the representatives of the estate, who were in a fiduciary relation to the legatee, and who insisted that he was morally, if not legally, bound to execute the release, thereby securing it from him, when he was by business reverses broken in spirit and wavering in his purposes.

NOTE.—*That the intention of the testator is to govern in the interpretation of wills*—see notes to *Dougherty v. Rogers* (Ind.) 3 L. R. A. 847; *Boston Safe Deposit & T. Co. v. Coffin* (Mass.) 8 L. R. A. 740; *Davidson v. Coon* (Ind.) 9 L. R. A. 584; *Masterson v. Townshend* (N. Y.) 10 L. R. A. 816; *Pray v. Belt*, 7 L. ed. U. S. 309.

As to doctrine of advancements; distinguished from gift; intention; effect on legacy—see *Jaques v. Swasey* (Mass.) 12 L. R. A. 566, and note.

As to effect and conclusiveness of receipts—see note to *Baker v. Nachtrieb*, 15 L. ed. U. S. 528.

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[No. 113 of October Term, 1898.]

Argued January 9, 10, 1899. Affirmed by Divided Court May 22, 1899. [See Book 43, p. 1188.] Leave granted to file petition for rehearing May 22, 1899. Rehearing granted October 30, 1899. Reargued January 10, 11, 1900. Decided April 16, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision reversing a decree of the Circuit Court dismissing a bill against administrators. *Affirmed.*

See same case below, 47 U. S. App. 676, 80 Fed. Rep. 448, 25 C. C. A. 547.

Statement by Mr. Justice **Brewer**:

*On November 16, 1891, the respondents, [472] trustees for the wife and children of William Means, filed their bill in the circuit court of the United States for the district of Kentucky against the petitioners as administrators (with the will annexed) of Thomas W. Means, deceased, and John Means, a son of said Thomas W. Means. The case passed to hearing in that court upon pleadings and proofs, and resulted in a decree, on July 31, 1895, in favor of the defendants, dismissing the bill. From such dismissal the plaintiffs appealed to the circuit court of appeals for the sixth circuit, which court, on February 8, 1897, reversed the decree of dismissal, and entered a decree in favor of the plaintiffs. 47 U. S. App. 439, 78 Fed. Rep. 536, 24 C. C. A. 198, 47 U. S. App. 676, 80 Fed. Rep. 448, 25 C. C. A. 547. On May 24, 1897, a petition was filed in this court for a certiorari, which was allowed, and on December 6, 1897, the certiorari and return were duly filed. At the October term, 1898, of this court, after argument and on May 22, 1899, the decree of the Circuit Court of Appeals was affirmed by a divided court. Thereafter, upon petition, a rehearing was ordered, and the case was argued at the present term before a full bench.

*The facts are these: Thomas W. Means, [473] a resident of Ashland, Kentucky, died there on June 8, 1890, leaving an estate consisting chiefly of personal property, which was appraised (including the notes of his son, William Means, for \$136,035.75) at \$752,302.44. He left four children, John Means, William Means, Margaret A. Means, and Mary A. Adams, and one grandson, Thomas M. Culbertson, the only child of a deceased daughter. Some ten years prior to his death, and on July 20, 1880, he made a will, in which, after provisions for the payment of his debts, funeral expenses, and expenses of administration, were these two items:

"Item 4. I give, devise, and bequeath all the residue and remainder of my estate, personal, real, and mixed, wherever situated or located, of which I shall die possessed, to be equally divided among my four children, John Means, William Means, Mary A. Adams, and Margaret A. Means, and my grandson, Thomas M. Culbertson (son and sole heir of my deceased daughter, Sarah Jane Culbertson), who shall be living at the time of my decease, and the issue of any child

now living, and of said grandson, who may then have deceased, such issue taking the share to which such child or grandson would be entitled if living. But said share given, devised, and bequeathed to said grandson or his issue is to be held in trust as hereinafter provided, and to be subject to the provisions hereinafter contained as to said grandson's share.

"Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision, herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made and that may hereafter be made, and that in the division, distribution, and settlement of my said estate said advances made and that may hereafter be made, be treated, not as advancements, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them, or the issue of any of them."

[474] *Thomas W. Means was a prosperous iron manufacturer, who had, as stated, accumulated in his lifetime a large estate. For many years he had been in the habit of letting his children have money. This he had been doing for at least twenty-five years before the making of the will. This money was not given to them in equal sums at regular or irregular intervals. In other words, he was not making a partial and equal distribution of his estate in advance of his death, but the money was paid to or for one or another of his children as occasion seemed to call for it. Accounts were entered with each of these children in his books, and the money thus paid to or for them was charged against them in these accounts, so that upon the face of the books they stood as debtors to him for the amounts so charged. The amounts thus charged were sometimes large. The accounts were often reduced by money or property returned to the father. So the father dealt separately with each child, letting him or her have money whenever in his judgment the interest of the child called for it. He was helping them in their business, paying their debts, and otherwise using his large properties for their benefit. At the same time the accounts were kept in his books in such a way as to indicate that he retained a claim against each child for the balance shown on such account. He made memoranda on his books, such as this at the head of John's account: "This account and the accounts of William Means and Mary A. Adams are not to be charged with interest when final settlement is made, or at any time. Thomas W. Means." With that as the relation between himself and children, Thomas W. Means made the will containing the two items above quoted. He was then seventy-seven years old. At the date of the

will the accounts showed the following debt- or balances:

John	\$79,214 36
William	58,409 54
Mrs. Adams	51,207 48
Margaret	39,120 78
Mrs. Culbertson	29,609 82

In 1888 a bank in Cincinnati, of which William was president, failed, a failure which brought financial ruin to William. To *relieve him from the embarrassment and[475] dangers which threatened by reason of such failure, a large sum of money was paid out by Thomas W. Means for William's benefit. The question presented in this case is whether the money thus paid out is to be held a part of William's share of his father's estate, or whether it is to be deducted from the estate and the division made of the balance between the five legatees.

Mr. Lawrence Maxwell, Jr., argued the cause and, with Messrs. John F. Hager and Julius L. Anderson filed a brief for petitioners.

Messrs. Judson Harmon and John J. Glidden argued the cause and, with Mr. H. P. Whitaker, filed a brief for respondents.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Brewer delivered the opinion-[475] of the court:

The primary question is upon the construction of the fifth item of the will of Thomas W. Means. If there had been no such item of course all sums due from the children and grandchild to the father and grandfather would be part of the property of his estate and to be counted in determining the sum to be divided among the five in accordance with item 4. But item 5 evidently contemplated that some amounts were to be deducted from the gross sum of the decedent's property before a division was to be made. What were those deductions? What did the testator intend should be deducted? For, in the absence of some absolute and controlling rule of law to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of the circumstances surrounding him at the date of its execution, always control as to the disposition of the estate. Without entering into any discussion we make these quotations from prior decisions of this court. In *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322, it was said by Chief Justice Marshall:

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. [*Davis v. Stephens*] 1 Dougl. 322; [*Perrin v. Blake*] 1 W. Bl. 672. This principle *is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions which he wills to be performed after his death.' 2 Bl. Com. 499. These intentions are to be collected from his

words and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. . . . No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. . . . Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly ([*Gulliver v. Poyntz*] 3 Wils. 141) 'that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'

And in *Blake v. Hawkins*, 98 U. S. 315, 324, 25 L. ed. 139, 141, Mr. Justice Strong used these words:

[477] "It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition *of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended."

See also *Clarke v. Boorman*, 18 Wall. 493, 21 L. ed. 904; *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164; *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631.

In the light of these decisions we turn to inquire, What was the intention of the testator? Suppose that on the next day after making this will he had died, upon what basis would the distribution of his estate have been made? Obviously by first canceling all the gifts and advances made to his children, and then distributing the balance equally between the five. For he declares that the equal provision made by item 4 shall be in addition to his advances, "and that in the division, distribution, and settlement of my said estate said advances . . . be treated, not as advancements, but as gifts not in any manner

to be accounted for by my said children and grandson, or any of them, or the issue of any of them." Language could not be more clear. Nothing could express the intent of the testator more forcibly than these words. Whatever he had done in the way of letting his children and grandson have money was to be taken as a matter of gift, for which none of the recipients was to account, and only his estate, less such gifts and advances, was to be equally distributed between the legatees named. And this intent, which is so clearly disclosed in respect to what he had already done, is equally clear in respect to what he might do thereafter. He says that he "may make further advances to them respectively, or to some of them," and declares that in the division, distribution, and settlement of his estate "said advances . . . that may hereafter be made, be treated, not as advancements, but as gifts." In other words, as he had used some of his property in the past again and again to help his children, he saw that it was likely in the future he might do the same thing, and declared, not only that every dollar he had let them have in the past, but also every dollar that he might let them have in the future, should be taken, "not as advancements, but as gifts." Not only that, but that such gifts should not be accounted for in any manner *by any of the recipients, and that only the balance of his estate, after all these personal gifts were canceled, should be distributed equally among the legatees. As in the past he had freely used his estate for the benefit of his children, so he announced his intention to deal as freely with it in the future, and to use any part of it in any way that he might deem best for the interests of any one of his children, and declared that such help given, or that might be given in the future, should not be made the basis of any accounting between his legatees. He knew he had a large estate, and that, whatever he might do with a fraction of it, there would be an abundance left for each of them—enough to place them beyond the reach of want. He had the large and generous paternal feeling; that feeling which prompts the parent to care as best he can during his lifetime for each of his children according to their respective wants, and he did not mean that anything he did for one child should be challenged by another. He doubtless recalled, as every parent does, that during infancy and childhood one child had called for more attention and care, more hours of toil and watch, than another. He realized that as they had grown to manhood and womanhood, and entered into their various places in life, there had been different calls for pecuniary assistance, and that doubtless there would be differences in the future. He knew that he had responded to every need of each child in its early days, was trying in the later days of manhood and womanhood to make like responses, and felt that while life should be prolonged to him he would be under the same pressure of affection to each. He believed that after he had done in his lifetime what in his judgment they severally required there would be an abundance of his estate

left for distribution, and intended that all dealings between himself and each of his children should be wiped out—there should be a *tabula rasa*—and that what was left (and it would be a large estate) after having discharged to each one his paternal obligation, the untouched estate, should be distributed equally. We do not see how that purpose and thought of his could be expressed more clearly and forcibly than it was done in the fifth item of the will, and it would be a sad commentary on the wisdom of the law if that purpose was not recognized and enforced.

[479] *It is said that there is an expressed limitation on this generous purpose in that he describes the advances already made as “charged to them respectively on my books,” and that as to further advances they “may be charged on my books to their respective accounts,” and that in order that any subsequent advances should come within the scope of this provision they should be formally charged on his books “to their respective accounts.” We cannot believe that the generous purposes of the father were intended to be limited by the action of a bookkeeper. In the full possession of his faculties and watchful over his books he knew what entries had been made, and that they told the full story of his advances to his children, and so, not unnaturally, he referred to those books as evidence of those advances, but as to future advances he says only that they “may be charged on my books,” and surely he did not make the possibilities of such entries the measure of his generosity. He was seventy-seven years of age when this will was made. He could not foresee the length of days which might be allotted to him nor the possible failure of any of his faculties—and indeed before his death there was a failure of eyesight, and possibly, towards the last, of his mental powers. Of course, when he made this will he knew the possibility of these things, and it is inconsistent with the whole spirit of the will to suppose that he meant that his generosity should be determined and measured by the fidelity or forgetfulness of a mere clerk. No man acting in a spirit of generous affection ever contemplates that a stranger shall measure the scope and reach of such affection. It is a matter personal to himself, the beginning and ending of which, the scope and limits of which, he and he only is to determine.

With this understanding of the scope and purpose of this clause in the will, we pass to a consideration of what took place in respect to the advances for the benefit of his son William. At that time the father was feeling the weaknesses of old age, his eyesight was failing, and he had called his son John to act as his agent in the care of his estate. News of the disaster to the bank and the effect of its failure on the welfare of his son William came to the father, and John went to Cincinnati to investigate, came back [480] and reported the situation as he had *found it; told his father of the personal loans made to William by the bank, and that they were

secured by collateral. We quote his testimony as to the conversation with his father:

Q. 832. What communication did you have with your father upon your return to Ashland?

A. I told him of William's debt to the bank—individual debt—and what it would probably amount to, and that friends here advised it was for William's interest that that debt, individual debt, should be paid. I told him that the securities which William had turned over to the bank as security on the debt would some of them probably be sacrificed at a sale here—that I thought we had better pay the debt.

Q. 833. What did he say?

A. He said that he was satisfied to do whatever I thought was best.

Q. 834. What else did he say about the matter other than to say to you that he was satisfied to do whatever you thought was best?

A. Well, I think I have answered it. I cannot repeat the conversation between us any more than the general result of it.

On the faith of this conversation John returned to Cincinnati, and having raised the needed money, paid off William's obligations to the bank and took up the collateral, whose face value was largely in excess of the indebtedness. That the collateral when properly utilized, as it apparently was, did not pay the amount of William's indebtedness to the bank, is immaterial, nor is it material that William gave a note for the amount of this advance, as well as other notes afterwards for like advances, and that such notes were entered on the books of the father in the account of “bills receivable.” It appears that this payment was not made at the request of William, but made upon consultation between the father and his son and agent, John, and made probably with the expectation that the collateral, if properly used, would pay the amount of the indebtedness.

And here it becomes important to consider the relations of John Means to his father. As the father grew old and his faculties began to fail he naturally called his oldest son John into his service, and John acted during the last years of his father's life as his agent, and it was really at John's suggestion *that the money was advanced for the benefit [481] of William. But in calling John to his service as agent and caretaker of his property there is nothing to indicate that the father meant that the son should do anything to prevent the full carrying out of the purpose expressed in his will. He had no express authority, and indeed no implied authority, to alter that instrument in which had long been recorded the settled determination of the father. So that whatever he may have done in caring for the property as the agent of his father during his lifetime is not to be taken, unless there are other circumstances to indicate the fact, as showing an intent on the part of the father to change in any way the scope and effect of the will.

And indeed it is but simple justice to John Means to say that from the evidence we are satisfied that there was no thought or intent on his part to change or limit his father's will. He did not intend by any strategy or device to thwart his father's purpose of kindness to any of his children, nor did he pursue the course he did in respect to this advance with the idea that he could satisfy his father's desire to help William and at the same time place the act of help outside the reach of item 5 of the will, and thus advance the pecuniary interest of himself and the other legatees not thus helped by his father. Very likely he was uncertain as to the construction which would be placed upon item 5; possibly thought that even if it meant exactly that which we are clear it does mean, there might be an impropriety at his father's age and feebleness in his advancing so much money for the benefit of a single child, and in order that the transaction, in case of his death before that of his father, might be clearly disclosed, took notes from William and entered them on his father's books under the head of "bills receivable." It appears from some of the testimony that there was also a thought of protecting William's share in the estate which by the death of the father might soon come to him, from attacks of creditors, and it may also be that partly on that account William executed the notes which were received for these moneys. At any rate, the correspondence between the brothers at the time of these transactions indicates that they were friendly, and that John was willingly doing that which he

[482] thought the father desired in using a portion of the father's estate in helping William out of his troubles. But whatever John or William may have purposed or thought, the evidence does not indicate that the father intended that this held extended to William should stand in any different attitude to that which he had theretofore extended to others of his children, or meant that this advance should not come within the scope of the provisions in item 5; and that is the fundamental question in the case. It is the father's estate which is being distributed, and it is the duty of the courts to see that it is distributed according to his expressed intention.

The testimony in this case is voluminous, and there are many facts and circumstances disclosed in it throwing light on the questions which we have considered. We have deemed it unnecessary to refer to them in view of the very full and satisfactory opinion filed by the circuit court of appeals, in which these facts and circumstances are recited and considered at length, and which in the main meets our approval.

One further question remains for consideration: The father died June 8, 1890. The will was duly probated, and administrators with the will annexed were appointed and qualified. On October 16, 1890, William Means executed and delivered to these administrators the following receipt:

Ashland, Ky., October 16, 1890.

Received of Thomas M. Adams and E. C. 177 U. S.

Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty-five and 75-100 dollars, being a part of my distributable share as legatee under said will applied by them as ordered by me upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz.:

[Here follows description of ten notes, with balance due on each, aggregating \$136,035.75.]

This receipt is given in pursuance of settlement made October 6, 1890.

William Means.

Attest: John F. Hager.

A. E. Lampton.

*The validity of this receipt or release was [483] challenged by the respondents (plaintiffs in the circuit court), who claimed title to that portion of the estate of Thomas W. Means passing under the will to William Means by virtue of the following proceedings: At the May term, 1891, of the common pleas court of the county of Greene, state of Ohio, a decree was entered in a cause then pending in said court between William Means on the one side and on the other Martha E. C. Means, his wife, and their children, Gertrude E. Means and Pearl E. Means and Patti Means, a minor, by her next friend, her mother, which, after finding that in the lifetime of Thomas W. Means, for a good and valuable consideration, William Means made an agreement with his wife and children whereby he settled upon them, through trustees, for their maintenance and support, his interest in expectancy in the estate of his father, Thomas W. Means, transferred all such interest to the plaintiffs as trustees. This decree having been entered after personal service upon William Means, of course binds him both by its findings and order. How far the findings in such decree as to the agreement and the time at which it was made may affect the action of the administrators is a matter discussed in the briefs, but which we deem it unnecessary to consider.

Neither do we stop to consider the charge of fraudulent conduct on the part of the administrators, for, independently of those considerations, we are of opinion that equity will not enforce this receipt or release. It was a surrender by William Means, without any consideration, of practically his whole interest in his father's estate, amounting to between \$100,000 and \$200,000. The administrators were acting in a fiduciary capacity. Their obligations to each of the beneficiaries were equal. Their duty was to dispose of the property placed in their hands according to the expressed will of the testator, and they were not at liberty to act in the interests of one legatee as against those of another. If they were doubtful as to the meaning of any clause in the will they should have applied to the court for its construction and direction. If they chose to act upon their own interpretation of its meaning they should have so acted, and not sought to conclude any of the legatees by a contract *binding him to [484]

accept their interpretation. As shown by papers introduced in evidence signed by William Means, they proceeded with more than promptness and with great activity and energy to secure this and other releases. Obviously William Means was in such a condition as to require that they who were in fact trustees of his interests should seek to protect instead of destroying them. We think the evidence justifies that which was said by the court of appeals in its opinion:

"William had lost all his property, and was in very straitened circumstances. Since his downfall he has been broken in spirit and wavering in his purposes. He seems at times to have been impressed that the administrators had a moral, if not a legal, claim upon him, that he should yield up his legacy to the estate, and this claim was pressed and insisted upon by the administrators. That they had no such legal claim upon him we have already determined. His brother and sisters all being in affluent circumstances, and his own family in needy circumstances, that he should have voluntarily given up the whole of this large sum, with no mistake in regard to what his legal rights were, it is difficult to believe. It amounted simply to a gift to the administrators for the benefit of the other legatees, whose only claim rested on the bounty of the testator. Courts of equity view such transactions with distrust, and, if the circumstances indicate that the trustee has dealt with the beneficiary unjustly, will not hesitate to set them aside. The absence of any adequate consideration in itself raises a presumption of unfairness which the trustee is bound to repel." [47 U. S. App. 467, 78 Fed. Rep. 552, 24 C. C. A. 214.]

While a man in the full possession of his faculties and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the situation of the beneficiary, and has obtained from him, even for only the benefit of other beneficiaries, large property without consideration, it will refuse to uphold the transaction thus accomplished. *Taylor v. Taylor*, 8 How. 183, 12 L. ed. 1040; *Comstock v. Herron*, 6 U. S. App. 626-637, 55 Fed. Rep. 803, 5 C. C. A. 266, and cases cited; 1 Story, Eq. Jur. §§ 307, 308; 2 Pomeroy, Eq. Jur. §§ 951, 958, [485] 1088. So, without considering the *debatable questions presented in respect to this receipt or release, we are of opinion that the circuit court of appeals was right in refusing to uphold it.

There is nothing else in the case that seems to us to call for consideration. We find no error in the conclusions of the Circuit Court of Appeals, and its decree is affirmed.

Dissenting: Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brown, and Mr. Justice White.

MAST, FOOS, & COMPANY, *Petitioner*,
v.
STOVER MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 485-495.)

Federal courts—comity—following prior decision in patent case—patent for windmill—lack of invention—ordering dismissal of bill before answer.

1. A circuit court of appeals is not bound to affirm an order of a circuit court which, upon the ground of comity, followed the decision of the circuit court of appeals of another circuit with reference to the validity and scope of a patent, but may investigate the matter of the validity and scope of the patent for itself, since comity is not a rule of law, but simply a rule of expediency.
2. The Supreme Court of the United States will not reverse a decision of a lower court, if correct upon the merits, simply because the lower court may not have sufficiently recognized the doctrine of comity.
3. The device of the Martin patent, No. 433,531, for an improvement in a windmill, which consists of the combination of an external toothed pinion with an internal toothed spur wheel, is invalid for lack of invention, because that kind of a combination had been previously well known in other machinery.
4. The application of a patented device to a use which was new only in the patented machine, and was well known in other machinery, constitutes mere mechanical skill, and does not constitute a patentable invention.
5. On appeal from an order granting a temporary injunction the court may properly order the dismissal of the bill before the filing of an answer or the taking of proofs, where the bill is obviously devoid of equity upon its face, and its invalidity cannot be cured by amendment.

[No. 149.]

Argued February 1, 2, 1900. Decided April 23, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree dismissing a bill in equity for the infringement of a patent. *Affirmed.*

See same case below, 60 U. S. App. 325, 89 Fed. Rep. 333, 32 C. C. A. 231.

NOTE.—As to patentability of inventions—see notes to *Cornlng v. Burden*, 14 L. ed. U. S. 683; *Thompson v. Bolsselier*, 29 L. ed. U. S. 76; *Grant v. Walter*, 37 L. ed. U. S. 553; *Market Street Cable R. Co. v. Rowley*, 39 L. ed. U. S. 284; *Dashlell v. Grosvenor*, 40 L. ed. U. S. 1025.

As to the effect upon the circuit court of appeals of previous adjudications as to the validity and construction of patents—see notes to *National Cash Register Co. v. American Cash Register Co.* 3 C. C. A. 565; *Thomson-Houston Electric Co. v. Hoosick R. Co.* 27 C. C. A. 427; *United States Freehold Land & Emigration Co. v. Gallegos* 32 C. C. A. 484.

As to review in circuit court of appeals of interlocutory decrees in patent cases—see notes to *Consolidated Piedmont Cable Co. v. Pacific Cable R. Co.* 3 C. C. A. 572; *Southern P. Co. v. Earl*, 27 C. C. A. 189; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 484.

Statement by Mr. Justice Brown:

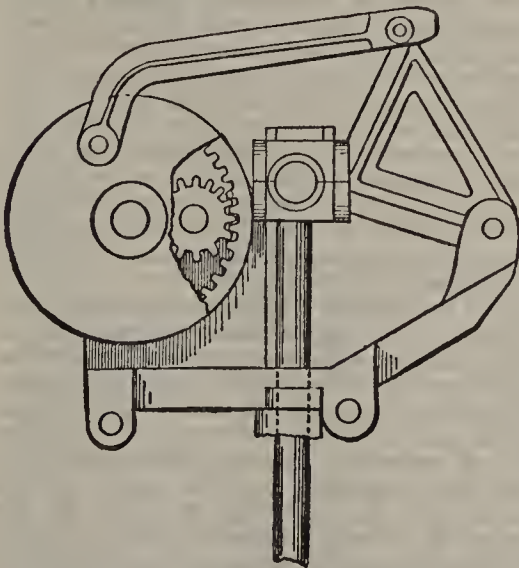
[486] This was a writ of certiorari to review a decree of the circuit court of appeals dismissing a bill in equity brought for *the infringement of a patent, and appealed to that court from an order of the circuit court for the northern district of Illinois, granting a preliminary injunction. The bill was filed by the petitioner, Mast, Foos, & Company, an Ohio corporation, and was founded upon letters patent No. 433,531, granted to the petitioner, upon the application of one Samuel W. Martin, for an improvement in windmills.

In his specification the patentee states that the "invention consists, essentially, of an improved back gear organization involving an external toothed pinion, and an internal toothed spur gear, the pinion being mounted on the wheel shaft, and the gear having formed on or connected with it the wrist pin, to which the operating pitman is attached, whereby the speed of the main shaft as applied to the wrist pin and pitman is reduced, and whereby, also, all pounding and lost motion is prevented as the pitman connection passes over the center and changes from a pushing to a pulling action. This object is accomplished by the fact that a plurality of the pinion teeth are always engaged with the internal spur gear, resulting in giving a perfectly uniform and smooth and noiseless reciprocating motion to the actuating rod, thereby prolonging the life of the machine by saving it from constant jarring and preventing wear and tear."

"The freedom of the organization from lost motion and sudden jerks as the wrist pin passes over the center renders the operation of the pump smooth and regular. This increases the effectiveness of the pump, and prevents undue wear and tear."

The following diagram illustrates the patented combination:

[487]



Petitioner sought a recovery only upon the first claim:

"1. The combination, with a windmill driving shaft and a pinion thereon, of an in-

ternal toothed spur wheel mounted adjacent to the said shaft and meshing with said pinion, a pitman connected with the spur wheel, and an actuating rod connected with the pitman."

Almost immediately upon filing the bill motion was made for a preliminary injunction, which was granted, largely upon the authority of an opinion of the circuit court of appeals for the eighth circuit in the case of *Mast, F. & Co. v. Dempster Mfg. Co.* 49 U. S. App. 508, 82 Fed. Rep. 327, 27 C. C. A. 191, 85 Fed. Rep. 782. An appeal was taken from that order to the circuit court of appeals, which not only reversed the order for the injunction, but dismissed the bill. 60 U. S. App. 325, 89 Fed. Rep. 333, 32 C. C. A. 231.

Whereupon petitioner applied for and was granted a writ of certiorari from this court.

Mr. H. A. Toulmin and **Lysander Hill** argued the cause and filed a brief for petitioner:

When a bill prays for injunction and other relief, it is error to dismiss it upon an injunction motion without allowing the cause to proceed regularly to final hearing upon full proofs.

Hummert v. Schwab, 54 Ill. 142; *Brockway v. Rowley*, 66 Ill. 99; *Pullen v. Baker*, 41 Tex. 419; *Strong v. Harrison*, 62 Miss. 61; *Walsh v. King*, 74 Mich. 350, 41 N. W. 1080; *Makemson v. Kauffman*, 35 Ohio St. 444; *Augusta Nat. Bank v. Printup*, 63 Ga. 570; *Johnston v. Alexander*, 6 Ark. 302; *Robinson v. Mays*, 76 Va. 708; *Noyes v. Vickers*, 39 W. Va. 30, 19 S. E. 429; *Knox v. The Coroner*, 13 La. Ann. 88; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 599.

The appeal taken under § 7 of the act of March 3, 1891, did not bring up the "merits" of the case, but only the question whether the judge below had, in granting the injunction, exercised his discretion providently or improvidently.

William C. Atwater & Co. v. Castner, 50 U. S. App. 394, 88 Fed. Rep. 642, 32 C. C. A. 77.

The circuit court of appeals dismissed the bill upon evidence taken in violation of the express requirements of the statutory rules of this court and of the statutes of Illinois.

Myers's (Ill.) Rev. Stat. chap. 51, §§ 24-38; 27 Stat. at L. 7 (act March 9, 1892).

The rule of comity, so far at least as concerns the Federal system of courts, is a rule of the highest wisdom and expediency.

Electric Mfg. Co. v. Edison Electric Light Co. 18 U. S. App. 637, 61 Fed. Rep. 834, 10 C. C. A. 106; *Beach v. Hobbs*, 82 Fed. Rep. 916.

Messrs. Charles K. Offield and **Charles C. Linthicum** argued the cause and, with **Mr. Loren L. Morrison**, filed a brief for respondent:

The circuit court of appeals had jurisdiction and power, upon an appeal from an interlocutory decree granting a temporary injunction, to direct a final decree dismissing the bill upon the record presented.

Smith v. Vulcan Iron Works, 165 U. S.

518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; *Knowville v. Africa*, 47 U. S. App. 74, 77 Fed. Rep. 501, 23 C. C. A. 252; *Curtis v. Overman Wheel Co.* 20 U. S. App. 146, 58 Fed. Rep. 784, 7 C. C. A. 493; *Magic Light Co. v. Economy Gas-Lamp Co.* 97 Fed. Rep. 87, 38 C. C. A. 56.

This court has frequently denied the title of inventor to improvers in the mechanical arts, where the inventions improve the particular device to which they are applied, only in the narrow sense of carrying forward an old idea.

American Road Mach. Co. v. Pennock & S. Co. 164 U. S. 26, 41 L. ed. 337, 17 Sup. Ct. Rep. 1; *Wright v. Yuengling*, 155 U. S. 47, 39 L. ed. 64, 15 Sup. Ct. Rep. 1.

[488] *Mr. Justice **Brown** delivered the opinion of the court:

1. Plaintiff complains of the action of the circuit court of appeals in refusing to follow the opinion of the circuit court of appeals for the eighth circuit in a case of this same plaintiff against the Dempster Mill Manufacturing Company, 49 U. S. App. 508, 82 Fed. Rep. 327, 27 C. C. A. 191, and in reversing the order of the circuit court, which, upon the ground of comity, followed the judgment of that court with respect to the validity and scope of the patent. Its contention is, practically, that the circuit court of appeals should have been governed by the prior adjudication of that court, and, so far, at least, as concerned the interlocutory motion, should have accorded it the same force and dignity as is accorded to judgments of this court. Premising that these considerations can have no application in this court,—whose duty it is to review the judgments of all inferior courts, and in case of conflict to decide between them,—we think the plaintiff overstates somewhat the claims of comity.

Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the *law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the

judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts.

The obligation to follow the decisions of other courts in patent cases of course increases in proportion to the number of courts which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority. So, too, if a prior adjudication has followed a final hearing upon pleadings and proofs, especially after a protracted litigation, greater weight should be given to it than if it were made upon a motion for a preliminary injunction. These are substantially the views embodied in a number of well-considered cases in the circuit courts and circuit courts of appeals. *Macbeth v. Gillinder*, 54 Fed. Rep. 169; *Electric Mfg. Co. v. Edison Electric Light Co.* 18 U. S. App. 637, 61 Fed. Rep. 834, 10 C. C. A. 106; *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.* 54 Fed. Rep. 678, and cases cited; *Beach v. Hobbs*, 82 Fed. Rep. 916, 63 U. S. App. 626, 92 Fed. Rep. 146, 34 C. C. A. 248; see, also, *Newall v. Wilson*, 2 De G. M. & G. 282.

Comity, however, has no application to questions not considered by the prior court, or, in patent cases, to alleged anticipating devices which were not laid before that court. As to such the action of the court is purely original, though the fact that such anticipating devices were not called to the attention of the prior court is likely to open them to suspicion. It is scarcely necessary to say, however, that when the case reaches this court we should not reverse the action of the court below if we thought it correct upon the merits, though we were of opinion it had not given sufficient weight to the doctrine of comity.

2. The principal mechanism of an ordinary pumping windmill is directed to the conversion of the rapid rotation of the wind wheel into the perpendicular reciprocating movement of an ordinary pumping shaft. This is accomplished in much the same way that the revolution of a water wheel is made to operate an upright saw, namely, by means of a pitman—of different *forms, but always [490] with the object of converting one motion into another. In doing this the revolving wheel, during one half of a complete revolution, pulls, and during the other half pushes upon the pitman. This change from a pulling to a pushing motion is accompanied, as the pitman rod passes over the center of motion, by a pounding, which not only produces a peculiar noise, but a strain upon the mechanism, resulting in frequent breakages. These poundings naturally increase in force as the mechanism becomes worn, and are sometimes heavy enough to strip the cogs from the wheels. Before the Martin patent the device usually employed was a small external toothed wheel or pinion mounted upon the shaft of the wind wheel, the cogs of which interlaced with the teeth or cogs of a large spur wheel, also externally toothed and revolving at a greatly reduced speed, to

which the pitman bar was attached. As both wheels were fitted with teeth on the outer edge of the rim, the consequence was that as each wheel presented its convexity to the other, but one or two teeth of either wheel engaged with the corresponding teeth of its fellow, and fractures of the teeth were frequent. There was also a tendency of the two wheels to draw apart. Martin obviated this by providing the large or spur wheel with teeth fitted on the inner side of the rim, whereby the concavity of the rim was opposed to the convexity of the pinion, and a greater number of teeth on each wheel engaged with the corresponding teeth of the other, and the strain occasioned by the change of motion was greatly reduced. That the invention was a useful and popular one is shown by the fact that it went into immediate use, and over three thousand windmills containing the combination are said to have been manufactured and sold since 1890.

Prior to Martin's patent, windmills of this class had been driven by externally toothed spur wheels, interlacing with externally toothed pinions, and hence were subject to the pounding motion which proved so destructive to the mechanism, and which it was the object of the Martin patent to obviate. The defense to this case is largely based upon the fact that the prior art had shown a large number of instances of spur wheels, provided with teeth on the inner side of the rim, operated by external *toothed pinions. [491] They are shown to have existed as early as 1841, in a patent to Perry Davis, No. 2,215, for an improvement in windmills, in which cogs fixed upon the inner periphery of the rim, interlaced with an external toothed pinion, although for a different purpose, of keeping the wheel in the wind. They are shown in several other patents for windmills, and also in a large number of other patents for harvesters, hay tedders, churns, mowing and sewing machines, and other mechanical movements for the conversion of motion. It would appear from the opinion and dissenting opinion in the case against the Dempster Mill Manufacturing Company, 49 U. S. App. 508, 82 Fed. Rep. 327, 27 C. C. A. 191, and from the opinion of the circuit court of appeals in this case, that, while the combination of an external toothed pinion and internal toothed spur wheel was common in other mechanisms, the only windmill patent in that case offered as an anticipation of Martin's was one granted to Edward Williams, September 19, 1876, No. 182,394, which showed a pitman actuated by two eccentric external toothed gear wheels; and that the majority of the court was of opinion that the transfer of the Martin device to windmills for the purpose named in the patent involved invention within the cases of the *Western Electric Co. v. La Rue*, 139 U. S. 601, 35 L. ed. 294, 11 Sup. Ct. Rep. 670; *Crane v. Price*, Webster, Pat. Cas. 393, and *Potts v. Creager*, 155 U. S. 597, *sub nom. C. & A. Potts & Co. v. Creager*, 39 L. ed. 275, 15 Sup. Ct. Rep. 194. In the present case, however, not only are there a large number of patents shown containing this combination, [491] 177 U. S.

but several in which the combination is used for different purposes in the construction of windmills: For instance, in patent No. 254,527, to George H. Andrews; in patent No. 500,340, to S. W. Martin; in patent No. 271,635, to William H. and Clifford A. Holcombe; in patent No. 273,226, to Peter T. Coffield; in patent No. 317,731, to Coleman & Turner; and in patent No. 346,674, to Henry G. Newell, in all of which the system is employed for different purposes in connection with windmills—generally to keep the wheel in the direction of the wind.

It is admitted that in none of the instances in which an internal toothed wheel is employed in windmills in connection with an external toothed wheel, is the combination used for the purpose specified in the Martin patent of converting the revolving *mo-[492] tion of the wind wheel shaft into the perpendicular motion of the pump shaft, though what is known as the Perkins mill presents the closest analogy. This mill is shown, by indisputable proof, to have been manufactured at Mishawaka, Indiana, as early as 1885, and to have been sold in considerable numbers. It does not appear to have been a pumping mill; and the upright shaft, instead of having the reciprocating perpendicular movement of a pumping shaft, revolved, and furnished, by means of a bevelled gear at the lower end of the shaft, a revolving motion to a horizontal shaft used for various purposes upon farms. A large internal toothed wheel was placed on the outer ends of the arms of the spider to which the wind-wheel arms were bolted, the internal gearing of which wheel engaged with a small gear wheel or pinion placed on an independent shaft, at the other end of which shaft a bevelled pinion was placed, interlacing with a corresponding bevel on the upper end of the upright revolving shaft. As there was no conversion or change of motion, the strain was uniform, and there was no interruption of a continuous motion or a pounding to be provided against. This is undoubtedly a different use from that to which the Martin combination was put; but the question is, whether there is not such an analogy between the several uses in which this combination was employed as to remove its adoption, in the use employed by Martin, from the domain of invention.

The case, then, reduces itself to this: The Martin combination had previously been used in a large number of mechanical contrivances for the purpose of converting a rotary into a reciprocating motion, as is notably shown in patent No. 421,533, to John Wenzin, for a reciprocating gearing; in patent No. 399,492, to Edward Burke, for a means of converting motion; in patent No. 89,217, to E. R. Hall, for a wood sawyer; in reissue patent No. 2,746, to Christopher Hodgkins, for a sewing machine; in patent to Krum and Brokaw, for harvesters; and in what is known as Filer & Stowell Company's lath bolter, a sketch of which is given in the record. The combination had also been used in windmills, but not for the purpose of converting rotary into reciprocating

[493] motion, although in the Perkins mill it was *used in connection with the shaft of the wind wheel to transfer power from a horizontal to an upright rotating shaft, which, at its lower end, transferred its own motion by a bevelled gearing to another horizontal shaft. The combination of two externally toothed wheels had also been used in windmills for the purpose of converting rotary into reciprocating motion.

Having all these various devices before him, and, whatever the facts may have been, he is chargeable with a knowledge of all pre-existing devices, did it involve an exercise of the inventive faculty to employ this same combination in a windmill for the purpose of converting a rotary into a reciprocating motion? We are of opinion that it did not. The main advantage derived from it arose from the engagement of a large number of teeth in each wheel. This peculiarity, however, inured to the advantage of every machine in which the combination was used for the purpose of converting motion, although the jar produced by the change of motion may not have been sufficient to endanger a small machine. So, too, a reduction of speed is involved wherever the cogs of a small wheel engage with the cogs of a large one. Martin, therefore, discovered no new function; and he created no new situation, except in the limited sense that he first applied an internal gearing to the old Mast-Foos mill, which was practically identical with the Martin patent, except in the use of an internal gearing. He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply it to a new purpose in a machine where it had not before been used *for that purpose*. The result may have added to the efficiency and popularity of the earlier device, although to what extent is open to very considerable doubt. In our opinion this transfer does not rise to the dignity of invention. We repeat what we said in *Potts v. Creager*, 155 U. S. 597, 608, *sub nom. C. & A. Potts & Co. v. Creager*, 39 L. ed. 275, 279, 15 Sup. Ct. Rep. 194, 199: "If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use." The line between invention and mechanical skill is often an exceedingly difficult one to draw; but in view of the state of the art as heretofore shown, we cannot say that the application of this

[494] old device to a use which was only new *in the particular machine to which it was applied was anything more than would have been suggested to an intelligent mechanic, who had before him the patents to which we have called attention. While it is entirely true that the fact that this change had not occurred to any mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices; but, as before stated, in determining the question of invention, we

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must presume the patentee was fully informed of everything which preceded him, whether such were the actual fact or not. There is no doubt the patent laws sometimes fail to do justice to an individual who may, with the light he had before him, have exhibited inventive talent of a high order, and yet be denied a patent by reason of antecedent devices which actually existed, but not to his knowledge, and are only revealed after a careful search in the Patent Office. But the statute (§ 4886) is inexorable. It denies the patent, if the device were known or used by others in this country before his invention. Congress having created the monopoly, may put such limitations upon it as it pleases.

The case in the eighth circuit was evidently decided upon a wholly incomplete showing on the part of the defendant.

3. One of the principal questions pressed upon our attention related to the power of the court of appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.

This question is not necessarily concluded by *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.

*Does this doctrine apply to a case where [495] a temporary injunction is granted *pendente lite* upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined upon the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why to save a protracted litigation, the court may not order the bill to be dismissed. Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity

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causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, but dismiss the bill. *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434. This practice was approved by the Chief Justice in a case where the bill disclosed no ground of equitable cognizance, in *Green v. Mills*, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90, and by the circuit court of appeals for the sixth circuit in *Knoxville v. Africa*, 47 U. S. App. 74, 246, 77 Fed. Rep. 501, 23 C. C. A. 252, where the question involved was one of law and was fully presented to the court. The power was properly exercised in this case.

There was no error in the action of the circuit court of appeals, and its decree is affirmed.

[496]***ORERLIN M. CARTER**, on the Petition of **Abram J. Rose**, *Appt. & Plff. in Err.*, v.

CAPTAIN BENJAMIN K. ROBERTS.

(See S. C. Reporter's ed. 496-500.)

Sentence of court-martial—petition for habeas corpus—raising constitutional objection—appeals—direct appeal to Supreme Court after appeal to circuit court of appeals.

1. The constitutional objection that a sentence of an army court-martial imposed a double punishment for the same offense can hardly be deemed to be raised in a United States circuit court, so as to authorize a direct appeal to the Supreme Court of the United States, by a bare averment in a petition for a writ of habeas corpus that, petitioner having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and his further punishment and detention "and the carrying out of said sentence is contrary to law and to the provision of the Constitution of the United States, and is illegal."
2. A direct appeal to the Supreme Court of the United States from a decision of a circuit court involving a constitutional right cannot be taken, under the act of Congress of March 3, 1891, after the cause has been appealed to and decided by the circuit court of appeals, as that act does not permit independent appeals to both courts.

[No. 570.]

Submitted April 9, 1900. Decided April 23, 1900.

A PPEAL from and in ERROR to the Circuit Court of the United States for the Southern District of New York to review a **177 U. S.**

decision dismissing a writ of habeas corpus on motions to dismiss or affirm. *Dismissed.*

See same case below, 97 Fed. Rep. 496.

The facts are stated in the opinion.

Messrs. Abram J. Rose and Benjamin F. Tracy submitted the cause for Carter:

That the court will, upon habeas corpus, inquire whether the accused has been twice punished for the same offense, and, if so, discharge the prisoner, is fully supported by the decisions of this court.

Nielsen, Petitioner, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *United States v. Chouteau*, 102 U. S. 603, 26 L. ed. 246; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872.

The right to appeal directly to this court from the circuit court because of a constitutional question is not waived by taking an appeal also to the circuit court of appeals.

Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

The question presented to this court in *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343, was simply as to the jurisdiction of the circuit court, the contention being that plaintiff could not have brought an original suit in the circuit court of the United States, and therefore that the case was not removable from the state court, where it was originally commenced.

Nor does the case of *Columbus Constr. Co. v. Crane Co.* 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721, in any way preclude the maintenance of this appeal. In that case the appeal was taken to this court while the case was still pending before the circuit court of appeals, and this court said it was not in accordance with orderly practice that separate appeals or writs of error on the merits in the same case should be pending at the same time in two appellate courts.

Solicitor General Richards submitted the cause for Roberts. *Mr. Henry L. Burnett* was with him on the brief:

To give the Supreme Court appellate jurisdiction under the act of March 3, 1891, upon the ground that the case "involves the construction or application of the Constitution of the United States," a construction or application of the Constitution must have been expressed or requested in the circuit court below.

Cornell v. Green, 163 U. S. 79, 41 L. ed. 77, 16 Sup. Ct. Rep. 969; *Muse v. Arlington Hotel Co.* 168 U. S. 435, 42 L. ed. 532, 18 Sup. Ct. Rep. 109; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

The constitutional provision that no person shall be deprived of liberty without due process of law is a restriction upon the courts of the United States, but courts-martial are no part of the judiciary of the United States, but simply an instrumentality of the executive, and neither the 5th nor any other amendment of the Constitution af-

fects the government of the land and naval forces.

Ex parte Milligan, 4 Wall. 123, 18 L. ed. 296; *Re Bogart*, 2 Sawy. 407, Fed. Cas. No. 1,596.

Even if the record exhibited a case coming under the act of March 3, 1891, § 5, the appellant has no right to have this case finally determined by the Supreme Court because he has heretofore elected to take his case to the circuit court of appeals by writ of error, under § 6 of that act, instead of taking it direct from the circuit court to the Supreme Court under an appropriate clause of § 5, if the same could be done.

Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *May*, U. S. Sup. Ct. Practice, p. 465; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

[496] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

[497] *Carter was a captain of the United States Army, assigned to the corps of engineers. He was arraigned and tried before a court martial in Savannah, Georgia, convened according to law, upon certain charges and specifications; found guilty; sentenced to dismissal; to suffer a fine; to be imprisoned; and to publication of crime and punishment. This sentence was approved by the Secretary of War and confirmed by the President of the United States, September 29, 1899, and the Secretary of War took the necessary action for the execution of the sentence. October 2, 1899, Carter obtained from the circuit court of the United States for the southern district of New York a writ of habeas corpus, directed to the military authority having him in custody, for his production before the court, together with the time and cause of his detention. He was accordingly produced, and due return made, setting up that he was lawfully held in custody by authority of General Orders No. 172, of September 29, 1899. During the pendency of the habeas corpus proceedings the fine imposed was paid. The circuit court dismissed the writ, and Carter was remanded to custody. 97 Fed. Rep. 496.

From this final order, as appears from the records of this court, and is conceded, petitioner prosecuted an appeal to the United States circuit court of appeals for the second circuit. The case having been there heard, that court, on January 24, 1900, entered judgment affirming the judgment of the circuit court, with costs. On February 5, 1900, an application for the writ of certiorari to the circuit court of appeals was made to this court, which, on February 26, 1900, was denied. 176 U. S. 684, *ante*, 638, 20 Sup. Ct. Rep. 1026.

On the same day an appeal from the final order of the circuit court directly to this court was allowed by a judge of the circuit court, as also a writ of error.

The 8th section of art. 1 of the Constitu-

tion provides that the Congress shall have power "to make rules for the government and regulation of the land and naval forces," and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War. Rev. Stat. § 1342. Every officer, before he enters on the duties of his *office, subscribes to these articles, and places himself within the power of courts martial to pass on any offense which he may have committed in contravention of them. Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced. [198]

The ground for an appeal directly to this court is said in the briefs to be that the case involved the construction or application of the Constitution, in that by the sentence petitioner was twice punished for the same offense. But if the statutes authorized the penalties in question to be inflicted in one and the same proceeding as punishment for the offenses charged, then there was no double punishment. And, as this was a case arising in the land forces, it is hardly to be conceded that the suggested constitutional objection was raised below as such by the bare averment in the petition that petitioner, having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and "his further punishment and detention," and "the carrying out of said sentence, is contrary to law and the provisions of the Constitution of the United States, and is illegal."

The circuit court stated the questions thus: "The contention of the relator is that, conceding that the court martial had jurisdiction of the person of the accused and of the offenses charged, and conceding, further, the regularity of its proceedings and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment, and degradation (special publication of sentence), although it might have imposed either one of them. When application was made for the writ, it appeared that the first punishment (dismissal from the service of the United States) and the fourth (publication of sentence) had been carried out; and the relator contended that, having thus paid a penalty which the court had power to inflict, he could not be held to submit to another penalty,*which the court had no power to add to the one already by it selected. [499] Since the return was made the relator has also paid the fine, and, although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides, and is now embodied in a stipulation, thus completing the case.

"If the relator's premises be sound, *viz.*, that punishments have been imposed in the

aggregate, when the statute authorized their imposition only in the alternative, his conclusion is supported by high authority. *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end. The important question in the case, therefore, is whether, under the statutes of the United States, the court martial had the power, under its findings, to impose a sentence inflicting these four penalties." And the court, after considering that question at length, held that the court martial had such power.

We need not discuss, however, whether a direct appeal could have been taken in the first instance, as we are of opinion that, even if so, the present appeal cannot be maintained. It falls directly within the ruling in *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343. It was there held that the judiciary act of March 3, 1891, does not give a defeated party in a circuit court the right to have his case finally determined both in this court and in the circuit court of appeals on independent appeals. That case was heard in the circuit court of the United States for the district of Idaho upon its merits, which included the consideration of questions involving the construction of a treaty and the validity of an act of Congress. Judgment passed for plaintiff, and defendant was allowed a direct appeal to this court. Pending this, defendant had also prosecuted an appeal to the circuit court of appeals, and the case was there again heard and determined. 29 U. S. App. 468, 67 Fed. Rep. 391, 14 C. C. A. 448. When subsequently the appeal to this court was heard, it was dismissed, because we held that "we could not properly retain cognizance thereof in face of the fact that the case had been adjudicated by the court of appeals, whose judgment remained undisturbed."

Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, is not to the contrary. The Pullman Company had taken an appeal directly from the circuit court to this court, on the theory that the case involved the construction or application of the Constitution, and had also taken an appeal to the circuit court of appeals for the third circuit. The circuit court of appeals overruled a motion to dismiss, but postponed further argument until the appeal to this court was disposed of. 39 U. S. App. 307, 76 Fed. Rep. 401, 22 C. C. A. 246. A motion to dismiss was also made in this court, whereupon an application was made for a writ of certiorari to the circuit court of appeals, and, by reason of the circumstances, was granted, and the record returned by virtue of that writ. And we proceeded to dispose of the case on the merits without passing on the question, which had become immaterial, whether the

direct appeal could have been maintained or not.

The case before us presents no such features. It has been regularly heard and gone to judgment in the circuit court of appeals, and an application duly made to this court for certiorari has been denied. These prior proceedings cannot be ignored and the cause brought here as if they had not been had.

When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal, lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. *Holt v. Indiana Mfg. Co.* 46 U. S. App. 717, 80 Fed. Rep. 1, 25 C. C. A. 301, 176 U. S. 68, ante, 374, 20 Sup. Ct. Rep. 272; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Benjamin v. New Orleans*, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298. But when the circuit court of appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

Appeal and writ of error dismissed.

*STATE OF TENNESSEE, Complainant, [501]
v.

STATE OF VIRGINIA.

(See S. C. Reporter's ed. 501-504.)

State boundaries—order appointing commissioners to retrace and re-establish.

[No. 11, Original.]

Submitted April 17, 1900. Decided April 30, 1900.

Mr. G. W. Pickle, Attorney General of Tennessee, for complainant.

Mr. A. J. Montague, Attorney General of Virginia, for defendant.

*Mr. Chief Justice **Fuller** announced that [502] the court ordered the following decree to be entered:

This cause coming on to be heard on the original bill filed herein by the state of Tennessee against the state of Virginia, the answer thereto by the state of Virginia, the reply to said answer by the state of Tennessee, and the stipulations filed herein by counsel for the respective parties; and the pleadings and stipulations having been duly considered, and the decree of this court entered on the third day of April, A. D. 1893, at the October term, 1892, in a certain original cause in equity, wherein the state of Virginia was complainant and the state of Tennessee

was defendant, and the record of said cause having been examined:—

It is thereupon, this 30th day of April, A. D. 1900, ordered, adjudged, and decreed that the boundary line established between the states of Virginia and Tennessee by the compact of 1803 between the said states is the real, certain, and true boundary between the said states, which boundary line was actually run and located under proceedings had by the two states in 1801-1803, was then marked with five chops in the shape of a diamond, was commonly known as the diamond line, and ran from White Top mountain to Cumberland gap.

And it appearing further to the court that the said boundary line has become so far obscured by lapse of time or loss of monuments as to justify and necessitate its re-establishment and remarking under the direction of this court, it is therefore further ordered, adjudged, and decreed that William C. Hodgkins, of the state of Massachusetts, James B. Baylor, of the state of Virginia, and Andrew H. Buchanan, of the state of Tennessee, be and they are hereby appointed commissioners to ascertain, retrace, remark, and re-establish said boundary line, but without authority to run or establish any other or new line.

[504] And it is further ordered that, before entering upon the discharge of their duties, each of the said commissioners shall be duly sworn to perform faithfully, impartially, without prejudice or bias, the duties herein imposed, said oath to be taken before the clerk of this court, or before either of the clerks of the circuit courts of the United States for the states of Massachusetts, *Virginia, or Tennessee, and returned with their report; that said commissioners may arrange for their organization, their meetings, and the particular manner of the performance of their duties, and are authorized to adopt all ordinary and legitimate methods for the ascertainment of the true location of said boundary line, including the taking of evidence, but, in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses, and the rules of law as to admissibility and competency shall be observed; and all evidence taken by the commissioners, and all exceptions thereto, and action thereon, shall be preserved and certified, and returned with their report.

And when the true location of said boundary line is ascertained, said commissioners shall cause such marks and monuments of a durable nature to be so placed on and along said line as to perpetuate it, and enable the citizens of each state, and others, to find it with reasonable diligence.

It is further ordered that the clerk of this court at once forward to the chief magistrate of each of said states, and to each of the commissioners designated by this decree, a copy of the decree duly authenticated, and that the commissioners proceed with all convenient speed to discharge their duty in ascertaining, retracing, remarking, and re-establishing said line, as herein directed, and

make their report thereof and of their proceedings in the premises to this court, on or before the first day of the next term thereof, together with a complete bill of costs and charges annexed.

And it is further ordered that, should vacancies occur in said board of commissioners while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint other commissioners, to supply the same, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all costs of this proceeding, including remuneration not exceeding \$10 per day for each commissioner, and the other costs incident to the ascertaining, retracing, remarking, and re-establishing said line, shall be paid by the states of Tennessee and Virginia equally.

*SHOSHONE MINING COMPANY, *Appt.*, [505]
v.

ROYAL J. RUTTER and F. W. Bradley.

(See S. C. Reporter's ed. 505-514.)

Appeal—Federal question—suit as to mining claim.

A suit brought in support of an adverse claim to a mine under U. S. Rev. Stat. §§ 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court without regard to the citizenship of the parties, unless it involves the determination of a question as to the construction or effect of the mining laws.

[No. 208.]

Argued March 21, 1900. Decided April 30, 1900.

A PPEAL from a judgment of the United States Circuit Court of Appeals for the Ninth Circuit in a consolidated case as to adverse claims to mining property. *Reversed.*

See same case below, 59 U. S. App. 538, 87 Fed. Rep. 801, 31 C. C. A. 223.

The facts are stated in the opinion.

Mr. W. B. Heyburn argued the cause and, with **Mr. Lyttleton Price** filed a brief for appellant.

Mr. Curtis H. Lindley argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

***Mr. Justice Brewer** delivered the opinion of the court: [505]

In *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, ante, 276, 20 Sup. Ct. Rep. 222, decided January 8, 1900, we held that a suit brought in support of an adverse claim

NOTE.—As to jurisdiction of cases involving Federal question—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 7; *Bailey v. Moshier*, 11 C. C. A. 308.

under §§ 2325 and 2326 of the Revised Statutes was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court regardless of the citizenship of the parties. In this case the same question is again presented, and has been elaborately argued by counsel against the opinion we then announced. Its importance, as well as the great ability with which it was argued by counsel for appellee, has induced a careful re-examination of the question. While it

[506] may be conceded *that the matter is not free from doubt, nevertheless our re-examination has not led us to change our former views. We deem it unnecessary to restate all the reasons given in the opinion then delivered, and yet some matters may appropriately be noticed.

By the Constitution (art. 3, § 2) the judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States" and to controversies "between citizens of different states." By article 4, § 3, cl. 2, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several states. It has provided that the Federal courts shall have exclusive jurisdiction of admiralty and patent litigation, and jurisdiction concurrent with the state courts of suits arising under the Constitution or laws of the United States. U. S. Rev. Stat. 629; 25 Stat. at L. 433, chap. 866.

When in § 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions as an "adverse suit," it simply declared that the adverse claimant should commence proceedings "in a court of competent jurisdiction." It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the

[507] competency of *the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts. In that view, if the adverse suit were between citizens of different states, and the value of the thing in controversy exceed-

ed \$2,000, then by virtue of the general provisions of the statutes the Federal courts might take jurisdiction, or, if the suit was one arising under the Constitution or the laws of the United States, and the amount in controversy was over \$2,000, then also the Federal courts might take jurisdiction. Conversely, it would be true that if the amount in controversy was not in excess of \$2,000, or if the parties were not citizens of different states, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction.

In the present case diverse citizenship does not exist. Jurisdiction must therefore depend upon the question whether the suit is one arising under the Constitution or laws of the United States.

We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States or by virtue of its laws. As said by Mr. Chief Justice Waite, in *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. ed. 656, 658:

"The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must, in some form, appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

The adverse suit, Rev. Stat. § 2326, is "to determine the question of the right of possession." That right may or may *not in- [508]volve the construction or effect of the Constitution or a law or treaty of the United States. By §§ 2319, 2324, and 2332, Revised Statutes, it is expressly provided that this right of possession may be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States;" or "by the statute of limitations for mining claims of the state or territory where the same may be situated." So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.

The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal

law. Section 2 of article I of the Constitution provides that the electors in each state of members of the House of Representatives "shall have the qualifications requisite for electors of the most numerous branch of the state legislature," but this does not make the statutes and constitutional provisions of the various states in reference to the qualifications of electors parts of the Constitution or laws of the United States.

On August 8, 1890, Congress enacted (26 Stat. at L. 313, chap. 728) that intoxicating liquors transported into any state or territory "shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory," etc., and in *Re Rahrer*, 140 U. S. 545, 561, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865, 869, this court said:

"Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws."

In *Miller v. Swan*, 150 U. S. 132, 136, 37 L. ed. 1028, 1029, 14 Sup. Ct. Rep. 52, 54, it appeared that the state of Alabama had passed an act containing this provision: "The said Alabama & Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same;" and it was held:

[509] "The question is not what rights passed to the state under *the acts of Congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the state does not make the determination of such rights a Federal question. A state may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

Inasmuch, therefore, as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district,

or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States.

As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Pacific Railroad Removal Cases*, 115 U. S. 1, *sub nom. Union P. R. Co. v. Myers*, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. The argument of Chief Justice Marshall in support of this was, briefly, that a corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do *any act [510] which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States, there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined, a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under the law of Congress. But that argument is not pertinent here. The right of the contestants in an adverse suit, as we have seen, does not always call for any construction of an act of Congress. It may depend solely on local rules or customs or state statutes, and in that case does not involve a dispute or controversy "which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. . . . In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws. In such cases the Federal courts have no original jurisdiction, unless there is a diversity of citizenship; but in cases arising under § 2326 of the Revised Statutes, the *authority* for the action is found in the legislation of Congress. Without this authority the action for the purposes avowed by the statute could not be maintained." 2 Lindley, Mines, § 748. A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.

Again, it is said that this adverse suit is one step in the administration of the laws of the United States in respect to mineral lands, and therefore it must be presumed that Congress intended that such step should rightfully be taken in one of the courts of the United States. This suggestion was

[511] open to the *consideration of Congress when it was determining where the adverse suit should be brought, but that it did not consider it vital is evident from the conceded fact that, unless the amount in controversy is over \$2,000, no jurisdiction attaches to the Federal court. In other words, Congress did not deem the matter of the jurisdiction of those courts so essential a part of the administration of the land laws of the United States as to vest in them jurisdiction of all such controversies, but left a large, if not a major, portion of them to be determined in the state courts. It evidently contemplated the fact that a controversy about a right of possession might as appropriately be decided in a state as in a Federal court, and, not prescribing in which court it should be litigated, left the matter to be determined by the ordinary rules in respect to the jurisdiction of the Federal courts.

Counsel also calls our attention to the difference in the procedure in the disposal of agricultural and mineral lands. With respect to the former, all proceedings are carried on in the Land Department, and it is only after the legal title has passed by patent that inquiry is permissible in the courts, while in respect to the latter the aid of the courts is invoked before the issue of a patent and in order to determine, to some extent, the right thereto. Noticing this distinction, he also notes the fact that a contest in respect to the validity of a patent for agricultural lands can be litigated in the Federal courts, and hence draws the inference that a contest preliminary to a patent for mineral lands, and involving the right thereto, must also be one which can be litigated in the same courts. But we think the true inference from this difference of procedure is to the contrary, because, in respect to agricultural lands, it is settled that all questions of fact are determined by the Land Department, and that after the issue of a patent only questions of law are open for consideration in the courts, and, as the laws of Congress alone determine the matter of the disposal of the public lands, it follows that the questions of law which are thus open for consideration are those arising under the acts of Congress. While on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent [512] of mineral lands not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. The scope of the inquiry which is permissible in the two cases emphasizes the fact that in the latter case the controversy may be one not arising under the Constitution or laws of Congress.

Again, it is said that Congress has in these cases prescribed a specific rule of limitation which is ordinarily different from that obtaining under state statutes in respect to actions for the recovery of possession; that it has authorized decrees in peculiar form, some partly for and partly against each of the different parties, and also some adversely to both. 21 Stat. at L. 505, chap. 140; 177 U. S.

Richmond Min. Co. v. Rose, 114 U. S. 576, 585, 29 L. ed. 273, 276, 5 Sup. Ct. Rep. 1055; *Perego v. Dodge*, 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971. But incidental matters such as these are not decisive, especially as confessedly the statute leaves the jurisdiction over those cases in which the matter in controversy does not exceed \$2,000 in value in the state courts. This fact shows conclusively that Congress was not intending to carve out a new jurisdiction for the Federal courts, and also that it did not doubt that the state courts would carry into effect its enactments in reference to limitations and procedure.

And, finally, it is said that Congress cannot confer any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that Congress cannot compel them to do so. But here again we are met with the fact that Congress has left all controversies in respect to right of possession, not exceeding \$2,000 in value, to the state courts. It evidently proceeded upon the supposition (which is a rightful one) that, as by the express terms of the Constitution, article 6, clause 2, "this Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding," no courts, national or state, would decline to carry into effect the acts of Congress. Whether, if a state court should refuse to act under these statutes, the matter is one which could be corrected by error in this court, is immaterial. *If it shall appear that state [513] courts decline to entertain such jurisdiction, and that it cannot be enforced upon them, Congress may further legislate. Evidently, thus far in these cases, as in many others, there has been no reason to suppose that any state court would decline to enforce the laws of the United States or to carry into effect their provisions. And, as well said by Mr. Justice Miller in *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 299, 34 L. ed. 155, 160, 10 Sup. Ct. Rep. 765, 769:

"The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the Land Department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

If every adverse suit could be taken into the Federal courts, obviously in some of the larger western states the litigation would not be "before some judicial tribunal located in the neighborhood where the property is," for in them the Federal courts are often held only in the capital or chief city of the state and at a great distance from certain parts of the mining regions there.

So, we conclude, as we did in the prior case, that although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts.

[514] It appears that there were two cases in the circuit court of Idaho, that they were there consolidated for trial, and the consolidated case taken on appeal to the circuit court of appeals. Of the two original cases, No. 81 on the docket of the circuit court was commenced by the appellees in that court. The other, No. 102, was commenced by the appellant in the district court of the first judicial district of the state of Idaho in and *for Shoshone county, and by the appellees removed to the Federal court. The matters involved in the two cases were similar, and hence the consolidation. Under these circumstances, and in view of the conclusion to which we have arrived, the order will be that *the judgment of the United States circuit court of appeals for the ninth circuit is reversed*, and the case remanded to the circuit court, northern division, district of Idaho, with instructions to reverse its decree and enter a decree dismissing case No. 81, and an order remanding case No. 102 to the state court.

Mr. Justice **White** did not hear the argument and took no part in the decision of this case.

Mr. Justice **McKenna** dissents.

CLEVELAND, CINCINNATI, CHICAGO, &
ST. LOUIS RAILWAY COMPANY, *Plff.*
in Err.,

v.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. THOMAS M. JETT.

(See S. C. Reporter's ed. 514-523.)

Interstate commerce—statute requiring passenger trains to stop at county seat.

The requirement that all regular passenger trains must stop at county seats, which is made by the Illinois act of March 21, 1874, § 26, constitutes a direct burden upon interstate commerce in violation of the United States Constitution, so far, at least, as that

NOTE.—*That state laws cannot regulate interstate commerce*—see *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107, and note.

As to state laws interfering with interstate or foreign commerce—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

As to state regulation of commerce—see notes to *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

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statute requires through interstate passenger trains to stop at such stations when adequate train service has been provided for local traffic.

[No. 198.]

Argued and Submitted March 16, 1900. Decided April 30, 1900.

IN ERROR to the Supreme Court of the State of Illinois to review a decision affirming a judgment awarding a mandamus to compel a railroad company to stop passenger trains at a county seat. *Reversed.*

See same case below, 175 Ill. 359, 51 N. E. 842.

Statement by Mr. Justice **Brown**:

*This was a petition for a writ of mandamus filed in the circuit court for the county of Montgomery, by the state's attorney for that county, to compel the defendant railway company, which for several years past has operated, and is now operating, a railroad from St. Louis, Missouri, through the county of Montgomery and the city of Hillsboro, the county seat of such county, to Indianapolis, Indiana, to stop a regular passenger train designated as the "Knickerbocker Special" at the city of Hillsboro a sufficient length of time to receive and let off passengers with safety. [515]

The petition was based upon section 26 of an act of the General Assembly of Illinois, entitled "An Act in Relation to Fences and Operating Railroads," approved March 21, 1874, which reads as follows:

"Every railroad corporation shall cause its passenger trains to stop upon its (their) arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety."

The answer of the railroad company averred that the company furnished four regular passenger trains each way a day, passing through and stopping at Hillsboro, and that they amply accommodated the travel, and afforded every reasonable facility to such city; that the Knickerbocker Special was a train especially devoted to carrying interstate transportation between the city of St. Louis and the city of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train, which connected with other similar trains on the Lake Shore and New York Central roads, and that it was necessary to put on this train because the trains theretofore run, none of which had ever been taken off, could not, by reason of stopping at Hillsboro and other similar stations, make the time necessary for eastern connections, or carry passengers from St. Louis to New York within the time which the demands of business and interstate *traf- [516] fic required; that the Knickerbocker Special is not a regular passenger train for carrying

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passengers from one point to another in the state of Illinois, such traffic being amply provided for by other trains, and that the Knickerbocker Special is used exclusively for interstate traffic from and to points without the state of Illinois; that it is not subject to regulation by the statute of Illinois providing that all trains shall stop at all county seats, and that to subject it to the statutes of the various states through which it passes, requiring it to stop at county seats, would wholly destroy the usefulness of the train, and would impede and obstruct interstate commerce, and that obedience to the statute in question would require it to abandon the train.

A demurrer to this answer was sustained, and the defendant electing to stand upon it as a full defense to the petition, a final judgment was rendered and a peremptory writ of mandamus awarded against the defendant. On appeal to the supreme court of the state this judgment was affirmed. Whereupon the railway company sued out a writ of error from this court.

Mr. John T. Dye argued the cause and, with **Mr. George F. McNulty**, filed a brief for plaintiff in error:

The line between the exclusive power of Congress to regulate commerce among the states, and the power of the states to regulate their internal affairs, is drawn as distinctly in this case as it was in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints which the states might choose to impose on it that the commerce clause was intended to secure. *Ibid.*

A state can do nothing which will directly burden or impede the interstate traffic of a railroad company, or impair the usefulness of its facilities for such traffic.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

Neither does this case come within that class where laws having for their object the personal security of passengers while traveling from one state to another, within their respective limits, have been held valid.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

Mr. E. C. Akin submitted the cause for defendant in error. *Messrs. C. A. Hill* and *B. D. Monroe* were with him on the brief.

In granting a charter to a private corporation, the state does not part with any of its power to enact proper police regulations operating upon such corporation.

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Ohio & M. R. Co. v. McClelland, 25 Ill. 140.

Every person and corporation within the territorial limits of a state is, while there, subject to the constitutional authority of the state government.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

A state legislature has power to regulate railroad corporations in the exercise of their corporate franchises, so as to provide for the public safety, welfare, and convenience.

Galena & C. U. R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; *Potter's Dwarrris on Stat.* 458; *Cooley, Const. Lim.* 6th ed. p. 715; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191, 22 Am. Rep. 71; *Chicago & A. R. Co. v. People*, 105 Ill. 657; *People ex rel. Walker v. Louisville & N. R. Co.* 120 Ill. 49, 10 N. E. 657; *Illinois C. R. Co. v. People*, 143 Ill. 435, 19 L. R. A. 119, 33 N. E. 178; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

When an act of Congress is claimed to be unconstitutional, the presumption is in favor of validity; and it is only when the question is free from any reasonable doubt, that this court should hold an act of the law-making power of the government to be in violation of that fundamental instrument upon which all the powers of the government rest.

Nicol v. Amcs, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

And the same rule should, of course, apply to an act of the legislature of a state.

***Mr. Justice Brown** delivered the opinion of the court: [516]

Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

*We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. Rep. 564), requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28), requiring telegraph companies to receive despatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934), forbidding the running of freight trains on Sunday (*Henning-*

ton v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086), requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710), forbidding the consolidation of parallel or competing lines of railway (*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714), regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418), providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289), and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335. In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce.

But for the reason that these laws were considered unreasonable and to unnecessarily hamper commerce between the states, we have felt ourselves constrained in a large number of cases to express our disapproval [518] of such as provided for taxing directly* or indirectly the carrying on or the profits of interstate commerce. We have also held to be invalid a statute of Louisiana requiring those engaged in interstate commerce to give all persons upon public conveyances equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color (*Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547), another regulating the charges of railway companies for passengers or freight between places in different states (*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4), another requiring telegraph companies to deliver despatches by messenger to the persons to whom the same are addressed, so far as they attempted to regulate the delivery of such despatches at places situated in another state (*Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126), and still another forbidding common carriers from bringing intoxicating liquors into the state without being furnished with a certificate that the consignee was authorized to sell intoxicating liquors in the county (*Bow-*

man v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062).

Several acts *in pari materia* with the one under consideration have been before this court, and have been approved or disapproved as they have seemed reasonable or unreasonable, or bore more or less heavily upon the power of railways to regulate their trains in the respective and sometimes conflicting interests of local and through traffic. In the earliest of these cases (*Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096), the very statute of Illinois under consideration in this case, as construed and applied by the supreme court of that state, was held to be an unreasonable restriction upon interstate traffic, in requiring a fast mail train from Chicago to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of its interstate passengers and United States mail by turning aside from its direct route and running to a station (Cairo) 3½ miles away from a point on that route, and back again to the same point, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for whom the railroad company furnished other and ample accommodation. Said Mr. Justice Gray: "The state may doubtless *com-[519]pel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

Upon the contrary, in *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627, a state statute requiring every railroad to stop all its regular passenger trains running wholly within the state at its stations in all county seats long enough to take on and discharge passengers with safety was held to be a reasonable exercise of the police power of the state, even as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers as well as the mail. The case was distinguished from that of the *Illinois C. R. Co. v. Illinois* in the fact that the train in question ran wholly within the state of Minnesota, and could have stopped at the county seats without deviating from its course; and that the statute of Minnesota expressly provided that the act should not apply to through trains entering the state from any other state, or to transcontinental trains of any railroad. Speaking of police regulations for the government of railroads while operating roads within the jurisdiction of the state, it was said that "they are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their applica-

tion and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." The railroad in this case was treated as a purely domestic corporation, notwithstanding it connected, as most railroads do, with railroads in other states.

In the most recent case upon this subject (*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465), a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at [520] a station, city, or village containing *over 3,000 inhabitants, for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by Congress upon the subject, consistent with the Constitution of the United States, when applied to trains engaged in interstate commerce through the state of Ohio. In delivering the opinion of the court Mr. Justice Harlan observed: "The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing 3,000 inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is only three minutes. Certainly the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. . . . It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who wished to pass through the state without stopping." This case is readily distinguishable from the one under consideration, in the fact that the statute of Ohio required only that three regular passenger trains should stop at every station containing 3,000 inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois has effectually closed.

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*The question broadly presented in this[521] case is this: Whether a state statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question.

The demurrer to the answer admits that the railway company furnishes a sufficient number of regular passenger trains (four each way a day), to accommodate all the local and through business along the line of the road, and that all of such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker Special still run and still stop at Hillsboro, and that they furnish ample and sufficient accommodation to all persons desiring to travel to and from that place; that the Knickerbocker Special was put on in response to an urgent demand on the part of the through traveling public from St. Louis to New York, and that it was necessary, as the passenger trains theretofore used could not, by reason of stopping at way stations, make the time required for eastern connections, and if compelled to stop at county seats the company will be compelled to abandon the train, to the great damage of the traveling public and to the railway company.

It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the *Lake Shore Case*, railways are bound to provide primarily and adequately *for the accommodation of those[522] to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellence of their tables would insure them

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such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed.

While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, that "while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. . . .

[523] If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own *passengers and regulate the transportation of its own freight regardless of the interests of others." The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort, and convenience of their patrons,—is too obvious to require discussion. *Railroad Commission Cases*, 116 U. S. 307, 334, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191.

We are of opinion that the act in question is a direct burden upon interstate commerce, and the judgment of the supreme court of the state of Illinois must therefore be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice **Brewer** and Mr. Justice **Shiras** concurring:

We concur in this judgment on the proposition that the act of the legislature of Illinois, whether reasonable or unreasonable, wise or foolish, is, as applied to the facts of this

case, an attempt by the state to directly regulate interstate commerce, and, as such attempt, is beyond the power of the state.

DE LAMAR'S NEVADA GOLD MINING COMPANY, *Plff. in Err.*,

v.

JAMES NESBITT.

(See S. C. Reporter's ed. 523-529.)

Appeal—Federal question—decision as to mining claim.

1. The mere fact that defendant in a suit to quiet title to a mining claim claims title under a location made under the general mining laws of the United States is not in itself sufficient to raise a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court, where the gravamen of defendant's argument was not the denial of any right under the mining laws, but the invalidity of the proceedings in a state court under which the plaintiffs claimed to have acquired title by virtue of a prior location.
2. A decision of a state court in favor of a right or privilege claimed by a party under an act of Congress will not be reviewed in the Supreme Court of the United States at the instance of the adverse party, who made no claim under that statute.

[No. 152.]

Argued March 1, 1900. Decided April 30, 1900.

IN ERROR to the Supreme Court of the State of Nevada to review a decision affirming a judgment for plaintiff in a suit to quiet title to a mine. *Dismissed.*

See same case below, 52 Pac. 609; rehearing denied in 53 Pac. 178.

Statement by Mr. Justice **Brown**:

*This was a suit begun in the district court [524] for the fourth judicial district of Nevada by Nesbitt, as part owner of the Fraction mine, against one William Davidson, the alleged locator of the Sleeper mining claim, covering the same ground as the Fraction mine, to quiet plaintiff's title and that of his co-tenants to the Fraction mine, and to recover a money judgment against the defendant.

The complaint alleged that the plaintiff and his co-owners were tenants in common, and since May 15, 1892, had been in possession of the Fraction mining claim, pursuant to the laws of the United States, and that the defendant also claimed a right to possession upon the alleged location of a certain mining claim called by him the Sleeper mine; that such location was made subse-

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what constitutes Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

quent to the location of the Fraction mine, and that the plaintiff had protested in the land office at Carson City against the issuance of a patent to the defendant.

The answer denied the ownership and possession of the plaintiff of the Fraction mine, and alleged as a defense the invalidity of the proceedings under which Nesbitt and his cotenants had acquired the titles of the original locators to the Fraction mine.

The case came on for trial before the court without a jury, and resulted in a judgment for the plaintiff, whereby it was decreed that the title of plaintiff and his cotenants to the Fraction mine be quieted, and the claim of the defendant to that portion of the Sleeper mine embraced within the boundary lines of the Fraction mine be rejected; with a further decree for the recovery of certain incidental fees and costs. Upon motion for a new trial it was ordered that De Lamar's Nevada Gold Mining Company be substituted as defendant in the place of Davidson, deceased, and that the motion for a new trial be overruled. Defendant appealed to the supreme court of the state, which affirmed the judgment. 52 Pac. 609. Whereupon it sued out a writ of error from this court.

Messrs. J. H. Ralston and William M. Stewart argued the cause and filed a brief for plaintiff in error.

Messrs. Walter A. Johnston and George S. Sawyer argued the cause and filed a brief for defendant in error.

[525] *Mr. Justice **Brown** delivered the opinion of the court:

Defendant, known as De Lamar's Nevada Gold Mining Company (hereinafter referred to as the mining company), claims title to the property in question through an application filed by Davidson in the land office at Carson City, in pursuance of Rev. Stat. § 2325, for a patent to the Sleeper mine, against the issue of which patent plaintiff Nesbitt filed an adverse claim as to so much of the Sleeper mine as was embraced within the boundaries of the Fraction mine.

Plaintiff Nesbitt took title to the Fraction mine through a location made May 12, 1892, by W. De Beque, H. Stevens, and A. Borth, who, it appeared, performed all the acts required to make a valid location. Plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title, and interest of De Beque and Stevens to this mine through certain judgments recovered in a justice's court against De Beque and Stevens, upon which executions had been issued, and a sale made to the Nesbitt brothers of their interests in the Fraction mine. This left the Nesbitts and Borth the owners of that mine as tenants in common. The court held these judgments to be void, but admissible for the purpose of showing or tending to show color of title and adverse possession in the Nesbitts and Borth. It further appeared that the Nesbitts and Borth did assessment work in each of the years 1895, 1896, and 1897 to the full amount required

by law (§ 2324); that no work was done in either of the years 1893 and 1894, but that the Nesbitt brothers, in December of each of said years, had a notice recorded in the county recorder's office, where the original notice of the location of the Fraction mine was filed, declaring their intention in good faith to hold and work the mine. Meantime, however, the Sleeper mine was located January 1, 1895, the boundaries of which took in the Fraction mine.

*The supreme court held the vital question [526] to be whether the notices which the Nesbitt brothers caused to be recorded of their intention to hold and work the mine had the legal effect of saving it from being subject to a relocation by Davidson. Revised Statutes, § 2324, provides that, until a patent has been issued upon a mining claim previously located, "not less than \$100 worth of labor shall be performed or improvements made during each year," and that "upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." But, owing probably to the stress of the financial panic then prevailing, Congress passed on November 3, 1893, an act (28 Stat. at L. 6, chap. 12) providing that the requirements of § 2324 be suspended for that year, "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year 1893," provided a notice of an intention to hold and work the claim be filed in the proper office. This act was extended to the year 1894 by a subsequent statute. 28 Stat. at L. 114, chap. 142. Plaintiff relied upon these statutes, and the court held that, the Nesbitt brothers and Borth having had the notice required by the statutes recorded, under an agreement between themselves recognizing each other as co-owners and tenants in common, and under the honest belief of all three that the Nesbitt brothers had legally acquired all the interest of De Beque and Stevens by virtue of the sale made under these judgments, the mine had not been forfeited and was not subject to relocation when the location of the Sleeper mine was made, and therefore that the location of such mine was invalid so far as it covered the Fraction mining claim.

From this summary of the pleadings and findings of the court, it is clear that the defendant set up no right, title, privilege, or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made by Davidson under the general mining laws of the United States * (Rev. Stat. [527] § 2325), was not in itself sufficient to raise a Federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court something more

must appear than that the parties claim title under an act of Congress.

The subject is fully discussed and the prior authorities cited in the recent case of *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, *ante*, 276, 20 Sup. Ct. Rep. 222, which was also a contest between rival claimants of a mine under §§ 2325 and 2326. It was held that the provision in § 2326 for the trial of adverse claims to a mining patent "by a court of competent jurisdiction" did not in itself vest jurisdiction in the Federal courts, although, of course, jurisdiction would be sustained if the requirements of amount and diverse citizenship existed; and that the judgment of the supreme court of the state in such case could not be reviewed in this court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the still later case of *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, *ante*, 486, 20 Sup. Ct. Rep. 399. See also *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

If the law were otherwise, then every land case wherein one of the parties claimed title, either immediately or remotely through a patent of the United States, would present a Federal question; and as most of the land titles in the western states of this country are traceable back to a right under the laws of the United States, every such case might be held reviewable by this court on writ of error. This position, of course, is untenable. If the fact that the plaintiff takes title, directly or indirectly, from the United States, be insufficient to create a case "arising under the Constitution or laws of the United States" within the meaning of the jurisdictional act of 1888, much less does it make one of a "title, right, privilege, or immunity" claimed under a statute of the United States, an adverse decision of which by the highest court of a state entitles the injured party under Rev. Stat. § 709, to a writ of error from this court. To raise a Federal ques-

[528] tion the right must be one claimed *under a particular statute of the United States, the validity, construction, or applicability of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error. No Federal question was presented by the pleadings in the case, and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which the Nesbitt brothers had acquired the interest of De Beque and Stevens in the Fraction mine.

There was undoubtedly a Federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of, and not against, the right claimed under this statute, and of this construction the plaintiff in error is in no position to take advan-

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tage, as it made no claim under those statutes. This subject was considered in the case of *Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state Constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat. § 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held that the *relator* had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of his right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review where the right or privilege was asserted by the other party, and the decision was in favor of that party, and adverse to himself. It is manifest that the object of § 709 was not to give a right of review wherever the validity of an act of *Congress was drawn in question, but to pre-[529] vent states from frittering away the authority of the Federal government by limiting too closely the construction of Federal statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed. To the same effect are *Dover v. Richards*, 151 U. S. 658, 666, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Rae v. Homestead Loan & Guaranty Co.* 176 U. S. 121, *ante*, 398, 20 Sup. Ct. Rep. 341, *Abbott v. Tacoma Bank of Commerce*, 175 U. S. 409, *sub nom. Abbott v. National Bank of Commerce*, *ante*, 217, 20 Sup. Ct. Rep. 153.

Except so far as the case under consideration required a construction of the above-mentioned acts of Congress suspending the forfeiture of mining claims, the questions were purely of a local nature, and not subject to review in this court.

There is no Federal question presented by the record in this case, and it must therefore be dismissed.

Mr. Justice McKenna dissented.

JOHN BAD ELK, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 529-538.)

Arrest—on Indian reservation—without

NOTE.—As to arrest with and without a warrant—see *State v. Hunter* (N. C.) 8 L. R. A. 529, and note.

As to what information an accused person is entitled to at the time of his arrest—see *State v. Taylor* (Vt.) 42 L. R. A. 673, and note.

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warrant—resistance—power of Indian policeman—erroneous instruction as to right to resist.

1. An officer at the Pine Ridge Indian reservation in South Dakota has no authority to arrest a resident on such reservation without a warrant, on a charge of misdemeanor not committed in his presence.
2. Indian policemen are not marshals or deputy marshals within the meaning of U. S. Rev. Stat. § 788, giving such officials in each state the same powers in executing the laws of the United States as sheriffs and their deputies may have by law in executing the laws thereof.
3. An instruction that officers had the right to use all necessary force to arrest the accused, and that he had no right to resist, is prejudicial error where the accused, who was thereupon convicted of murder committed in resisting an arrest, had not been guilty of any offense for which the officers had any legal authority to make the arrest.

[No. 350.]

Submitted February 26, 1900. Decided April 30, 1900.

IN ERROR to the Circuit Court of the United States for the District of South Dakota to review a sentence of conviction for murder. *Reversed.*

The facts are stated in the opinion.

Mr. Thomas B. McMartin submitted the cause for plaintiff in error. Mr. S. B. Van Buskirk was with him on the brief.

Assistant Attorney General Boyd submitted the cause for defendant in error.

[530] *Mr. Justice Peckham delivered the opinion of the court:

The plaintiff in error was convicted in April, 1899, in the circuit court of the United States, in South Dakota, of the murder on March 13, 1899, of John Kills Back at the Pine Ridge Indian reservation, in South Dakota, and sentenced to be hanged. The case is brought here on writ of error to the circuit court.

Both the deceased and the plaintiff in error were Indians and policemen, residing on the reservation at the time of the killing.

Upon the trial it appeared that the plaintiff in error, on March 8, 1899, while out of doors, fired a couple of shots from *his gun at or near the place where he resided. Soon after the firing, one Captain Gleason, who stated that he was what is called an "additional farmer" on the same reservation, having heard the shots, and meeting the plaintiff in error, asked him if he had done that shooting, and he said that he had; that "he had shot into the air for fun;" to which Gleason responded by saying to him, "Come around to the office in a little while, and we will talk the matter over." Thereupon they separated. As he did not come to the office, Gleason, after waiting several days, gave verbal orders to three of the Indian policemen to go and arrest plaintiff in error at his mother's house near by and take him to the agency, some 25 miles distant. No reason for making the arrest was given, nor any

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charge made against him. The policemen, one of whom was the deceased, went to the house where the plaintiff in error was stopping, and came back and reported to Gleason that he was not there, and they were then ordered to return and wait for him and to arrest him. They returned to the house, but came back again and reported that the plaintiff in error said that he would go with them to the agency in the morning; that it was too late to go with them that night. Gleason then told them to watch him and see that he did not go away, and in the morning to take him to the Pine Ridge agency.

The policemen then again went back to the house where plaintiff in error was staying and met him coming towards his mother's place. He went into the house, and one of their number followed him; found him smoking, and told him that they had come to take him to the agency at Pine Ridge. Plaintiff in error refused to go, and the policeman went outside. Another of them then went into the house, and in a few minutes both he and the plaintiff in error came out, and the latter saddled his horse and went over to the house of a friend, and they followed him. It was getting dark when he came back to his mother's house, still followed by them, and while following the plaintiff in error to his house on this last occasion they were joined by others, so that when he went into the house there were four or five men standing about it. In a short *time the plaintiff in error came out, and asked of those outside, "What are you here bothering me for?" The deceased said: "Cousin, you are a policeman, and know what the rules and orders are." To which plaintiff in error replied: "Yes; I know what the rules and orders are, but I told you I would go with you to Pine Ridge in the morning." Then, according to the evidence for the prosecution, the plaintiff in error, without further provocation, shot the deceased, who died within a few minutes.

The policemen had their arms with them when they went up to where the plaintiff in error was at the time the shooting was done.

This is substantially the case made by the prosecution.

There is an entire absence of any evidence of a complaint having been made before any magistrate or officer charging an offense against the plaintiff in error, and there is no proof that he had been guilty of any criminal offense, or that he had even violated any rule or regulation for the government of the Indians on the reservation, or that any warrant had been issued for his arrest. On the contrary, Gleason swears that his orders to arrest plaintiff in error were not in writing, but given orally. Indeed, it does not appear that Gleason had any authority even to entertain a complaint or to issue a warrant in any event.

The plaintiff in error testified in his own behalf, and said that during the day he had been looking after the schools along the creek near the station; that that was his duty as a policeman; that he arrived at his

mother's house about half past four in the afternoon, and soon afterwards an Indian named High Eagle came into the house, stayed a minute or two, but did not speak, then went out doors, and Lone Bear came in, and said that he was directed to take the plaintiff in error to Pine Ridge to Major Clapp. To which the plaintiff replied: "All right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder's, and get another horse." Lone Bear said all right. Then the plaintiff in error started for his brother's, and when he got there found that the horses were out on the range, and when they came in his brother promised to bring one of them down to him.

[533] In this he was corroborated by his *brother, who testified that he brought the horse over about dark. On his way back to his mother's the plaintiff in error stopped at a friend's and got a Winchester rifle for the purpose, as he said, of shooting prairie chickens. When he went back to his mother's he was there but a short time when the deceased and two or three others came to his house to arrest him, and the plaintiff in error went out, and, according to his testimony, the following was what occurred: "I asked John Kills Back and High Eagle what they were there bothering me all the while for. John Kills Back said: 'You are a policeman, and know what the rules are.' I said: 'Yes, I know what the rules are, but I told you that I would go to Pine Ridge agency in the morning.' Then the deceased moved a little forward, and put his hand around as if to reach for his gun. I saw the gun, and shot; then I shot twice more, and John Kills Back and High Eagle ran off. John Kills Back fell after he had gone a short distance. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time I shot." This was in substance all the evidence.

Counsel for plaintiff in error asked the court to charge as follows:

"From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

The court denied the request and counsel excepted.

The court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him.

gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgotten his duties as an officer, and had gone beyond the force necessary to arrest defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest."

This charge was duly excepted to.

We think the court clearly erred in charging that the policemen had the right to arrest the plaintiff in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it.

The evidence as to the facts immediately preceding the killing was contradictory; the prosecution showing a killing when no active effort was at that very moment made to arrest, and the defendant showing an intended arrest and a determination to take him at that time at all events, and a move made by the deceased towards him with his pistol in sight, and a seeming intention to use it against the defendant for the purpose of overcoming all resistance. Under these circumstances the error of the charge was material and prejudicial.

At common law, if a party resisted arrest by an officer without warrant and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offense of the party resisting arrest would be reduced from what would have been murder if the officer had had the right to arrest, to manslaughter. What would be murder if the officer had the right to arrest might be reduced to manslaughter by the very fact that he had no such right. So an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence. 1 Arch. Crim. Pr. * & Pl. 7th Am. ed. 103, note [535] (1); also page 861 and following pages; 2 Hawk. P. C. 129, § 8; 3 Russell on Crimes, 6th ed. 83, 84, 97; 1 Chitty's Crim. L. *15; 1 East, P. C. chap. 5, p. 328; *Derecourt v. Corbishley*, 5 El. & Bl. 188; *Fox v. Gaunt*, 3 Barn. & Ad. 798; *Reg. v. Chapman*, 12 Cox C. C. 4; *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601; *S. C.* on a subsequent writ, 72 Ill. 37. If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest. 1 East, *supra*.

We do not find any statute of the United States or of the state of South Dakota giving any right to these men to arrest an individual without a warrant, on a charge of mis-

[534] * "In this connection I desire to say to you,

demeanor not committed in their presence. Marshals and their deputies have in each state, by virtue of § 788, Revised Statutes of the United States, the same powers in executing the laws of the United States as sheriffs and their deputies in such state may have by law in executing the laws thereof. This certainly does not give any power to an officer at the Pine Ridge agency to arrest a person without warrant, even though charged with the commission of a misdemeanor. These policemen were not marshals nor deputies of marshals, and the statutes have no application to them.

By § 1014 of the Revised Statutes, the officers of the United States named therein and certain state officers may, agreeably to the usual mode of process against offenders in such state, order the arrest of an offender for any crime or offense committed against the United States. This section has no application.

Referring to the laws of South Dakota, we find no authority for making such an arrest without warrant. The law upon the subject of arrests in that state is contained in the Compiled Laws of South Dakota 1887, § 7139, and the following sections, and it will be seen that the common law is therein substantially enacted. The sections referred to are set out in the margin.†

- [536] *No rule or regulation for the government of Indians upon a reservation has been cited, nor have we found any, which prohibits the firing of a gun there, "for fun," nor do we find any law, rule, or regulation which authorizes an arrest, without warrant, *of an Indian not charged even with the commission of a misdemeanor, nor does it anywhere appear that Gleason had authority to issue a warrant for an alleged violation of the rules or regulations.

It is plain from this review of the subject

†Sec. 7139. An arrest may be either—

1. By a peace officer, under a warrant;
2. By a peace officer, without a warrant; or,
3. By a private person.

Sec. 7141. If the offense charged is a felony, the arrest may be made on any day and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant.

Sec. 7144. The officer must inform the defendant that he acts under the authority of the warrant, and must also show the warrant if required.

Sec. 7145. If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

Sec. 7148. A peace officer may, without a warrant, arrest a person—

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

Sec. 7150. He may also at night, without a warrant, arrest any person whom he has rea-

sonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that the felony had not been committed.

Sec. 7151. When arresting a person without a warrant, the officer must inform him of his authority and the cause of the arrest, except when he is in the actual commission of a public offense, or is pursued immediately after an escape.

Sec. 7153. When a public offense is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

Sec. 7154. A private person may arrest another—

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Sec. 7155. He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the offense, or when he is arrested on pursuit immediately after its commission.

sonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that the felony had not been committed.

Sec. 7151. When arresting a person without a warrant, the officer must inform him of his authority and the cause of the arrest, except when he is in the actual commission of a public offense, or is pursued immediately after an escape.

Sec. 7153. When a public offense is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

Sec. 7154. A private person may arrest another—

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Sec. 7155. He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the offense, or when he is arrested on pursuit immediately after its commission.

tion, when the officer had the right to make the arrest, from what it does if the officer had no such right. What might be murder [538] in the first *case might be nothing more than manslaughter in the other, or the facts might show that no offense had been committed.

The plaintiff in error was undoubtedly prejudiced by this error in the charge, and the judgment of the court below must therefore be reversed, and the case remanded with instructions to grant a new trial.

COUNTY OF APACHE, Appt.,

v.

JULIA BARTH, Executrix of Jacob Barth,
Deceased.

(See S. C. Reporter's ed. 538-548.)

Appeal—from territorial court—findings of fact—additional findings on appeal—evidence of county warrants—burden of proof of genuineness and execution.

1. On an appeal from a territorial supreme court which, in addition to adopting the facts found by the trial court, made an additional finding of facts, the Supreme Court of the United States may consider the latter findings, as well as the former, in determining the question of the sufficiency of the facts found to authorize the judgment.
2. Additional findings of facts, and not mere conclusions of law, are involved in findings by the supreme court of a territory, when that court, after reciting that it adopts the facts found by the trial court as the statement of facts in the cause, also finds that the court below did not err in granting judgment in favor of the validity of county warrants, "notwithstanding the verified answer" denying their execution, nor in refusing to enter judgment, notwithstanding the lack of any evidence to establish the genuineness of the warrant sued on, "because the court finds that the warrants were verity of themselves," and that the verified answer only put defendant in a position to establish the facts set up, and did not put plaintiff on proof of their genuineness, wherefore the court finds as a conclusion that the judgment should be affirmed.
3. County warrants are inadmissible in evidence at common law without proof of their execution, where the genuineness of the signatures thereto is put in issue by the pleadings.
4. An affidavit of verification in an action on county warrants, that the facts stated in the answer as defenses to the various causes of action declared on are true, and that the warrants sued on are not genuine, is a sufficient compliance with a statute requiring the verification of any answer containing a denial of the execution of an instrument on which suit is brought.
5. The verification of an answer containing a denial of the execution of county warrants sued on, in compliance with Ariz. Rev. Stat.

1887, 735, which requires the verification of any answer containing a denial of the execution of an instrument on which suit is brought, renders the warrants inadmissible in evidence until their execution is proved.

[No. 181.]

Submitted March 13, 1900. Decided April 30, 1900.

A PPEAL from a decision of the Supreme Court of the Territory of Arizona affirming a judgment in favor of the plaintiff in an action on county warrants. *Reversed.* See same case below, 53 Pac. 187.

Statement by Mr. Justice **Peckham**:

In September, 1891, Jacob Barth commenced an action in one of the district courts of the territory of Arizona against the board of supervisors of Apache county, in that territory, to recover upon certain warrants which he alleged had been issued *by that [539] county during the year 1884, and of which he claimed to be the owner. Barth soon thereafter died, leaving a will, which was proved in February, 1892, and by order of the court in March, 1896, the action was revived in the name of Julia Barth, the appellee, who was the executrix named in the will. She filed in March, 1896, by leave of court, an amended complaint containing forty counts upon as many different warrants, which she alleged had been issued by the board of supervisors of the county on account of debts due from the county, and of which warrants she was the owner, and that the county owed her thereon an amount exceeding \$7,000, for which sum she duly demanded judgment, with interest. A copy of each warrant was annexed to the complaint, and formed part thereof.

The defendant filed an unverified amended answer to this amended complaint, which answer was subsequently verified, and among other things denied that any of the warrants sued on had ever been issued or been directed to be issued by the board of supervisors of the county or by the authority of that board, but, on the contrary, defendant alleged that the pretended warrants sued on were, and each of them was, falsely made and forged, and that they were, and each of them was, a forgery, and that they were so falsely made and forged with a fraudulent intent to defraud the county of Apache. The defendant prayed judgment that plaintiff take nothing by her action, and for costs and for general relief.

Other defenses were set up, among which was the statute of limitations.

The case came on for trial before the court, a jury trial having been waived, and the court, having decided it, signed a statement of the facts found by it, in which it was stated that evidence had been introduced upon the trial, both oral and documentary, and upon the admission of the plaintiff the court found that the figures on eleven of the warrants (duly described and identified) had been altered and changed after they had been issued, and that such alterations and changes

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

As to scope, nature, and effect of verification—see note to *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 13 L. R. A. 267.

vitiated and rendered null and void those warrants as against the defendant, and that they were not valid claims against the county. The *court then made a general finding that all of the other warrants sued on were valid and subsisting legal claims against the county, and that plaintiff was entitled to recover upon each warrant the amount named therein, which, with interest, amounted to about the sum of \$14,000 and for that sum judgment was directed to be entered, which was subsequently done. There was no further or special finding made by the trial court.

From this judgment an appeal was taken by the county to the supreme court of the territory of Arizona, where it was affirmed.

The supreme court at the time of affirming the judgment made and signed by its chief justice a statement of facts in the case as follows:

"The supreme court takes the facts as found by the district court on the trial in that court and as shown by the record, and makes them the statement of the facts in this cause.

"This court finds that the district court did not commit error in finding against the plea of limitation set up by appellant.

"The court further finds that the district court did not commit error in granting and rendering judgment in favor of appellee on the warrants sued on and against appellant, notwithstanding the verified answer of appellant. The supreme court further finds that the district court did not commit error in refusing to render judgment for appellant on the verified answer of appellant, notwithstanding appellee did not introduce any evidence to establish the genuineness of said warrants for which appellee asked judgment, because the court finds that the warrants were verity of themselves, and the verified answer only put appellant in position in court to prove the facts set up in her answer, and did not put appellee on proof of their genuineness; hence the supreme court finds as a conclusion that the judgment of the district court should be affirmed. Judgment of affirmation and confirmation is therefore ordered and directed.

"This June 11th, 1898."

The county has appealed to this court from the judgment of the supreme court of the territory.

Mr. J. F. Wilson submitted the cause for appellant.

Mr. Reuben Hatch submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

[541] ***Mr. Justice Peckham**, after stating the facts, delivered the opinion of the court:

The statute approved April 7, 1874, entitled "An Act Concerning the Practice in Territorial Courts and Appeals Therefrom" (18 Stat. at L. 27, chap. 80), by the 2d section provides:

"That the appellate jurisdiction of the Supreme Court of the United States over the 177 U. S.

judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed, or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree," etc.

The legislature of the territory passed an act in 1897 providing as follows:

"Sec. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this territory to the supreme court of the territory, the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case.

"Sec. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the supreme court without any bill of exceptions or other assignment of errors as herein provided."

*This last act was passed subsequently to the trial of this action, but immediately after the filing of findings herein, and, pursuant to its provisions, the reporter's notes of trial, with his certificate, were returned upon appeal, and are contained in this record. [542]

This act could give us no jurisdiction to review an objection to evidence taken upon the trial, if no exception were taken, for the act of Congress of 1874, above cited, provides for a review in this court only when the decisions of the court were excepted to, and our jurisdiction is regulated by that act. *Grayson v. Lynch*, 163 U. S. 468, 474, 41 L. ed. 230, 232, 16 Sup. Ct. Rep. 1064.

Upon a review of a judgment in a case not tried by jury and taken by appeal from the supreme court of a territory, this court is by statute restricted to an inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence. *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 18, 41 L. ed. 327, 334, 17 Sup. Ct. Rep. 7; *Harrison v. Perea*, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129; *Young v. Amy*, 171 U. S. 179, 183, 43 L. ed. 127, 128, 18 Sup. Ct. Rep. 802.

There is no bill of exceptions in the record, and there is nothing to show that any exception was taken on the trial to the admission or rejection of evidence. Counsel for appellee therefore urges that the only in-

quity before this court is whether the facts found by the trial court authorize the judgment which was entered; and he claims that upon those findings there can be no question that the judgment entered is right. This does not give the full and proper force to the additional finding of facts by the supreme court to which it is entitled. Although in that finding it is said that "the supreme court takes the facts as found by the district court on the trial in that court, and as shown by the record, and makes them the statement of the facts in this cause," yet a perusal of the statement made by the supreme court renders it plain that such court found other facts in addition to those adopted from the district court, and those facts found by it should be regarded in the decision of this case.

[543] What we regard as additional facts in the statement of the supreme court are regarded by counsel for the appellee as conclusions *of law only, and he contends that we are confined to the general findings of fact made by the district court and adopted by the supreme court, and that upon those facts the appellee is clearly entitled to judgment. We cannot acquiesce in the correctness of the claim so made.

The supreme court in its statement finds a conclusion of law, *viz.*: That the court below did not err in granting judgment for appellee; and this conclusion is immediately followed by the declaration, "notwithstanding the verified answer of the appellant," which latter is a statement of fact. In addition to the fact thus stated, and in continuation of its statement, the court "further finds that the district court did not commit error in refusing to render judgment for appellant on the verified answer of appellant, notwithstanding appellee did not introduce any evidence to establish the genuineness of said warrants for which appellee asked judgment, because the court finds that the warrants were verity of themselves, and the verified answer only put appellant in position in court to prove the facts set up in her answer, and did not put appellee on proof of their genuineness; hence the supreme court finds as a conclusion that the judgment of the district court should be affirmed."

We do not think that all of this can be called a conclusion of law only, and not a finding of any fact. It is too technical a treatment of this statement to limit the finding of facts wholly to those set forth in the finding of the district court.

If we were not, in this particular, limited to the findings of the court, and could look at the notes of the stenographer taken on the trial and attached to the record by virtue of the territorial act referred to, we should there find that defendant was granted leave to verify its answer before the plaintiff rested her case, and that the answer was then verified and the plaintiff given opportunity to put in such evidence as she chose after such verification was made and before she closed her case. She did not avail herself of the leave, and the case rests only upon the production of the warrants, with

the words indorsed thereon: "Not paid for want of funds; Presented Dec. 31, 1884. D. Baca, Treasurer, A. Ruiz, Deputy. Sol. Barth;" also with the word "Forgery" marked in red ink across the faces of the warrants. *No proof whatever was given as to [544] the genuineness of these signatures.

The finding of the supreme court shows that its decision was not placed upon the ground that the answer was verified after the plaintiff had rested; nor was its finding put on any ground of waiver. We must therefore take the fact that the answer was verified in ample time to call upon the plaintiff to prove the affirmative of the issues presented by the pleading.

Coming to an examination of the case in the light of these facts, we see that this was an action brought upon certain county warrants fully described in the amended complaint, and it was therein alleged that they were issued under the direction and authority of the board of supervisors of the county, signed by the chairman, and countersigned by the clerk of the board. The answer denied the fact that the warrants were issued by the authority or direction of the board, and alleged that they were forged warrants, and that the county was not liable thereon. Irrespective of any statute in regard to pleading, an issue was thus joined which raised the question of the genuineness of the signatures subscribed to these warrants; in other words, the question of their execution was put in issue, which would make it necessary for the plaintiff to prove that fact before they could be admitted in evidence. We are aware of no exception to this rule which would permit the introduction of alleged county warrants such as these, without any proof whatever of their execution. They do not prove themselves. The mere production of a piece of paper upon which is written or printed a promise to pay upon the part of a county, and upon which certain signatures appear, without the slightest proof of the genuineness of such signatures, does not entitle such paper to be admitted in evidence.

It is stated that it has been held by the courts generally that county and state warrants signed by the proper officers are *prima facie* binding and legal; that those officers will be presumed to have done their duty, and that such warrants make a *prima facie* cause of action, and that impeachment must come from the defendant. 1 Dillon's Municipal Corporations, 3d ed. sec. 502. *This may [545] very well be in regard to those warrants when, as above stated, they have been, in fact, signed by the proper officers, and very probably the presumption may then be made that those officers who are proved to have signed the warrants have done their duty; but we are aware of no case where it has been held, in the absence of a statute to that effect, that the mere production of a paper upon which is written or printed an obligation of a county, bearing certain names thereon, can be put in evidence without the slightest proof that the signatures on the paper were those of the persons they purport

to be. No such case has been called to our attention, and we think there is no principle upon which such a holding could stand.

The cases referred to by counsel simply hold the burden of proof shifted after there has been proof of the execution of the warrants; that such proof makes out a prima facie case against the county. Such are the cases of *Floyd County Comrs. v. Day*, 19 Ind. 450, and *Leavenworth County Comrs. v. Keller*, 6 Kan. 510. In both those cases the warrants were proved to have been signed by the proper authorities of the county before they were admitted in evidence, and it was said in the Indiana case, upon these facts, that "the officer, in the discharge of his general powers, will be presumed to have done his duty, in drawing a warrant or order, till the contrary appears; and hence such order makes a prima facie cause of action," citing *Hamilton v. Newcastle & D. R. Co.* 9 Ind. 359. And in the Kansas case it appeared that the county board audited and allowed the bill of claimant, and that a county warrant was drawn in his favor for the amount due, and signed by the chairman of the board, and it was held that upon those facts an action might be maintained on the warrant, but that it was liable to be defeated by showing that the tribunal which issued it had no authority to make the allowance on which the warrant was issued. In other words, that proof being given of the signature of the proper officer, the warrant was admissible in evidence and constituted a prima facie case [546] against the county, and any *facts going to show that no cause of action existed rested upon the defendant to prove.

In *Grayson v. Latham*, 84 Ala. 546, 549, 550, 4 So. 200, 202, 366, two county warrants were sued on which were alleged and purported to have been issued by the commissioners of the county of Pickens and signed by the probate judge. In delivering the opinion of the court, Stone, Chief Justice, said:

"The warrants declared on, issued and signed by the judge of probate, as they were shown to have been, prima facie imported a liability on the county. . . . Upon the question we have been discussing, the plaintiff made a prima facie case when he produced and proved his warrants, showed that they had been registered, proved that, in the receipt and disbursement of county funds, the time had arrived for their payment according to their place on the registry, and that payment has been demanded and refused; or, if payment was not shown to have been demanded, by proving that demand would have been unnecessary. Making this prima facie case, if made, the burden would then be shifted to the defendants to overturn the presumption of liability."

Another case relied upon to sustain the ruling of the courts below is that of *Wall v. Monroe County*, 103 U. S. 74, 26 L. ed. 430. That case does not show that the warrants were proved by their mere production; on the contrary, it appears that the warrants were drawn by the clerk of the county upon the treasurer in favor of one Frank Gall-

gher, and transferred by him to the plaintiff. Their execution was alleged and proved, and the question decided had no relevancy to the matter here under discussion.

No case cited by counsel shows that there is anything peculiar to a paper in the form of a county warrant, which proves itself upon mere production.

It is clear, then, that at common law, in an action upon such an instrument, and upon a pleading denying the execution thereof by the defendant, and setting up its forgery, the plaintiff in order to be entitled to put the instrument in evidence, and thereby to make a prima facie case, would be compelled to prove its execution. The question is, what difference the statute of Arizona makes in this rule.

*The Revised Statutes of Arizona, 1887. [547] provide:

"735. (Sec. 87.) Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:—

"8. A denial of the execution by himself or by his authority, of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority."

The answer in this case did deny the execution on behalf of the county of these warrants, and alleged that they were forgeries made to defraud it. The affidavit of verification was made by the clerk of the board of supervisors, who swore that the facts stated in the answer, as defenses to the various causes of action declared on, were true, and that the warrants sued on were not genuine. The statute does not require that the affidavit should contain a denial of the execution of the instrument on which suit is brought. It requires that any answer which contains a denial of the execution of an instrument shall be verified, and the verification in this case is not open to the objection of insufficiency urged by the appellee.

We have, then, the fact as stated by the supreme court of the territory, that this answer was verified, and that the appellee did not introduce any evidence to establish the genuineness of the warrants sued on, and as a conclusion of law from those facts the court held the plaintiff entitled to judgment on the ground that the verified answer did not put the plaintiff to proof of the genuineness of the warrants.

It seems plain to us that the court did not give that force to the verification of the answer which it was entitled to, and that by reason of such verification the defendant was not only put in position to prove the facts set up in the answer, but the plaintiff *in the [548]

action was thereby compelled to prove the execution of the warrants by the proper officers of the county.

Statutes similar to this have been passed in other states, and it has been held in Colorado, in *Lothrop v. Roberts*, 16 Colo. 250, 254, 27 Pac. 698, that an answer denying the execution of a note, under oath, made it necessary for the plaintiff to give proof of its execution before the note was properly admissible in evidence.

In *Horn v. Volcano Water Co.* 13 Cal. 62, 73 Am. Dec. 569, under a somewhat similar statute, where the answer was a general denial without verification, the genuineness and due execution of the note sued on were regarded as admitted.

To the same effect is *Corcoran v. Doll*, 32 Cal. 82, 88, where it was stated that the action being upon a note, and the complaint containing a copy, and the answer not verified, the due execution of the note was admitted.

In *Shepherd v. Royce*, 71 Ill. App. 321, under a similar statute, it was held that the effect of the verification of the plea setting up the forgery of a note sued on was to cast upon appellant the burden of proving the execution of the note as at common law, citing *Wallace v. Wallace*, 8 Ill. App. 69.

The Michigan courts have decided in the same way upon the same kind of a statute. *Ortmann v. Merchants' Bank*, 41 Mich. 482, 2 N. W. 677; *New York Iron Mine v. Citizen's Bank*, 44 Mich. 344, 6 N. W. 823.

We have no doubt that the effect of the statute of Arizona is that when the defendant does not verify his answer in a case provided for therein, the note or warrant or other paper sued on is admitted as genuine, but when the answer denying that fact is verified, the plaintiff must prove it as he would have had to do at common law in a case where the genuineness of the paper was put at issue by the pleadings.

Upon the facts found by the district judge and accepted by the supreme court of the territory in this case, and upon the additional facts found by that court, we are of opinion that the judgment entered under its direction is erroneous and not warranted by those facts, and therefore it is reversed, and the case remanded, with directions to grant a new trial, and it is so ordered.

[549] *A. J. DAGGS and R. E. Daggs, Appts.,
v.

PHENIX NATIONAL BANK.

(See S. C. Reporter's ed. 549-558.)

National banks—rate of interest taken by—when rate fixed by law—contract rate for—pleading—evidence—finding of facts on evidence.

1. The rate of interest which a national bank may charge in Arizona is not limited to 7

NOTE.—As to usury by national banks—see note to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196.

per cent by U. S. Rev. Stat. §§ 5197, 5198, authorizing such banks to charge interest at the rate allowed by the laws of the state or territory where they are located, and allowing only 7 per cent if no rate is fixed by such laws, although Ariz. Stat. 2161, 2162, allow parties to agree upon any rate, and in default of any agreement to take 7 per cent only, since under these statutes any rate which may be agreed upon is thereby "fixed" by the law.

2. An unverified denial of each and every allegation in a counterclaim which sets up assignment of a promissory note for a valuable consideration, the fact of the maker's insolvency, of which the assignor had knowledge, and the nonpayment of the note, puts the allegations of insolvency and nonpayment in issue.
3. Facts alleged to be established by the testimony cannot be considered in passing upon a motion for judgment based on confession of the allegations of a counterclaim.
4. No finding of facts need be made where the question before the court for decision is the sufficiency of the averments of a counterclaim as a defense.

[No. 138.]

Submitted January 30, 1900. Decided April 30, 1900.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming a decision in favor of the plaintiff in an action on notes and mortgages alleged to be usurious. *Affirmed.*

See same case below, 53 Pac. 201.

Statement by Mr. Justice McKenna:

*This cause embraces three suits brought by [549] the Phoenix National Bank against A. J. and R. E. Daggs, defendants in error. They were respectively numbered 2554, 2555, and 2556, and were consolidated by stipulations of the parties.

They were brought to recover on three promissory notes, aggregating the sum of \$9,741.73 signed by A. J. Daggs, one of the appellants. Each note was dated November 1, 1894, and payable on or before one year from date, with interest at the rate of 10 per cent per annum. Also, to foreclose certain mortgages executed to secure the notes:—one executed by R. E. Daggs on the 28th of November, 1894, on certain real estate in Maricopa county, Arizona, and on four water rights of the Consolidated Canal Company, represented by certificates; two executed by A. J. Daggs on same day, on certain other real estate situate in the same county.

The answers were substantially the same in all of the cases.

They admitted the making of the notes and mortgages, but alleged that the interest charge was usurious, and in violation of §§ 5197 and 5198 of the Revised Statutes of the United States.

As a counterclaim it was alleged that the plaintiff (appellee) was indebted to the defendant (appellant) upon a certain promissory note executed by W. A. Daggs and P. P. Daggs as copartners and as individuals, and delivered to Thomas Armstrong, Jr., and as-

signed by him to the plaintiff in blank, and by the latter, on the 28th of November, 1894, [550] for a valuable *consideration, to the defendant, A. J. Daggs, at which time the makers were, and ever since have been, notoriously insolvent, all of which the plaintiff knew. The note was as follows, marked "Exhibit A," and made part of the counterclaim:

No. 1340. Due Sept. 1st.

Phoenix, Arizona, July 1st, 1893.

\$5,000.00.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phoenix National Bank, at their office in Phoenix, Arizona, five thousand dollars (\$5,000) in United States gold coin, with interest, at the rate of 1 and $\frac{1}{4}$ per cent per month, until paid. In case of legal proceedings hereon, we or either of us agree to pay 10 per cent of amount due hereon as attorney's fees. W. A. and P. P. Daggs.

Secured by chattel mortgage of even date herewith.

W. A. Daggs.
P. P. Daggs.

It was also alleged that no part of the note was paid, and that there was due thereon the sum of \$7,076.91. And judgment was prayed for the amount and interest.

For another defense it was alleged that at the time of the execution of the three promissory notes sued on, the plaintiff (appellee) and the defendant, A. J. Daggs, entered into a contract in writing (a copy of which is attached to the answer, marked Exhibit "B") wherein the plaintiff as part of the consideration for the said three notes, sold and assigned and expressly stipulated that the three notes should be received in payment for all its rights, title, and interest in and to that certain right in action wherein Hugh McCrum was plaintiff and W. A. and P. A. Daggs were defendants, and plaintiff was intervener, over that certain \$5,000 note marked "Exhibit A" herein, and the mortgage securing the same.

That at said time the makers of said note were actually insolvent, which plaintiff [551] knew, and it was agreed that plaintiff *should carry on the said litigation in its name until the cause of action should be determined and settled, and pay all costs accruing prior to November 1, 1894, and the defendant to pay those accruing thereafter. And it was alleged that the defendant paid out large sums of money in the prosecution of said suit, to wit, \$45.65 as transcript fee from the court below, and \$500 as costs, and expended work and labor of the reasonable value of \$500, and has performed all the conditions of said contract, but that plaintiff (appellant) has failed to perform the conditions on its part to the damage of defendant in the sum \$10,122.55.

For another defense, it was alleged that the defendant pledged certain water stock in the Tempe Irrigating Canal as security for said promissory notes, which was reasonably worth \$4,000, and that the plaintiff (appellee) has converted it to its own use, to de-

endant's damage in the sum of \$4,000; wherefore defendant prayed that he be relieved from the payment of interest on said notes, for his expenditures in said suit; the amount of said \$5,000 note, for \$4,000 value of the water stock pledged, and for \$2,000 damages.

In case No. 2555 the defendants filed a plea in abatement on account of the pendency of case No. 2554, and a like plea in case No. 2556. The pleas were overruled.

And in case No. 2555 A. J. Daggs moved for judgment upon his counterclaim on the ground that it was confessed, because no reply was made to it.

A similar motion was made in case No. 2556.

Testimony was taken and judgment was entered for the plaintiff, the Phoenix National Bank, against the defendant, A. J. Daggs, for the principal of the three notes and interest, and decreeing a foreclosure of the mortgages and the sale of the property mortgaged. A motion for a new trial was made and denied. On writ of error to the supreme court of the territory the judgment was affirmed (53 Pac. 201), and an appeal was then taken to this court.

In passing on the case the supreme court of the territory said:

"At the outset we are compelled to call attention to the *omission of counsel to comply with the statute and the rules of this court on the subject of assignments of error. [552]

"These are imperative and must be observed. It is not our business to search the record if perchance we may find reversible error. It is our duty to examine into such alleged errors, and only such, as are distinctly pointed out in the record. The assignments made by plaintiffs in error in their brief are, for the most part, so general in character and so wanting in definiteness that they cannot be considered. Although defective as assignments, we have, by liberal construction, found that two of them present questions for our review.

"The first of these reads as follows:

"The court erred in not giving judgment for plaintiffs in error on their pleas in bar of the recovery of any interest for the reason that the contract with the national bank for 10 per cent interest is *ultra vires*."

"The second assignment of error as made by plaintiffs in error, reads: 'The court erred in overruling the plaintiffs' in error motion for judgment on the pleadings for the reason that there was no reply to plaintiffs' in error verified counterclaims.'"

No statement of facts in the nature of a special verdict being certified with the record, the plaintiffs in error moved for and obtained from this court a certiorari to supply the defect, and in response thereto a statement of facts, which had been made by the supreme court of the territory, was certified to this court, in which was recited act No. 71 of the territory, regulating appeals and writs of error to the supreme court, the judgment of foreclosure and sale, the assign-

ments of error of appellants, and concluded as follows:

"Under the assignments of error thus made and presented in the record this court could and did make no determination of the facts of the case, except such as appeared in the pleadings and judgment, for the reason that such of the assignments as were sufficient in form to raise any question presented none for our consideration which necessitated the further finding of facts in the case. We are unable to determine from the record presented in this court, in the absence of a

[553] bill of exceptions *and a statement of facts, what the facts were which were put in evidence on the trial in the court below, further than as they are shown by the transcript of the reporter's notes, and from such review of the record the judgment of the district court was affirmed as follows:

"In the Supreme Court of the Territory of Arizona.

"R. E. Daggs and A. J. Daggs, Plaintiffs in Error,

v.

Phoenix National Bank, a Corporation, Defendants in Error.

"This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court herein be, and the same is hereby, affirmed.

"It is further ordered and adjudged that the defendant in error herein do have and recover of and from the plaintiffs in error, R. E. Daggs and A. J. Daggs, as principals, and R. F. Doll, W. M. Billups, and the London Company, as sureties, on cost bond, its costs in this court, taxed at forty-three and 10-100 (\$43.10) dollars.

"By the court: Webster Street, C. J.
Richard E. Sloan, A. J.
Fletcher M. Doan, C. J.
Geo. R. Davis, A. J."

Asserting that the statement did not embody a finding of fact according to law, plaintiffs in error moved for a rule to show cause why a mandamus should not issue, commanding the supreme court of the territory to make and certify a statement of the facts in the nature of a special verdict, and also the rulings of the district court on the admission and rejection of evidence excepted to.

Plaintiffs in error submitted with the motion a statement which they claimed the record justified.

The motion was denied January 29, 1900.

Mr. A. J. Daggs, *propria persona*, submitted the cause for appellants.

Messrs. Aldis B. Browne and Alexander Britton submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

[554] *Mr. Justice McKenna, after making the foregoing statement, delivered the opinion of the court:

We are confined by the record to the points

passed on by the supreme court of the territory; to wit, the defense of usury, and the motion for judgment on the counterclaim.

(1.) By § 5197 of the Revised Statutes of the United States a national bank may charge on any note interest at the rate allowed by the laws of the state or territory where it is situated. It is further provided, however, that if no rate is fixed by such laws the bank may not charge a greater rate than 7 per cent, and if a greater rate be knowingly charged, the entire interest agreed to be paid shall be forfeited. Sec. 5198.

The laws of the territory are as follows:

2161. "Sec. 1. When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of 7 per cent per annum on all moneys after they become due on any bond, bill, promissory note, or other instrument in writing, or any judgment recovered in any court in this territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained, and for money received for the use of another."

2162. "Sec. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment."

The contention of appellant is that the rate of interest is not *fixed* by the laws of the territory. It permits the parties to do so, but does not do so itself. In other words, it is urged that the rate is fixed by permission of the laws, and not by the laws, and upon this distinction a power which every person and every bank in the territory has, it is contended, the national banks do not have.

*We cannot accept this as a correct interpretation of either the spirit or the words of the national banking act. By that act, certainly no discrimination was intended against national banks, and that the interpretation contended for would seriously embarrass their business is manifest.

We said in *Tiffany v. National Bank*, 18 Wall. 409, 21 L. ed. 862, that national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks."

The language of the Revised Statutes is that national banks "may take, receive, reserve, and charge on any loan . . . upon any note . . . interest at the rate *allowed* by the laws of the state, territory, or district" where located, "and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be *allowed* for associations organized or existing in any such state under

this title." Rev. Stat. § 5197. The italics are ours.

The meaning of these provisions is unmistakable. A national bank may charge interest at the rate *allowed* by the laws of the state or territory where it is located; and equality is carefully secured with local banks.

The clear meaning and purpose of these provisions remove the ambiguity of those which follow, if there is any ambiguity. "When no rate is *fixed* by the laws of the state or territory or district, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum." "*Fixed by the laws*" must be construed to mean "*allowed by the laws*," not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. *Tiffany v. National Bank*, 18 Wall. 409, 21 L. ed. 862.

It is urged, however, that *National Bank v. Johnson*, 104 U. S. 271, 26 L. ed. 742, is in conflict with these views.

[556] In that case the defendant, a national bank doing business in "the state of New York, discounted for the plaintiff in the case, at the rate of 12 per cent per annum, commercial paper and promissory notes amounting to \$158,003. The interest which the bank knowingly charged amounted to \$6,564.88, an excess of \$2,735.36 beyond the rate allowed by the general laws of the state. Judgment was rendered for twice the amount of the interest, which was affirmed by this court upon the statute of the state, which established the rate of interest for the loan or forbearance of money at 7 per cent.

Meeting the arguments of counsel upon a supposed difference between loans and discounts, and usurious and nonusurious contracts under the laws of the state in the transactions of natural persons, the learned justice who delivered the opinion of the court made some remarks which seemed to imply that a rate allowed by a state law was not a rate fixed by a state law. The remarks, however, were not necessary to the decision, and cannot be considered as expressing the judgment of the court.

(2.) The counterclaim of plaintiffs in error present these facts:

The making of the \$5,000 note by W. A. and P. P. Daggs, and its delivery to Thomas Armstrong, Jr.; its assignment by the latter to the Phoenix National Bank (appellee), and by the bank, in writing, for a valuable consideration to the defendant, A. J. Daggs (one of the appellants); the insolvency of the makers, W. A. and P. P. Daggs, and the nonpayment of the note or any part of it.

To the counterclaim there was a demurrer for insufficiency, and a denial of each and every one of its allegations. The denial was not verified. The supreme court of the territory, considering an error assigned on the overruling of appellants' motion for judgment on the counterclaim, held it insufficient because it did not allege that due diligence to

collect the note had been exercised, as required by the statute of the territory, or that any effort had been made to collect the same.

By this ruling it is urged that the court assumed that the counterclaim was based on the rights of a surety, instead of upon the direct obligation of the Phoenix Bank as assignor of the Armstrong note on account of Armstrong's insolvency. Articles 122, 1226, and 788 of the Arizona Statutes.

*Assuming, without deciding, that appellants are correct in their construction of the Arizona statutes, and assuming that the answer to the counterclaim did not put in issue the making of the Armstrong note and its assignment to plaintiff in error, nevertheless the answer to the counterclaim did put in issue the other facts alleged; to wit, the insolvency of the makers of the note and its nonpayment. [557]

But it is said that the contract marked "Exhibit B" shows the insolvency. It certainly does not. It recites the transfer of the Armstrong note to A. J. Daggs, and that it is secured by a mortgage on 3,500 sheep; that the note is in litigation between the Phoenix Bank and Hugh McCrum, of San Francisco, as assignee of D. A. Abrams as assignee of the Bank of Tempe, "to establish and determine the priorities of rights under mortgages between said litigants hereinbefore mentioned, which said cause of action and rights of the Phoenix National Bank under its first mortgage in said litigation described is also hereby sold, assigned, transferred, and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and 73/100 dollars (\$9,741.73). It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phoenix National Bank until the said case is determined and settled; but it is further agreed that from this date, November 1, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said case."

This contract standing alone establishes nothing definite, and appreciating this the appellants attempt to explain it by a resort to what they allege to be the testimony in the case. It is said that "they (W. A. and P. E. Daggs) could not pay their notes, three suits in court foreclosing three mortgages, each seeking priority, hanging to them like mill stones, grinding them to dust. Appellee had lost its reputed first mortgage in the district court and appealed. It then sold this note and litigation, the contract shows, and agreed to stand up and carry the suit on in its name. The case was tried in the supreme court of Arizona, and held adversely to the appellee in appellants' suit against the makers of the \$5,000 note. The appellee then fell down and refused to let its name be used any farther to carry on the suit, refused to sign the bond, and would have nothing more to do with the suit. . . . Appellant then demanded payment of the \$5,000 note, and was refused. Appellant spent over \$500 in money and \$500 in services prosecuting the makers of the \$5,000 note, followed it to the supreme court of Arizona, and

would have went further, but appellee refused to let its name be used and he was compelled to stop. Appellant then demanded credit for the \$5,000 note."

Those facts, however, are not a part of the counterclaims, and, it is hardly necessary to say, cannot be considered in passing on a motion for judgment based on a confession of the allegations of the counterclaims.

Nor can it be said that such facts should have been found by the lower court, because, as we have seen, under the statement of the case as considered by that court, the question for decision was the sufficiency of the averments of the counterclaims as a defense.

We repeat, therefore, that we are confined to the propositions we have stated above and discussed, and as there was no prejudicial error in the ruling of the supreme court of the territory on them, its judgment is *affirmed*.

CITY OF LOS ANGELES, Herman Silver,
Z. D. Matthuss, *et al.*, Appts.,
v.

LOS ANGELES CITY WATER COMPANY,
Crystal Springs Land & Water Company,
and S. G. Murphy.

(See S. C. Reporter's ed. 558-584.)

Waterworks—lease of, by city—reservation of power to fix rates—impairment of obligation of contract by change of judicial decision—estoppel to contest ordinance by

NOTE.—As to *estoppel by silent acquiescence*—see notes to *Reichert v. St. Louis & S. F. R. Co.* (Ark.) 5 L. R. A. 183; *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 755; *Tarkington v. Purvis* (Ind.) 9 L. R. A. 609; *Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

As to *impairment of obligation of contract by state Constitution*—see note to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405.

Change of decision of state court as impairing obligation of contract.

The exposition given by the highest tribunal of the state to its laws and Constitution will be taken by the United States Supreme Court as correct, so far as contracts made under the laws so interpreted are concerned, and their validity and obligation cannot be impaired by any subsequent change in the decisions of the state court. *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Havemeyer v. Iowa County*, 3 Wall. 295, 18 L. ed. 38; *Lee County v. Rogers*, 7 Wall. 181, 19 L. ed. 160; *Kenosha v. Lamson*, 9 Wall. 477, 19 L. ed. 725; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Weightman v. Clark*, 103 U. S. 256, 26 L. ed. 392; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159.

reason of delay—income of water company as affected by change of rates—equitable relief against ordinance—invalidity not appearing on its face—estoppel of city as to taking of water from stream.

1. Reservation by a city in a lease of its waterworks, of the right to regulate rates, provided they be not reduced below the then existing rates, must, if valid, be deemed to be a limitation upon the right of the city as a municipality to regulate water rates, and not a mere granting back by the lessees of the right of the city in its proprietary capacity only.
2. A contract authorized by the existing state Constitution as then construed by the highest court of the state cannot be affected by subsequent change in the decisions of that court, or by the adoption of a new Constitution.
3. A water company is not estopped to contest the constitutionality of a city ordinance fixing its water rates at a rate in violation of a provision in a contract between the city and the grantors of the company, merely because for fifteen years it has collected the rates established by similarly objectionable ordinances, where it has annually protested against the city's conduct.
4. A reduction of the income of a water company need not be shown in order to establish the fact that a reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction.
5. The right to equitable relief against an invalid ordinance reducing the rates of a water company in violation of a contract, on the ground that it is a cloud upon title, is not

It will be noticed, however, that in all the above decisions the United States Supreme Court had acquired jurisdiction on some grounds other than the unconstitutionality of such decisions; and that court has held that such a decision is not an unconstitutional law which will give the United States Supreme Court jurisdiction to revise the judgment of the state court. *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958.

The decisions of the United States Supreme Court have, however, had more or less effect upon state decisions, and the state courts have to some extent acquired the idea that the obligation of a contract ought not to be impaired by a later judicial decision. See *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065, 1067; *Farrior v. New England Mortg. Security Co.* 92 Ala. 176, 12 L. R. A. 856, 9 So. 532; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161; *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616.

For a full review of the cases cited above, see note to *Allen v. Allen* (Cal.) 16 L. R. A. 646.

In *Union Bank v. Oxford Comrs.* 90 Fed. Rep. 7, the court refused to follow a decision of a state court rendered after an issue of bonds, which changed the construction previously given to a state statute under which the bonds were issued, so as to invalidate them. The court said: "To hold otherwise would be to impair by judicial decision the obligation of a contract made in compliance with the law,

precluded by the fact that the ordinance is void, where its invalidity appears only when it is considered in connection with the contract and evidence showing what the rates were when the contract was made.

6. A municipality which for nearly thirty years has allowed a water company to divert from a stream an amount of water greatly in excess of the quantity specified in a contract between them, and to expend vast sums of money upon the faith of a continuance of the right to take such water, cannot during the life of the contract withdraw its consent to a continuance of such taking of the larger quantity.

[No 148.]

Submitted March 15, 1900. Decided April 30, 1900.

A PPEAL from a decree of the Circuit Court of the United States for the Southern District of California vacating an ordinance. *Affirmed.*

See same case below, 88 Fed. Rep. 720.

Statement by Mr. Justice **McKenna**:

- [559] *This suit involves the constitutionality of an ordinance of the city of Los Angeles, adopted February 23, 1897, fixing the water rates to be charged and collected by the Los Angeles City Water Company for the year ending June 30, 1898.

It is claimed that the ordinance impairs the obligation of the contract made with the grantors of the company on the 20th of July, 1868.

which the Constitution of the United States does not permit."

But a change by a state court of its construction of a state statute, even if its former construction had become a rule of property, cannot constitute a Federal question as to the impairment of the obligation of a contract, for which a writ of error will lie from the Supreme Court of the United States to the state court. *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

A decision by the highest court of a state overruling a prior decision, and holding unconstitutional a statute held to be constitutional by that decision, does not impair the obligation of a contract entered into before the later decision was rendered, as a decision of a court is not in fact a law, and, if erroneously made, cannot make a law. *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154. The court discussed a number of cases decided by the United States Supreme Court which bear upon the question, and said: "The real ground upon which each of the decisions rests is that the Federal courts do not consider themselves bound to follow the state courts in the determination of questions of which they have concurrent and independent jurisdiction, and that in determining what the law of the state is as to the matter under consideration they will follow or disregard the decisions of the state court, as they may deem best. It follows that the decisions of the Supreme Court of the United States in those cases are not binding upon the state courts as authority in the determination of like questions."

So, the reversal of a decision erroneously construing a state statute is not prohibited as a law impairing the obligation of a contract made in reliance on the erroneous decision.

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The facts were stipulated, and are substantially as follows:

On the 22d of July, 1868, the city of Los Angeles entered into a contract with John S. Griffin, P. Beaudry, and Solomon Lazard, whereby it leased its waterworks to the said persons and their assignees for a term of thirty years, with the right to lay pipes in the streets of the city, and to sell and distribute the water for domestic purposes to the inhabitants of the city; *also with the right to take water from the Los Angeles river at a point at or above the present dam, to be selected within sixty days of the date of the contract. It was provided that no more than 10 inches of water should be taken from the river without the previous consent of the mayor and common council.

The city bound itself not to make any other lease, sale, contract, grant, or franchise to any person, corporation, or company for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract.

And it was provided "that the mayor and common council of said city shall have, and do, reserve the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the parties of the second part for water."

The said persons agreed to pay the city a rental of \$1,500 for the waterworks; to lay

Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460.

But the construction of a statute of descent, established by the decisions of the courts at the time of the execution of a quitclaim deed by heirs claiming under the statute, becomes a part of the contract and must govern the rights of the parties, as against a different construction thereafter adopted by overruling the former decisions. *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379, 33 N. E. 358.

And an order of court made prior to the commencement of a sheriff's term of office, fixing the compensation to be allowed him for boarding vagrants, establishes a definite contract between the sheriff and the county, the obligation of which cannot be impaired by a retrospective order fixing a greater compensation. *Strock v. Cumberland County Comrs.* 4 Pa. Dist. R. 321.

A decision of a state court upholding the validity of chattel mortgages as common-law assignments giving preference to creditors, rendered after these mortgages were executed, does not impair the obligation of a contract between the mortgagor and an unsecured general creditor who gave him credit at a time when under the existing decisions such mortgages would be void. *Brown v. Grand Rapids Parlor Furniture Co.* 16 U. S. App. 221, 58 Fed. Rep. 286, 7 C. A. 225, 22 L. R. A. 817.

A school township can raise no question in respect to vested rights in the surplus dog tax fund, which, it claims, were invaded by a change in the judicial construction of a statute providing for the disposition of such surplus, as the control of the state over public corporations is not subject to the limitations operating in favor of individuals and private corporations. *Center School Twp. v. State ex rel. Indianapolis School Comrs.* 150 Ind. 168, 49 N. E. 961.

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down in the streets of the city 12 miles of iron pipes of sufficient capacity to supply the inhabitants with water for domestic purposes; to extend the pipes as fast as the citizens would agree to take sufficient water to pay 10 per cent upon the cost of such extension; to erect one hydrant, as protection against fire, at one corner of each crossing of streets where pipes were or might be laid; to erect an ornamental fountain on the public plaza at a cost not exceeding \$1,000; to construct and erect, within two years, such reservoirs, machinery, ditches, and flumes as would secure the inhabitants with a constant supply of water for domestic purposes; to furnish water free of charge for the public school-houses, hospitals, and jails; to keep in repair all of said improvements, at the cost and expense of the parties of the second part, for said term of thirty years, and to return said waterworks to said party of the first part at the expiration of said term, in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of \$20,000 for the performance of said contract, and to pay all state and county taxes assessed upon the waterworks during the period of thirty years.

[561] *And as the circuit found:

"Griffin, Beaudry, and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the state of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract, and assigned all their rights and franchises under said contract to said company by a written instrument dated June the 12th, 1869, and recorded in the office of the recorder of said county of Los Angeles, June the 15th, 1869.

"On April the 2d, 1870, the legislature of California passed an act hereinafter set forth, in terms ratifying and confirming said contract.

"Griffin, Beaudry, and Lazard did nothing personally in carrying out said contract or constructing or maintaining said waterworks, but said company, after it was organized, took possession of said waterworks, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the waterworks at expiration of lease, and in such performance has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed 6 reservoirs, with an aggregate capacity of nearly sixty-six millions of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires and for the public schools, hospitals, and jails in said

city free of charge. The aforesaid extensions of the waterworks were rendered necessary by the growth of said city, whose population in 1868 was between 5,000 and 6,000, and is now about 103,000.

"During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues in a square form, the center of which was the center of the old pueblo plaza.

"About 1872 the limits were extended 420 yards south of *the former south boundary, [562] and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between 10 and 15 square miles of additional adjoining territory. Immediately after the extension of the said limits, the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been, and is now, furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire hydrants within the said additional territory and furnished water free of charge, and has in all respects continued to lay pipes, erect fire hydrants, and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it, and so with the more recent extensions of the city limits, to wit, those made within the last three years, the company has also extended its pipes in portions of those limits and furnished water in the same way.

"The quantity of water required to supply the domestic wants of the people of said city is 1 inch of water, measured under a 4-inch pressure, to every 100 inhabitants. To meet the increased demands upon it for water under said contract, said company has, among other things, purchased the system known as the 'Beaudry System of Waterworks,' and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company.—the same mentioned in paragraph 10 of the complaint.

"In the growth of the city its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles river for supplying the city and its inhabitants, as in said contract provided, was so located in said river that it was impracticable to *there maintain dams [563] and diversion works that would not occasionally be swept away or rendered useless by floods; and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for domestic uses; and in the year 1889 the Crystal Springs Land & Water Company

made excavations in the places referred to in the bill of complaint, and laid the pipes therein as alleged, and the water that has been used by the Los Angeles City Water Company for supplying the city with water, as provided in said contract, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles river in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to the higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

"The Los Angeles City Water Company ever since its incorporation has taken more than 10 inches of water, measured under a 4-inch pressure, from the Los Angeles river, and the amount taken has increased with the increase of the population of the city and the demands of the municipality itself for water for extinguishing fires and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1,000 to 1,500 inches of water, measured under a 4-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1,000 to 1,500 inches under a 4-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a 4-inch pressure.

"The city of Los Angeles has always had flowing in the Los Angeles River, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water [564] for domestic purposes and *municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

"On October the 19th, 1896, the council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to 40 per cent of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles river, and before the 21st day of October, 1896, to attorn to the city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and, in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking, or interfering with any of the water mentioned in 177 U. S.

said resolution, except 10 inches after the 20th day of October, 1896.

"On October the 19th, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land & Water Company of said resolution, and demanded compliance therewith, delivering a copy of said resolution to each of said companies. Neither of them ever attorned to said city for said water or any part thereof, or ever agreed to pay any rental for the same. After the passage of said resolution and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles river, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1,000 inches, measured under a 4-inch pressure.

"On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

"To the Honorable the Mayor and Common Council of the City of Los Angeles and the Los Angeles City Water Company:

"The undersigned commissioners, duly appointed on behalf *of your honorable bodies [565] to adjust, fix, and establish the rates and charges of the Los Angeles City Water Company (a corporation duly incorporated under the laws of the state of California for the purpose of supplying the inhabitants of Los Angeles City with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows, to wit:

"(Then follow the rates agreed upon.)

"The commissioners referred to in said report had been previously selected, two by the city and two by the Los Angeles City Water Company.

"In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established the same rates as those established in April, 1870.

"On the 13th of August, 1874, a committee constituted in the same manner and for the same purposes as the committee already mentioned reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted and a committee appointed in conjunction with the city attorney to draft an ordinance embodying the rates fixed in said report, and thereafter, on August the 20th, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871.

"Since and including the year 1880 the

[566] city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force for one year from and including July the 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more, but in *the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July the 1st, 1896, and ending June 30, 1897, at less than they had ever been fixed before, and a suit was then brought by the complainants herein in this court against the city of Los Angeles to set aside the said ordinance; and in February of the year 1897 the city of Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates.

"The action of the Los Angeles City Water Company in collecting the rates fixed by said several ordinances constitutes the only acquiescence (if it be an acquiescence) in the action of said council.

"If the rates established in 1870 were collected for the year beginning July the 1st, 1897, and ending June the 30th, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than \$50,000 in excess of the amount which would be received under the rates named in the ordinance of February, 1897.

"In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year, protesting at the same time against the establishment of any rates less than those which were in force at the date of the lease hereinbefore mentioned, to wit. July the 22d, 1868.

"In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement or to fix any rates less than those which were in force in July. 1868.

"Similar statements, accompanied by similar protests, were made annually thereafter up to and including the year 1889, and since that time unverified statements or reports showing its receipts and expenditures have been made by said company to the city council each year.

[567] *"Article 14 of the present Constitution of California, adopted in 1879, is as follows:

"ARTICLE XIV.

"Water and Water Rights.

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the

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state in the manner to be prescribed by law: *Provided*, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use.

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

"To carry out these provisions of the Constitution, the legislature of California passed an act entitled 'Act to Enable *the Board [568] of Supervisors, Town Council, Board of Aldermen,' etc., which was approved March the 7th, 1881. Stat. Cal. 1881, p. 54.

"In the year 1888 the electors of the city of Los Angeles, pursuant to provisions of the Constitution of said state authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said Constitution, submitted to the legislature of said state for its approval, ratification, and adoption, and the said charter was, on the 31st day of January, 1889, adopted by said legislature, and thereupon became and ever since has been the charter of the said city of Los Angeles; and by the said charter it is provided, in § 193 as follows:

"The rates of compensation for use of water to be collected by any person, company, or corporation in said city shall be fixed annually by ordinance, and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested." Stat. 1889, p. 503.

"The ordinance of 1897 now sought to be

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annulled was passed pursuant to the foregoing constitutional and statutory provisions." [88 Fed. Rep. 723.]

A decree was entered for complainants (appellees), adjudging that that part of the contract entered into between the city of Los Angeles and Griffin, Beaudry, and Lazard, in so far as said contract provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid, and that the ordinance of February 23, 1897, reduced the water rates below those so charged, and "impaired the obligation of such contract, and said ordinance is null and void; and it is further ordered, adjudged, and decreed that the said ordinance be, and the same is, hereby vacated and set aside and held for naught."

From the judgment this appeal is taken.

The assignments of error present the contentions discussed in the opinion.

Mr. S. O. Houghton submitted the cause for appellants. **Mr. Walter F. Haas** and **Messrs. Lee & Scott** were with him on the brief.

Complainants have been guilty of such acquiescence in the action of the council as to estop them from maintaining the present suit; and even if this be not so, their laches in not sooner seeking an injunction against infringement of their rights is fatal.

Smith v. Clay, 2 Ambl. 645; Pom. Eq. Jur. §§ 817, 418, 419; Beach, Modern Eq. Jur. §§ 17, 18; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

If the company had a valid contract it should have gone on and collected the rates authorized by that instrument. Its remedy was to disregard the ordinance.

Austin v. Austin City Cemetery Asso. 87 Tex. 330, 28 S. W. 528.

Injunction is not the proper remedy, as there is an adequate remedy at law against any attempt to enforce the ordinance if invalid.

Spring Valley Waterworks v. Bartlett, 9 Sawy. 555, 16 Fed. Rep. 615; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Murphy v. East Portland*, 42 Fed. Rep. 308; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832, 32 N. E. 962.

The constitutional provision with regard to incurring a forfeiture by charging higher rates than those fixed by the council cannot apply here.

Los Angeles v. Los Angeles City Water Co. 124 Cal. 385, 57 Pac. 216; *Los Angeles v. Los Angeles City Waterworks Co.* 49 Cal. 638.

The rule that the interpretation placed by parties on a contract controls does not apply to acts of authorities of municipal corporations.

National Waterworks Co. v. School Dist. No. 7, 4 McCrary, 198, 48 Fed. Rep. 523.

A license is never irrevocable where it appears to be intended to continue during the pleasure of the licensor, and the licensee cannot make the license irrevocable by imprudently expending money upon the hope
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and expectation that the license will not be countermanded.

Emerson v. Bergin, 76 Cal. 201, 18 Pac. 264; *Potter v. Mercer*, 53 Cal. 673; *Washburne*, Real Prop. marg. pp. 400 *et seq.* p. 727 (star p. 560).

A license with respect to real property can be revoked even after the licensee has incurred expense on the faith thereof.

Morse v. Copeland, 2 Gray, 302; *Wood v. Edes*, 2 Allen, 578; *Mason v. Holt*, 1 Allen, 45; *Houston v. Laffee*, 46 N. H. 505; *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824; *Hathaway v. Yakima Water, Light, & Power Co.* 14 Wash. 469, 44 Pac. 896; *Wheeler v. St. Joseph Stockyards & Terminal Co.* 66 Mo. App. 260; *Jensen v. Hunter* (Cal.) 41 Pac. 14.

It is only in exceptional cases that an estoppel can be invoked against a municipal corporation.

Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44.

Messrs. John Garber and **S. M. White** submitted the cause for appellees. **Mr. J. S. Chapman** and **Messrs. White & Monroc** were with them on the brief.

The city is estopped from challenging the authority of this contract, in view of the various acts of the legislature and the acceptance of the charters by the city, and of the various city ordinances and the entire conduct of both parties.

Illinois Trust & Sav. Bank v. Arkansas City, 40 U. S. App. 257, 76 Fed. Rep. 271, 22 C. C. A. 171, 34 L. R. A. 518.

Where a contract is uncertain and indefinite,—as this one certainly is, with reference to the amount of water to be taken,—the courts will accept the interpretation that the conduct of the parties has put upon it.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. Rep. 255; *McNeil v. Shirley*, 33 Cal. 206; *Hill v. McKay*, 94 Cal. 20, 29 Pac. 406; *Mulford v. Le Franc*, 26 Cal. 108; *Pico v. Coleman*, 47 Cal. 65; *Truett v. Adams*, 66 Cal. 218, 5 Pac. 96; *Yocco v. Conroy*, 104 Cal. 468, 38 Pac. 107; *Long-Bell Lumber Co. v. Stump*, 57 U. S. App. 546, 86 Fed. Rep. 578, 30 C. C. A. 260.

The city, having allowed the water company for nearly thirty years to divert more than 10 inches of water under a 4-inch pressure, and to expend vast sums of money upon the faith of the continuance of the right to take such water, could not withdraw its consent within the period of the contract.

Los Angeles v. Los Angeles City Water Co. 124 Cal. 368, 57 Pac. 210, 571.

The prohibition in the contract against taking more than 10 inches of water does not mean 10 inches of water measured under a 4-inch pressure.

Dougherty v. Haggin, 56 Cal. 522.

The validity of the contract has frequently been recognized by the California supreme court.

Los Angeles v. Los Angeles City Waterworks Co. 49 Cal. 638; *Los Angeles v. Los Angeles City Water Co.* 61 Cal. 65; *Los Angeles Water Co. v. Los Angeles*, 55 Cal. 176;

Los Angeles v. Los Angeles City Water Co. 124 Cal. 368, 57 Pac. 210, 571.

The legislative act ratifying the contract, passed after the company was incorporated and after the assignment to it, does not come within the principle of *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493.

Santa Ana Water Co. v. San Buenaventura, 56 Fed. Rep. 348; *People ex rel. Atty. Gen. v. Stanford*, 77 Cal. 371, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

The legislature may confer powers upon, or grant privileges to, private corporations by special act.

California State Teleg. Co. v. Alta Teleg. Co. 22 Cal. 398.

[569] *Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

The circuit court decided that the provision of the contract executed by the city and Griffin, Beaudry, and Lazard constituted a contract, and the ordinance of the city regulating the rates of appellees impaired it. Against this conclusion the appellant contends: (1) The contract only purports to bind the city in its corporate capacity,—the city as landlord and owner, and not as a governmental agent of the state; (2) the city did not have power to bind the state; (3) the provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract; (4) the act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void; (5) the water company has no power under its charter to collect water rates, except as prescribed by the Constitution and statutes of the state; (6) By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief, and is guilty of laches; (7) water rates established by the ordinance are not shown to be lower than those charged in 1868, or if lower, that the revenue of the company is reduced; (8) if the ordinance is invalid, it is void on its face, and there is therefore no cloud on the company's title; (9) the company violated the contract by taking water from the Los Angeles river, and therefore is not entitled to specific performance.

We will consider these contentions in their order.

1. The contract only purports to bind the city in its corporate capacity,—the city as landlord and owner, and not as governmental agent of the state.

The argument to support the contention, succinctly stated, is that the right to regulate rates came from the contract, not from the law. In other words, it was reserved from the contract, and was a virtual granting back by the lessees of the proprietary

[570] *right which would have otherwise passed by the lease, leaving, however, all municipal powers intact.

The provision of the contract is as follows: "Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second

part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

The municipal powers of the city provided in the act of incorporation, among others, were: "To make by-laws or ordinances, . . . to make regulations to prevent and extinguish fires, . . . to provide for supplying the city with water."

It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right, made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation,—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it. Whether the limitation was and is valid is another consideration.

2. The city did not have the power to bind the state.

This contention as expressed is very comprehensive, and seems to deny the competency of the state to give the city the power to bind it. We do not, however, understand counsel as so contending, nor could they. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. See also *People v. Stephens*, 62 Cal. 209. We understand the argument to be that the power, if not expressly given will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given,—not *simply convenient, but indispensable [571] to them. In other words, the rule of strict construction is invoked against the grant of such power to the city.

The rule is familiar. It has often been announced by this court, and quite lately in *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

The effect of the rule in the case at bar we are not required to determine if the act of 1870 ratifying the contract is valid.

It reads as follows:

"An Act to Ratify Certain Acts and Ordinances of the Mayor and Common Council of the City of Los Angeles.

"The people of the state of California, represented in senate and assembly, do enact as follows:

"Sec. 1. The following acts, contracts, and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los An-

geles City Waterworks, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22d), eighteen hundred and sixty-eight, which contract and ordinance are recorded in the office of the county recorder of Los Angeles county, in book one of miscellaneous records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431); (here follows certain other ordinances and deeds not affecting the contract in question)."

Appellants assert that the act violates the following provision of the Constitution of the state:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." [Art. 4, § 31.]

[572] At the time of the passage of the act of 1870 the contract of 1868 had been assigned to the water company, and the facts show that it was applied for and procured on behalf of Griffin, *Beaudry, and Lazard, and other persons, with the intention of forming a corporation to execute its provisions, and for such purpose they and other persons organized under the laws of the state the Los Angeles City Water Company, the appellee. It is hence argued that the act of 1870 confers franchises on the company by a special act, instead of by a general law, and thereby infringes the constitutional provision, and against the existence of such power in the legislature the following cases are cited; *Low v. Marysville*, 5 Cal. 214; *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493; *Oroville & V. R. Co. v. Plumas County Supers.* 37 Cal. 354; *Spring Valley Waterworks v. Bryant*, 52 Cal. 132; *San Francisco v. Spring Valley Waterworks*, 53 Cal. 608.

Of these cases, only *Low v. Marysville* and *Oroville & V. R. Co. v. Plumas County Supers.* were decided before the passage of act of 1870.

It was held in *Low v. Marysville* that the legislature was prohibited from conferring upon a municipal corporation powers other than governmental by a special act. Chief Justice Murray said: ". . . for as it would have been a violation of the Constitution to create an incorporation by special act, for any other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing, by two acts, that which the legislature could not do by one; and corporations for almost every purpose might be created by special act by first incorporating the stockholders as a municipal body."

But in *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398, decided at July term, 1863, a contrary doctrine was announced. It 177 U. S.

was held that the legislature could grant exclusive franchises and privileges to persons or corporations; that if granted to a person they could be assigned to a corporation, and that a corporation could receive from the legislature a direct grant of special privileges and franchises. The case necessarily involved all of those propositions.

The right and privilege passed on were granted by an act of *the legislature, and [573] consisted of the exclusive right to O. E. Allen and Clark Burnham to construct and put in operation a telegraph line from San Francisco to the city of Marysville. They assigned the right to the California State Telegraph Company. The court said: "The case presents the following questions for our adjudication: 1st. Is the act of May 3d, 1852, granting certain exclusive privileges to Allen and Burnham, constitutional? 2d. Have the plaintiffs the power or right to purchase, hold, and enjoy these exclusive privileges?"

Both propositions were answered in the affirmative. Of the second the court said:

"The next and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had power to sell and convey, for the act specially makes the grant to them or 'their assigns,' thus clearly making the privileges assignable. But it is urged that the clause in the Constitution which prohibits the legislature from creating a private corporation by special act equally prohibits them from conferring any powers or privileges of a corporate character by special law; and that all the powers and privileges which a corporation can exercise or hold must be derived from a general law, applicable alike to all corporations.

"It is clear that the Constitution prohibits the legislature from 'creating' corporations by special act, except for municipal purposes; and it is equally clear that this prohibition extends only to their 'creation.' There is nothing in the language used which either directly or impliedly prohibits the legislature from directly granting to a corporation already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises which may have been granted to others. To give the Constitution any such effect we would be compelled to interpolate terms not used, and which cannot be implied without a perversion of the language employed. To give it such a construction we would have to make it read thus: 'Corporations may be formed, and other franchises *and special privileges granted, under [574] general laws, but shall not be created or granted by special act, except for municipal purposes.' If such had been the meaning intended by the framers of the Constitution, they could have easily expressed it in apt words. The language used by them is clear, and they well knew that it included but one of a numerous class of franchises, the sub-

jects of legislative grant, and that a regulation of one could not by any reasonable implication be extended to others not mentioned."

And the learned justice who delivered the opinion of the court concluded the discussion by saying: "I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the legislature, and of purchasing them from the grantees."

There was an implied recognition of the same doctrine in *Spring Valley Waterworks v. San Francisco*, 22 Cal. 434.

But it is urged by appellants that *Oroville & V. R. Co. v. Plumas County Supers.* (decided in April, 1869) held "that the legislature could not authorize the county to grant special privileges to a private corporation, and this was confirmed in *Waterloo Turnp. Road Co. v. Cole*, 51 Cal. 384 (decided in 1876)." The latter case we may disregard, as it was decided subsequently to the act of 1870. The former case did not decide as contended, nor was the point involved in it. The action was mandamus to compel the county to subscribe to the capital stock of the railroad company under an act of the legislature directing the supervisors of the county to meet at a designated day and take and subscribe to the capital stock of the railroad company.

The defense was not want of power in the legislature to direct the subscription, not want of power in the company to receive it because it was a corporation, but want of power to receive because it was not a corporation. Against this it was urged that the act of the legislature recognized the company as a corporation. To the contention the court replied: "But it is claimed that the existence of the corporation is recognized by the act requiring the county to subscribe to the stock of the company. Admitting such to be the case, that will not overcome the difficulty, for a corporation of this character cannot *be created by legislative recognition; the Constitution (art. 4, § 31) prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws."

It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the state that the Constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons, or grants of them directly from the legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions. *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Ohio L. Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup.

Ct. Rep. 134. Nor by the new Constitution of 1879. *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405.

The subsequent decisions of the supreme court of the state have not been uniform. *San Francisco v. Spring Valley Waterworks* unqualifiedly overruled *California State Teleg. Co. v. Alta Teleg. Co.* but *People ex rel. Atty. Gen. v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693, restored its doctrine to the extent, at least, of holding that the constitutional provision that "corporations may be formed by general laws, but shall not be created by special act," only prohibits the creation of corporations and conferring powers upon them by legislative enactment, and does not prohibit "the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same." See also *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075.

There are expressions in the latter case which, it is urged, that notwithstanding the modification by it and by *People ex rel. Atty. Gen. v. Stanford* of the doctrine of *San Francisco v. Spring Valley Waterworks*, make that doctrine applicable to the case at bar. The San Luis Water Company was a corporation, and was formed for the purpose of furnishing the town of San Luis Obispo and the inhabitants thereof with pure fresh water.

*By an act of the legislature entitled "An[576] Act to Provide for the Introduction of Good and Pure Water into the Town of San Luis Obispo," approved March 28, 1872, a franchise was granted for that purpose to M. A. Benrimo, C. W. Dana, and W. W. Hays. The San Luis Water Company claimed to be the assignee of the franchise. The assignment was attacked on the ground that it was invalid under the Constitution of the state. The court said: "The precise point made is, that the power to supply a city with water cannot be conferred, directly or indirectly, upon a private corporation by special act."

And further: "The grant to Benrimo and his associates was also to their assigns. There can be no doubt but that they might, by the terms of the grant, sell or assign the franchise. It seems to me too plain to require argument, that the purchase by the plaintiff was strictly and directly within its powers, and contributed necessarily and directly to its objects and purposes." But the learned commissioner who delivered the opinion also said: "If any connection could be traced between the plaintiff and the passage of the special act of 1872, or it appeared that the act was obtained for the purpose of evading the constitutional inhibition, I could see how the case of *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, might apply. But, in view of the facts in this case, I cannot regard the article of the Constitu-

tion mentioned or the case last cited as having any application here." But this is not a decision that the case would apply. And if it is a concession of strength in the argument it is not a concession of conclusive strength.

[577] We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellants. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides legislative recognition, besides recognition by many acts of the city, the contract has received judicial recognition. Taxation upon the property acquired to execute it has been sustained. 49 Cal. 638. It was interpreted, and under its provisions the company denied compensation* for water used in sprinkling the streets of the city. 55 Cal. 176. An ordinance was declared void imposing a license upon the company for doing business in the city. 61 Cal. 65. Its right to take more than 10 inches of water from the river was sustained in 124 Cal. 368, 57 Pac. 210, 571.

The case in 61 Cal. was heard in department and in banc, and the contract received careful consideration. The judgment of the trial court was for the water company, and department 2 of the supreme court, affirming it, said:

"The court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868 were already vested in the defendant as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the legislature. The city cannot, during the term of the lease, of its own motion, increase the amount to be paid for the privileges granted.

"It is hardly necessary to say that the point made by the appellant, that neither the city nor the legislature can grant or alienate any of the rights of sovereignty, has no application to this case."

The court in banc, through its chief justice, approved this language, and, after quoting cases, said:

"The authorities of the city of Los Angeles, by a contract (the validity of which has not been challenged by either party) and for certain valuable considerations therein expressed, granted to the defendant's assignors the privilege of supplying the city of Los Angeles and the inhabitants thereof with fresh water for domestic purposes, with the right to receive the rents and profits thereof to their own use;"—and after citing cases to show that the exaction of the license

would impair the obligation of the contract, concluded as follows:

"The principles enunciated in the foregoing cases are eminently *sound and just, and [578] are directly applicable to the case we are now considering. The city of Los Angeles, by its solemn contract and for various considerations therein stated, gave to the party under whom defendant claims the privilege of introducing, distributing, and selling water to the inhabitants of that city on certain terms and conditions which defendant has complied with; and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted."

3. The provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract. 4. The act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void. 5. The water company has no power under its charter to collect water rates, except as prescribed by the Constitution and statutes of the state.

These contentions are dependent upon the same reasoning as the preceding one, and do not require a separate discussion.

6. By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief and is guilty of laches.

There was no such acquiescence as estopped the water company from contesting the ordinance of the city. The facts are that in 1880 the city passed an ordinance to be in effect one year, establishing water rates, and passed one every year thereafter, including 1897, when the one in controversy was passed. The rates established by the ordinances were less than those adopted in 1870, and the latter are claimed to have been not higher than the rates charged in 1868. The company collected the rates established by the ordinances, except those established in 1896 and 1897. A suit was brought by the company to set aside the ordinance of 1896, and that of 1897 is assailed in the case at bar. These ordinances fixed the rates at less than they had been fixed before. The company has also every year since 1882 filed a statement with the city council, showing the names of the consumers of water, the rates paid, and the expenditures made for supplying water for the preceding year. The company *always protested against the right [579] of the city to demand statements, and claimed to make them solely for its information. The company also in 1882 protested against the power of the city to fix rates on any other basis than that of the contract of 1868. The city therefore cannot claim to have been deceived by the action of the company in collecting the rates established prior to 1896. They were less, it is stipulated, than those of 1870, but how much less we are not informed. It is true we are not informed how much less those fixed in 1896 and 1897 are than those of the prior years. They are

less, "less than they had ever been fixed before," is the stipulation; and they will, according to the stipulation, produce more than \$50,000 less revenue than those of 1870.

Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remembered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and we think could legally be, exerted. As we have said, there was no concealment, no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel or of laches. Appellants, however, assert there was, and claim that the acquiescence of the water company was induced by the fear that the city would prevent the unlimited use of the river water,—a use beyond the 10 inches claimed to be allowed by the contract, and a use against other and proprietary rights of the city. Of the latter the record does not enable us to form a judgment. Of the former the supreme court of the state (124 Cal. 368, 57 Pac. 210, 571) has decided against the contention of the city. We approve the decision and hereafter quote its language. The appellants' inference, therefore, is without the support of anything in the record.

7. The water rates established by the ordinance are not shown to be lower than those charged in 1868, or, if lower, that the revenue of the company is reduced.

[580] *To sustain this contention it is claimed by appellants that there is no testimony in the record to show that the rates established in 1897 were lower than those charged in 1868. Appellants say:

"The only thing which complainants rely on to establish this fact is the recital in the report of a committee of the council appointed in 1870 for the purpose of agreeing with the water company upon a schedule of water rates to be charged, in which it stated (by the joint committee) 'that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868. That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows.'"

It is urged this is not a statement that the rates fixed in 1870 were equal to those of 1868; indeed, that they may have been higher. And it is also urged there is a distinction made between rates for domestic purposes and rates for "other reasonable objects and purposes," which may mean not domestic purposes, and as to these it does not appear upon what they were based.

We are not disposed to dwell long on these claims. It is incredible that the city should have demanded statements from the com-

pany yearly, have passed ordinances yearly, and provoked and endured an expensive litigation to establish rates higher than or the same as those which already existed. If statements and ordinances were necessary in fulfillment of the duty of the city under the Constitution of the state, neither controversy nor litigation was necessary, nor would either have ensued.

It is urged under this head that it is not shown that the income of the water company is less under the rates fixed by the city than under those of 1868. The showing would be irrelevant. The contract concerns rates, not income, and the power of the city over them under the contract.

8. If the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title.

The contention is that "if the contract of 1868 is valid, and the ordinance of 1897 reduces the income of the company below *that [581] which it should receive, the ordinance is void on its face as being in conflict with the Federal Constitution, and is no cloud on complainants' title."

It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one.

We concur with the learned trial judge that the ordinance is not void on its face. As said by him:

"In the case at bar, however, the ordinance upon its face is valid, and its invalidity appears only when considered in connection with the contract of July the 22d, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July the 22d, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court (one of the justices dissenting) in *Brady v. Page*, 59 Cal. 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged, without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further:

"The complainants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting, without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby

bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, [582] so far from being adequate *to the exigencies of the situation, are, as complainants in their brief forcibly put it, mere mockeries of a remedy."

9. The company violated the contract by taking water from the Los Angeles river, and therefore is not entitled to specific performance.

In reply to this contention, we may adopt the language of the supreme court of the state of California, used on behalf of the court by Mr. Justice McFarland, in *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 377, 57 Pac. 213.

The contract of 1868 and the right of the water company to take water from the river were considered and decided. The learned justice said:

"Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on; to wit: That the only quantity of the water of the Los Angeles river to which the water company is entitled under the contract is 10 inches under a 4-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river 'more than 10 inches of water without the previous consent' of the city; there is nothing in the contract about '4-inch pressure,' nor is there any intimation as to what the parties meant by '10 inches' of water. But, looking at the context and the subject-matter of the contract, it is quite evident that the parties did not mean only 10 inches under a 4-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times 10 inches under a 4-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city; and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for thirty years from a flow of 10 inches under a 4-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of 10 inches under a 4-inch pressure; soon after

[583] the execution *of the contract the company was using 300 inches under a 4-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from 300 to 700 inches so measured. Therefore, whatever (if anything) was meant by the simple words '10 inches,' the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than 10 inches measured under a 4-inch pressure. There is no pretense that the city ever objected to the use of this water by the water company
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until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than 10 inches from the river. It is difficult to imagine how this ordinance was passed seriously; for if the water company had been prevented from taking from the river at that time more than 10 inches of water under a 4-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company for nearly thirty years to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract."

The learned justice then quoted and approved the following remarks of the circuit court in the case at bar:

"If it be conceded, as claimed by defendants (which, however, I do not decide) that the provision of the contract, limiting the quantity of the water to be taken from the river without previous consent of the city, is sufficiently certain for enforcement, or, more specially, that said quantity is 10 inches measured under a 4-inch pressure, still, the consent of the city to the taking of a larger quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent." The court cites as authorities to the point: *Rhodes v. Otis*, 33 Ala. 600, 73 Am. Dec. 439; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739; *Lacy v. Arnett*, 33 Pa. 169; **Russell v. Hubbard*, 59 [584] Ill. 339; *Beall v. Marietta Paper Mill Co.* 45 Ga. 33; *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 153; *Williamston & T. R. Co. v. Battle*, 66 N. C. 546; *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84; *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022, all of which sustain the point."

Decree affirmed.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte, & Northwestern Railroad Company, *Plff. in Err.*,

v.

OTTO J. MORASCH and Eliza Morasch, as the Next of Kin of Irene Morasch, Deceased.

(See S. C. Reporter's ed. 584-587.)

Receivers—duties of—liability to suit—regulation of speed of trains by city—effect on interstate trains—exception of dummy engines or electric railroad.

1. A receiver appointed by a Federal court to

NOTE.—As to actions against receivers—see *Dillingham v. Anthony* (Tex.) 3 L. R. A. 634, and note.

As to action by and against receivers—see note to *J. I. Case Plow Works v. Finks*, 26 C. C. 4. 49.

As to equality of rights and privileges—see

take charge of a railroad must operate the road according to the laws of the state in which it is situated.

2. A receiver is liable to suit in a court other than that by which he was appointed, even in a state court, for disregard of official duty which causes injury to the parties suing.
3. A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress shall take action in the matter.
4. An exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within a city, does not make an arbitrary and unreasonable classification in denial of the equal protection of the laws.

[No. 249.]

Submitted April 18, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of the State of Kansas to review a decision sustaining an ordinance regulating speed of trains in a city. *Affirmed.*

See same case below, 60 Kan. 251, 56 Pac. 133.

The facts are stated in the opinion.

Messrs. B. P. Waggener and Albert H. Horton submitted the cause for plaintiff in error.

Mr. George B. Watson submitted the cause for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Brewer delivered the opinion of the court:

While in their briefs many matters are [585]discussed with fulness *and elaboration by counsel for plaintiff in error, we are of opinion that those of a Federal nature involved in this record are few in number and practically determined by previous decisions of this court. Of course, all questions arising under the Constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts. *Turner v. Wilkes County Comrs.* 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77, and cases cited in opinion.

In September, 1888, the city council of Kansas City passed an ordinance regulating the running of railroad trains through that city. Sections 2 and 8 are the only ones material to the present controversy. They are as follows:

"Sec. 2. It shall be unlawful for any such engineer, conductor, or other persons having a railway engine or train of cars in charge to permit the same to be run along any track

in said city at a greater speed than six miles an hour."

"Sec. 8. The provisions of this ordinance shall not apply to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the state in which it is situated. 25 Stat. at L. 436, chap. 866, § 2; *United States v. Harris*, 177 U. S. 305, ante, 780, 20 Sup. Ct. Rep. 609.

Second, that he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing. *McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

Third, that a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Cleveland, C. C. & St. L. R. Co. v. Illinois ex rel. Jett*, 177 U. S. 514, ante, 868, 20 Sup. Ct. Rep. 722. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter.

And, fourth, the sections quoted of the ordinance are not in *conflict with those provisions of the 1st section of the Fourteenth Amendment to the Constitution, which restrain a state from denying the equal protection of the laws. This last proposition seems to be the only matter requiring anything more than a declaration of the law and a citation of decided cases. [586]

The contention here is that the exception of the Interstate Transit Railway Company from the provision in reference to the speed of its trains creates a classification which is arbitrary and without any reasonable basis, and therefore operates to deny the equal protection of the laws. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. If there were nothing in the record beyond the mere words of the ordinance we are of opinion that that contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts crossing or along streets constantly traveled upon by foot passengers and vehicles, while others may pass through remote parts of the city where there is little travel

Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

As to validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

That state laws cannot regulate interstate commerce—see *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107, and note.

As to state laws interfering with interstate

or foreign commerce—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

As to state regulation of commerce—see notes to *Ratterman v. Western U. Tele. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Tele. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

and little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which permit of the fencing of the tracks and where its tracks are in fact fenced. Under those circumstances a difference of regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.

[587] But in this case we are not left to any mere matter of presumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but *with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two. It is not strange that one witness differs from another in respect to the comparative danger of the two roads. One jury might also disagree with another in respect to the same matter. But neither witness nor jury determine the validity of state or municipal legislation. Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations. We see nothing else in this case calling for notice, and the judgment of the Supreme Court of Kansas is affirmed.

GEORGE L'HOTE and the Church Extension Society of the Methodist Episcopal Church, *Plff. in Err.*,
v.

CITY OF NEW ORLEANS *et al.*

(See S. C. Reporter's ed. 587-600.)

Constitutional law—police power—ordinance designating limits for prostitutes.

An ordinance prescribing limits in a city outside of which no woman of lewd character shall dwell, with a proviso that nothing therein shall be so construed as to authorize such women to occupy a house in any portion of the city, and with nothing in the ordinance to deny the ordinary rights of individuals to restrain a private nuisance, is an exercise of the police power which does not invade the rights of property owners in or adjacent to the prescribed limits, in violation of the Federal Constitution, although the pecuniary value of their property may be depreciated in consequence thereof.

[No. 204.]

Argued March 20, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of the State of Louisiana to review a decision reversing a judgment for an injunction against enforcing an ordinance. *Affirmed.*

See same case below, 51 La. Ann. 93, 44 L. R. A. 90, 24 So. 608.

Statement by Mr. Justice Brewer:

*By ordinance No. 13,032, council series, [588] approved January 29th, 1897, it was ordained by the common council of the city of New Orleans:

"That from the first of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live, or sleep in any house, room, or closet, situated without the following limits: South side of Custom House street from Basin to Robertson street, east side of Robertson street from Custom House to St. Louis street, south side of St. Louis street from Robertson to Basin street. *Provided*, That no lewd woman shall be permitted to occupy a house, room, or closet on St. Louis street. *Provided further*, That nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room, or closet in any portion of the city. § 2. That it shall be unlawful for any person or persons, whether agent or owner, to rent, lease, or hire any house, building, or room to any woman or girl notoriously abandoned to lewdness or for immoral purposes outside the limits specified in section 1 of this ordinance. § 3. That public prostitutes or notoriously lewd and abandoned women are forbidden to stand upon the sidewalks in front of or near the premises they may occupy, or at the alleyway, door, or gate of such premises, or to occupy the steps thereof, or to accost, call, or stop any person passing by, or to walk up and down the sidewalks, or to stroll about the city streets indecently attired, or in other respects so as to behave in public as to occasion scandal, or disturb and offend the peace and good morals of the people. § 4. That it shall not be lawful for any lewd women to frequent any cabaret or coffee house or bar room and to drink therein. § 5. That it shall be unlawful for any party or parties to establish or carry on a house of prostitution or assignation without the lim-

NOTE.—As to power of a city over houses of ill fame—see *People v. Hanrahan* (Mich.) 4 L. 177 U. S. R. A. 751, and note; and note to *State v. Karstendiek* (La.) 39 L. R. A. 520.

its specified in section — of this ordinance. § 6. That wherever a house of prostitution or assignation within or without the limits established by this ordinance may become [589] dangerous *to public morals, either from the manner in which it is conducted or the character of the neighborhood in which it is situated, the mayor may, on such facts coming to his knowledge, order the occupants of such house, building, or room to remove therefrom within a delay of five days, by service of notice on such occupants in person, or by posting the notice on the door of the house, building, or room, to remove therefrom within a delay of five days, and upon such occupants failing to do so, each shall be punished as provided in section — of this ordinance. § 7. That in the event that the occupants of such house, building, or room referred to in section 6 do not remove therefrom after the infliction of the penalty, the mayor is authorized to close the same and to place a policeman at the door of such premises to warn away all such parties who shall undertake to enter. § 8. That any person or persons who shall violate the provisions of this ordinance, or who shall disturb the tranquillity of the neighborhood or commit a breach of the peace, shall be punished by the recorder having jurisdiction, for the first offense by a fine not exceeding \$5, and in default of payment by imprisonment not exceeding ten days, for the second offense by a fine not exceeding \$10, and in default of payment by imprisonment not exceeding twenty days, and for any subsequent offense by a fine not exceeding \$25, and in default of payment by imprisonment not exceeding thirty days. § 9. That each day any person or persons shall continue to violate the provisions of this ordinance shall constitute a separate offense. § 10. That on and from the day this ordinance takes effect all ordinances in conflict therewith be and the same are hereby repealed, provided that nothing herein contained shall affect ordinance 12,456, C. S., relative to prostitutes in the fifth district."

By ordinance No. 13,485, council series of the city of New Orleans, approved July 7th, 1897, it was ordained: "That section 1 of ordinance 13,032, C. S., be and the same is hereby amended as follows: From and after the 1st of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live, or sleep in any house, room, or closet situate without the following limits, [590] *viz.: 1. From the south side of Custom House street to the north side of St. Louis street, and from the lower or wood side of North Basin street to the lower or wood side of Robertson street. 2. And from the upper side of Perdido street to the lower side of Gravier street, and from the river side of Franklin street to the lower or wood side of Locust street, *provided* that nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room, or closet in any portion of the city. Be it further ordained, That section 1 of ordinance

13,032, C. S., as amended above, be and the same is hereby re-enacted."

The above ordinance being in force, the plaintiff in error George L'Hote, a resident, citizen, and taxpayer of New Orleans, brought this action in the civil district court for the parish of Orleans against the city of New Orleans, its mayor and superintendent of police, on behalf of himself and all other persons similarly situated, who might intervene and bear their proportion of costs and expenses. The object of the suit was to obtain a decree enjoining and prohibiting the defendants from in any manner enforcing ordinance No. 13,032 as amended by section 1 of ordinance No. 13,485.

The bill alleged that the plaintiff was the owner of property situated in the square bounded by St. Louis, Franklin, Tremé, and Toulouse streets in the second district of the city of New Orleans, and resided with his wife and children in that square at No. 522 Tremé street; that the chief and principal way of approach to his residence, and for ingress and egress thereto, was in, through, and from St. Louis street; that the locality in which he resided was, at the commencement of the action, and had always been, used for private residences, schools, groceries, and other mercantile establishments; that the people residing in that locality were then and had always been moral, virtuous, sober, law-abiding, and peaceful; that the locality referred to was not then and never had been dedicated to immoral purposes or used for dwelling places and as the refuge of public prostitutes, lewd and abandoned women and the necessary attendants thereof, drunkards, idle, vicious, and disorderly persons, who gather around them to gratify their depraved appetites, and *who were re- [591] garded as dangerous to the peace and welfare of the community, their presence at any place being always a just cause of alarm and apprehension:

That the above ordinances were unconstitutional, illegal, unreasonable, and oppressive, and would, if executed, work irreparable injury, wrong, and damage to the plaintiff;

That the council in enacting those ordinances pretended to have acted under and by virtue of the power conferred upon them in § 15 of act No. 45, approved July 7th, 1896, "to regulate the police of houses of prostitution and assignation and to close such houses in certain limits, and shall have the power to exclude the same, and to authorize the mayor and police to close said places;" and

That the enforcement of those ordinances in the manner provided for violated the provisions both of the Constitution of the United States and of the state, and would deprive the plaintiff of his property without due process of law, and amount to a taking or damaging of such property for public purposes without just and adequate compensation being first paid.

The bill further alleged that "the introduction of public prostitutes, women notoriously abandoned to lewdness, in said locality, authorizing them to occupy, inhabit,

live, and sleep in houses and rooms situated therein, will materially lessen and depreciate the value of your petitioner's property, render his dwelling and the dwelling of his neighbors similarly situated unfit for the occupancy of private families, destroy the morals, peace, and good order of the neighborhood, drive out and turn away the law-abiding, virtuous citizens and their families from said locality, and dedicate the same to public and private nuisances *per se*, contrary to law and good morals;"

That "the common council of the city of New Orleans had previously designated the limits within which prostitutes and women notoriously abandoned to lewdness should inhabit and live, and had thereby exhausted whatever power was vested in them by legislature of the state and were without legal right to alter, change, or modify the same to the injury, detriment, and damage of your petitioner and others residing in said locality, which said council have attempted to include within said *limits; that, having so exhausted the authority conferred upon them by the legislature, the said council was without power to capriciously change the limits previously established by them; that the avocations plied by public prostitutes and women notoriously abandoned to lewdness are *contra bonos mores*, and the said common council of the city of New Orleans have no right, power, or authority to legalize the same and to permit such persons to reside in the said vicinity in which your petitioner and others dwell with their families;"

That "there was no good and sufficient reason for the enactment of said ordinance or the changing of the limits previously existing and established;"

That "said council, in enacting said ordinance No. 13,485, council series, eliminated and excluded a large area of the city which had been previously dedicated to the occupancy of lewd and abandoned women, to the detriment and injury of petitioner, by changing said limits so as to include St. Louis street in his locality;"

That the execution of the ordinances would render plaintiff's dwelling house and those of his neighbors unfit and unsuitable for the occupancy of their families, wives, and children, and wholly valueless for the purposes for which they were constructed and had theretofore been used; and

That the plaintiff and others similarly situated would be compelled, if the ordinances were executed, to abandon and remove from their dwellings at great trouble, expense, and annoyance, and that the enforcement of the ordinance would oppress, injure, and seriously damage and incommode the plaintiff and all others similarly situated.

The plaintiff also averred that the ordinances if executed would deprive him and others similarly situated of the equal protection of the laws and be in violation equally of the Constitution and laws of the United States and of the state; that, under the laws and ordinances of the city as they existed, he and all others similarly situated in the locality had the right to cause houses of

prostitution and assignation suppressed as nuisances *per se* and the inmates arrested and forced to vacate and remove therefrom, and of that right the plaintiff had theretofore availed himself; *and that the ordinances if executed would legalize such nuisance and take away the rights of citizens theretofore existing and vested in plaintiff and others residing in that locality.

After alleging that the enforcement of the ordinance would work irreparable damage and injury to him in the depreciation in value of his property, because it would cease to be a fit and proper place for the dwelling house of himself, his wife, and children, and necessitate their abandonment of the same and removal from the locality, he prayed that the ordinances might be declared null and void.

The writ of injunction as prayed was directed to be issued.

The city of New Orleans, its mayor and superintendent of police, pleaded that the court was without jurisdiction *ratione materiae*.

Bernardo Gonzales Carbajal intervened by petition, and after alleging that he was the owner of certain improved property within the limits prescribed by the above ordinances, reiterated all the allegations of the petition of L'Hote so far as they related to his property, and averred that the enforcement of the ordinances would work great and irreparable injury to him and depreciate his property by rendering it unfit and unsuitable for dwelling houses. He united in the prayer that the ordinances be declared null and void.

The Church Extension Society of the Methodist Episcopal Church, a corporation chartered and organized under the laws of Pennsylvania, also intervened, and alleged that it was the owner of buildings and improvements within the above district which were used and occupied for church purposes; that a religious congregation known as the Union Chapel of the Methodist Episcopal Church assembled and worshipped therein on each and every Sabbath and on Tuesday and Friday evenings, as well as on other stated occasions; that besides the religious services conducted in that church a Sunday school was organized and established which was attended by 170 children, who received religious instruction and teaching, and that the membership of that congregation consisted of about 300 persons, while those worshipping in the church numbered about 600 persons.

*The society reiterated all the allegations of the plaintiff's petition and alleged that if the ordinances were enforced the value of its property would be destroyed and the same would be unfit for the purposes for which it was erected and was now being used, enjoyed, and occupied; that the threats to enforce the ordinances had already caused a portion of the congregation attending the church to cease from attending therein; that, encouraged by the action of the city council of New Orleans in passing the ordinances, a number of lewd and abandoned women had

already taken up their abode and habitation in the vicinity of the church and were plying their vocation as prostitutes; and that a number of houses were then in progress of erection and construction which were intended to be used and kept as brothels and houses of prostitution, and other places had been leased and let for the purpose of carrying on liquor saloons and concert halls, for the purpose and with the intention of changing the hitherto respectable character of that neighborhood into a resort for vice and the establishment of nuisances *mala in se*.

After averring that the above ordinances were in violation of the Constitution of the United States and the Constitution and laws of Louisiana, and that the city council had no right to destroy the value of the intervenor's property and render the neighborhood in which the same was located the resort of lewd and abandoned women, it united in the prayer of the plaintiff's petition that those ordinances be declared null and void.

The exceptions filed by the defendants to the petitions of the plaintiff and the interveners having been overruled, the city of New Orleans and its chief of police filed an answer averring that the ordinances in question were legal and that their enforcement would be a lawful exercise of the power conferred upon the city, and especially a valid exercise of the power conferred upon it by act No. 45 of 1896.

The civil district court rendered judgment in favor of the plaintiff, but in favor of the city against the interveners. From that judgment suspensive appeals were allowed and prosecuted by the city as well as by the Church Extension Society.

By the final judgment of the supreme court of Louisiana the *judgment of the civil district court in favor of the plaintiff was reversed, and the injunction obtained by him was dissolved and his suit dismissed, while the judgment dismissing the intervening petitions and dissolving the injunction granted on behalf of the interveners was affirmed. 51 La. Ann. 93, 44 L. R. A. 90, 24 So. 608.

Mr. E. Howard McCaleb argued the cause and filed a brief for plaintiff in error:

The extraordinary power conferred upon the mayor by the ordinance in question is not due process of law.

Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550.

Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential.

Black. Const. Law, p. 481, § 212; *Pennay-er v. Neff*, 95 U. S. 715, 24 L. ed. 565.

The city of New Orleans, in dedicating the area prescribed in the ordinance for the residence of bawds and prostitutes, infringes plaintiff's and intervenor's rights of property.

Eaton v. Boston, C. & M. R. Co. 51 N. H. 504. 12 Am. Rep. 147; *Lackland v. North Missouri R. Co.* 31 Mo. 180; Wood, Nuisances, §§ 595, 743, 744, 755; *Pumpelly v. Green*

Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

The police power does not extend to the supervision, regulation, and inspection of prostitutes. The city of New Orleans has no authority to regulate prostitution.

Tiedeman, Limitation of Police Power, p. 131, ¶ 49, p. 150, p. 391, ¶ 105.

The state cannot, under the exercise of its police power, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

The ordinance complained of denies to plaintiff and intervenor the equal protection of the laws. Immoral contracts and immoral persons are permitted in one portion of the city of New Orleans, and prohibited in the others. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

To recognize the right of the city to create an asylum for abandoned women, and to dedicate a portion of her territory for the residence of this class of people, and to permit them there to ply their unholy vocation, is a violation of the principles of the Christian religion, which the Supreme Court of the United States says is the foundation of our government and the civilization which it has produced in the western world.

Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 49, 34 L. ed. 493, 10 Sup. Ct. Rep. 792; Wood, Nuisances, §§ 29, 32.

Mr. James J. McLoughlin argued the cause and, with *Messrs. Samuel L. Gilmore and Branch K. Miller*, filed a brief for defendant in error:

It is settled that police laws and regulations are not unconstitutional, even though they may disturb the enjoyment of individual rights. If the individual suffers any injury, it is deemed *damnum absque injuria*, or, in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve.

1 Dill. Mun. Corp. p. 93; 1 Dillon, § 310; Black. Const. Law, p. 310; Dwarries, Statutes, p. 455.

The Federal Constitution, broad and comprehensive as it is, was not designed in any respect to interfere with the power of a state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357.

Ordinances to regulate and confine the prosecution of business, even lawful and not immoral in character, within certain definite territorial limits, have been held by this court as being purely police regulations.

within the competency of a municipality possessed of ordinary powers.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 707, 28 L. ed. 1146, 5 Sup. Ct. Rep. 730.

The confinement of houses of prostitution to certain prescribed limits, in the judgment of municipal authorities best calculated to mitigate their evil effects, is obviously included within the ordinary powers of a municipal corporation.

State v. Karstendiek, 49 La. Ann. 1621, 39 L. R. A. 521, 22 So. 845.

In Louisiana the power to suppress such establishments has been held free from constitutional objection.

Shreveport v. Roos, 35 La. Ann. 1011.

[595] *Mr. Justice **Brewer** delivered the opinion of the court:

The question presented in this case is whether an ordinance of the city of New Orleans prescribing limits in that city, outside of which no woman of lewd character shall dwell, operates to deprive these plaintiffs in error of any right secured by the Constitution of the United States. It is well, in the first place, to look at the negative side and see what is not involved. No woman of that character is challenging its validity; there is no complaint by her that she is deprived of any personal rights, either as to the control of her life or the selection of an abiding place. She is not saying that she is denied the right to select a home where she may desire, or that her personal conduct is in any way interfered with. In brief, the persons named in the ordinance, and against whom its provisions are directed, do not question its validity.

In the second place, no person owning buildings outside of the prescribed limits is complaining that he is deprived of a possible tenant by virtue of the ordinance, or saying that the abridgment of her freedom of domicile operates to cut down the amount of his rents.

In the third place, it will be perceived that the ordinance does not attempt to give to persons of such character license to carry on their business in any way they see fit, or, indeed, to carry it on at all, or to conduct themselves in such a manner as to disturb the public peace within the prescribed limits. [596] Clauses 3 *and 4 of the first section of the ordinance are clearly designed to restrain any public manifestation, of the vocation which these persons pursue, and to keep so far as possible unseen from public gaze the character of their lives, while clauses 6, 7, 8 and 9 provide means for enforcing order and preventing disturbances of the peace.

The question, therefore, is simply whether one who may own or occupy property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, can prevent the enforcement of such an ordinance on the ground that by it his rights under the Federal Constitution are invaded.

In this respect we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those

cations which minister to and feed upon human weaknesses, appetites, and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of population the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation. In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, it was said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

See also *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 154, and cases in the opinion. [597]

Obviously, the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state or Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.

Now, this ordinance neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicile, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the vocation of these persons to certain localities, and no one can question the legality of the location. The power to pre-

scribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and cannot become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the

[598] legislative *body is unable to protect all, must it be denied the power to protect any?

It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, and therefore the power to prescribe limits could never be exercised, because, whatever the limits, it might operate to the pecuniary disadvantage of some property holders.

The truth is, the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.

Among the cases in which this question has been presented may be noticed *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, and *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. In the first of these cases an act of the general assembly of the state of Illinois had authorized the fertilizing company to establish a plant for the purpose of converting dead animals into an agricultural fertilizer. In pursuance of this authority the company had built its factory outside the then limits of the city of Chicago and in a territory adjacent to which there was no population. As the years rolled by population gathered around the factory, and the character of the work carried on was such as to make it a nuisance to the neighborhood. The village of Hyde Park, which had grown up around the works of the company, passed an ordinance to suppress these works, and a bill was filed in the state court to restrain the enforcement of that ordinance. The supreme court of the state held the ordinance valid, and on error to this court that judgment was affirmed. Although there was a charter right to maintain these works, and although when established they were located in a territory in which there was no population, yet when population had gathered around them the police power of the state was held sufficient to stop their existence, and that without compensation to the owner. The pecuniary injury which directly resulted to the company from the stoppage of its works was held no bar to the police power

of the state. In the other case *Mugler* had established a brewery in Kansas, when such an institution was authorized by the laws of the *state. The buildings and machinery [599] were of little value except for the purpose of manufacturing beer. Yet when Kansas, in the exercise of its police power, determined that the manufacture of beer should cease, it was ruled by this court that the pecuniary loss to *Mugler* did not justify any restraint of the legislative acts prohibiting the manufacture of beer. Each individual holds his property subject to the ordinary and reasonable exercise of the police power, and the fact that its exercise may in a particular case work pecuniary injury was adjudged insufficient to stay the legislative action. It is true those cases involved pecuniary injury to the persons whose action was prohibited, but it cannot be that the police power of a state can be stayed because it works injury to one person, and not stayed if it works injury to another.

In 1 Dill. Mun. Corp. 4th ed. § 141, the rule is thus stated:

"Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally."

The learned author, in these and accompanying sentences, is discussing the rule when legislative action operates directly upon the property of the complainant and where injuries alleged *to result are the direct consequence of legislative action. If under such circumstances the individual has no cause of action, *a fortiori* must the same be true when the injuries are not direct but consequential, when his property is not directly touched by the legislative action but is affected in only an incidental and consequential way. Here the ordinance in no manner touched the property of the plaintiffs. It subjected that property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by this ordinance. Who can say in advance that in

proximity to their property any houses of the character indicated will be established, or that any persons of loose character will find near by a home? They may go to the other end of the named district. All that can be said is that by narrowing the limits within which such houses and people must be, the greater the probability of their near location. Even if any such establishment should be located in proximity, there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance. Under these circumstances we are of the opinion that the ordinance in question is not one of which the plaintiffs in error can complain. *The judgment of the Supreme Court of Louisiana is therefore affirmed.*

[601] *GEORGE S. WILLIAMS, *Plff. in Err.*,
v.
C. E. WINGO.

(See S. C. Reporter's ed. 601-604.)

Ferry license—as a contract—effect of general law.

A ferry license granted by the county court under Va. act March 5, 1840 (Va. Code 1873, chap. 64, § 23), which was an act of general legislation making it unlawful for the court to grant a license for a ferry within $\frac{1}{2}$ mile of any other ferry, does not constitute a contract the obligation of which is impaired by Va. act March 5, 1894, which specially authorizes the establishment of a ferry within less than $\frac{1}{2}$ mile of the former ferry.

[No. 222.]

Argued April 11, 12, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a decision affirming a judgment sustaining a ferry license. *Affirmed.*

Statement by Mr. Justice **Brewer**:

[601] *By the statutes of Virginia authority was given to the county courts of the several counties to license ferries. By an act passed March 5, 1840 (Acts Assembly 1839-1840, p. 58), carried, with simply verbal changes, into chap. 64 of the Code of Virginia of 1873 as § 23, and subsequently into chap. 62 of the Code of 1887 as § 1386, it was provided:

"Be it enacted by the general assembly, That it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile, in a direct line, of any other ferry legally established over the same watercourse."

In 1880 the county court of Giles county gave to the plaintiff in error a license to main-

tain a ferry across New river. On March 5, 1894, the general assembly of Virginia passed the following act (Acts Assembly 1893-1894, p. 789):

"Be it enacted by the general assembly of Virginia, That it shall be lawful for the county court of Giles county to establish a ferry at a point on New river, in said county at a point around Egglestons Springs depot and between Egglestons Springs and Egglestons depot, on the New river branch of the Norfolk & Western Railroad, Giles county, Virginia. Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hundred *and seventy-seven, thirteen hundred and seventy-eight, thirteen hundred and seventy-nine, thirteen hundred and eighty, thirteen hundred and eighty-one, thirteen hundred and eighty-two, thirteen hundred and eighty-three, thirteen hundred and eighty-four, and thirteen hundred and eighty-five of the Code of Virginia; but section thirteen hundred and eighty-six of said Code so far as the distance of one half a mile is concerned, shall not apply to the establishment of said ferry at said place."

Under this act a license was given to the defendant in error to establish a ferry within less than half a mile of the ferry established by the plaintiff in error under his prior license. The rightfulness of this action was sustained by the circuit court of Giles county, and subsequently by the supreme court of appeals of the state of Virginia, and to review such decision this writ of error was brought.

Mr. **W. J. Henson** argued the cause and filed a brief for plaintiff in error.

Mr. **Samuel W. Williams** argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Brewer** delivered the opinion [602] of the court:

The contention of the plaintiff in error is that, under the laws of the state of Virginia in force at the time of such action, the license granted by the county court to him to establish a ferry created a contract between him and the state to the effect that no ferry should be established within half a mile; and that the act of 1894 and the subsequent proceedings of the county court of Giles county impaired the obligation of that contract, and, therefore, were repugnant to section 10 of article 1 of the Constitution of the United States.

This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the general assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action. When the general assembly gave to the county courts power to license ferries it by that act in effect forbade them to establish a second *ferry within half a mile of one already established, but that bound only the county court. It did not tie

NOTE.—As to what laws are void as impairing obligation of contracts—see note to *Fletcher v. Peck*, 3 L. ed. U. S. 162.

As to what contracts the rule prohibiting states from impairing obligation affects—see note to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405.

the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the state is only created by clear language, and is not to be extended by implication beyond the terms of the statute. *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043, is in point and decisive. In that case the plaintiff was by an act of the Iowa territorial legislature given authority to establish a ferry across the Mississippi river at the then town of Dubuque, and the act also provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town. The city of Dubuque was thereafter incorporated, and under its general corporate powers entered into a contract with the defendant to run a steam ferryboat across the river. The plaintiff thereupon filed a bill to restrain the defendant from so doing. It was held that the bill could not be maintained, this court saying (pp. 533, 534, 14 L. ed. 1047):

"Although the county court and county commissioners were prohibited from granting another license to Dubuque, yet this prohibition did not apply to the legislature; and as it had the power to authorize another ferry, the general authority to the council to 'license and establish ferries across the Mississippi river at the city,' enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done. . . . The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication."

This case was cited with approval in *Wheeling & B. Bridge v. Wheeling Bridge*, 133 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301, in which this very statute of Virginia of 1840 was under consideration, and it was said (p. 292, L. ed. p. 969, Sup. Ct. Rep. p. 303):

"Here the prohibition of the act of 1840 was only upon the county courts, and that in no way affected the legislative power of the state."

The case of *The Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137, is not inconsistent. There an act of the legislature, authorizing the one bridge, contained a proviso "that it should not be lawful for

[604]*any person or persons to erect a bridge within a distance of two miles." That provision was held a part of the contract between the state and the bridge company, Mr. Justice Davis, speaking for a majority of the court, saying (p. 81, L. ed. p. 145):

"As there was no necessity of laying a restraint on unauthorized persons, it is clear that such restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles,' is, that the legislature will not make it lawful by licensing

any person or association of persons to do it."

In the case at bar the only effect of the act of 1840, while in force, was, as we have said, to tie the hands of the county court. It operated in no manner as a restraint upon the legislature or as a contract upon its part that the state would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second. The judgment of the Supreme Court of Appeals of Virginia was correct, and is affirmed.

*GEORGETTE A. CHAMBERLIN *et al.*, [605]
Appts.,
v.

HORATIO BROWNING and Alpheus Middleton, Trading as Browning & Middleton; Thomas T. Keane; The Central National Bank of Washington; and Edward C. Whitford.

(See S. C. Reporter's ed. 605-609.).

Appeal—amount in dispute—uniting separate claims of appellees.

1. The separate and distinct claims of attachment creditors cannot be united for the purpose of making the jurisdictional amount on appeal from a judgment denying an injunction to prevent the enforcement of their claims against real estate, where they do not jointly assert their claims, or claim under a common right.
2. An appellant cannot unite the separate interests of appellees, to make up the jurisdictional amount, for the purpose of an appeal, if the appellees could not have done so in case of recovery against them.

[No. 251.]

Argued April 19, 1900. Decided May 14, 1900.

APPEAL from a decision of the Court of Appeals of the District of Columbia affirming a decree of reversal. *Dismissed for want of jurisdiction.*

See same case below, 14 App. D. C. 389.

Statement by Mr. Justice **White**:

*John D. Scott executed in the District of [605] Columbia, on April 24, 1886, a deed of voluntary assignment for the benefit of his creditors, embracing in a schedule of his assets, among other property, a life estate in certain land situated in Montgomery county, Maryland. Horatio Browning qualified as assignee under the deed of assignment.

NOTE.—As to amount necessary to give United States Supreme Court jurisdiction—see note to *Schunk v. Mollne, M. & S. Co.* 37 L. ed. U. S. 255.

Various steps were taken under the assignment, but prior as well as subsequent to the recording of the deed in Montgomery county, Maryland, certain creditors of Scott, all but one of whom resided in the District of Columbia, seized the real estate referred to under attachment process issued in Maryland. The attachment proceedings went to judgment, whereupon one of the judgment creditors filed a bill in the Maryland court to declare that the interest of Scott in said real estate was in fee simple, and not merely a life estate. In this latter suit a decree was entered sustaining the claim of the creditors, and proceedings were then taken by the several creditors to enforce their judgment claims against said real estate.

[606] The appellants, as creditors of Scott, thereupon filed their bill in the supreme court of the District of Columbia against Scott, Browning, the assignee, and the various creditors who had instituted the attachment proceedings in Maryland. In substance the bill set out the various facts hereinbefore related, charged *that the attaching creditors had actual and constructive notice of the deed of assignment, and had participated in the proceedings thereunder, and were without lawful right to enforce their attachment claims against the real estate referred to, and thus to secure a preference over the other creditors who had elected to take the benefit of the deed of assignment. The sums sought to be recovered by each of the attaching creditors in the proceedings in Maryland were enumerated in the bill, and in no instance did the claim or claims of any of said creditors aggregate more than \$3,500. Various allegations were also contained in the bill with respect to mismanagement by Browning in the execution of his trust as assignee. Part of the specific relief prayed in the bill was the removal of Browning as assignee, a stating of his accounts, discovery by Scott of further assets, and the execution by him of a deed in fee simple of the Maryland property. As to the attaching creditors, the following relief was prayed:

"Six. That the attaching creditors be restrained, pending this action, from in any manner proceeding to enforce their said attachments on judgments of condemnation against said Maryland land, and from doing any act or thing to hinder, delay, or interfere with the control or management of the estate abroad for the equal benefit of all said Scott's creditors, and from in any way seeking to secure to themselves any greater benefit or interest out of said estate and effects than shall represent their 'pro rata' share under said assignment, and that on final hearing such injunction be made perpetual.

"Seven. Or, if this cannot be done, that the attaching creditors be directed to bring into court any moneys realized from said land, and that the same be treated as assets passing by said deed of assignment, and distributed among the creditors as therein directed." [Keane v. Chamberlain, 14 App. D. C. 84.]

Each of the defendants who are appellees
177 U. S.

in this court demurred to the bill. From an order overruling the demurrers an appeal was allowed by the court of appeals of the District of Columbia. That court reversed the order made by the lower court and remanded the cause, with directions to sustain the demurrers and dismiss the bill as to the appellees Keane, Middleton, *the Central National Bank of Washington, Edward O. Whitford, and the partnership of Browning and Middleton, and for further proceedings not inconsistent with the opinion of the court. Thereafter the supreme court of the District, upon consideration of the mandate of the court of appeals, entered a decree sustaining the demurrers and dismissing the bill of complaint as to the defendants named in the mandate of the court of appeals. From this decree the case was again taken to the court of appeals, and that court affirmed said decree. This appeal was then taken.

Mr. O. B. Hallam argued the cause and filed a brief for appellants:

In a suit for property, plaintiff's averment of value determines the amount in controversy.

Bennett v. Butterworth, 8 How. 124, 13 L. ed. 859.

The value of the specific property which is in litigation must determine the jurisdiction. The value of a trust estate which is involved is the value of the matter which is in dispute, for the purpose of an appeal by the trustee.

Kenaday v. Edwards, 134 U. S. 117, 33 L. ed. 853, 10 Sup. Ct. Rep. 523.

If the determination of a cause necessarily involve the validity of title to land of more than \$5,000 in value, and several plaintiffs claim under it, although the claim of no one exceeds that sum, the amount is within the jurisdiction of the Supreme Court.

New Orleans P. R. Co. v. Parker, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364.

When a bill by a preferred creditor for more than \$5,000 under an assignment, to enjoin a sale of the property by attaching creditors and to establish the assignment with its preferences, is dismissed, the distribution of the assigned property among those claiming under the assignment not being in question, an appeal may be had if the property involved in the assignment exceeds \$5,000 in value, although the amount of the claims of the attaching creditors is less than that sum.

Estes v. Gunter, 121 U. S. 183, 30 L. ed. 884, 7 Sup. Ct. Rep. 854; 122 U. S. 450, 30 L. ed. 1228, 7 Sup. Ct. Rep. 1275; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568, 10 Sup. Ct. Rep. 242; *The Alaska*, 130 U. S. 201, sub nom. *Metcalf v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; *Lovell v. Cragin*, 136 U. S. 150, 34 L. ed. 379, 10 Sup. Ct. Rep. 1024; *Brown v. Trousdale*, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419.

Messrs. Arthur Peter and A. A. Bir-
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ney argued the cause and, with Mr. James S. Edwards, filed a brief for appellees:

It is well settled that neither codefendants nor coplaintiffs can unite their separate and distinct interests, for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal.

Henderson v. Wadsworth, 115 U. S. 276, 29 L. ed. 379, 6 Sup. Ct. Rep. 40.

Distinct judgments in favor of or against distinct parties cannot be joined to give this court jurisdiction.

Adams v. Crittenden, 106 U. S. 577, 27 L. ed. 99, 1 Sup. Ct. Rep. 92; *Schwed v. Smith*, 106 U. S. 188, 27 L. ed. 156, 1 Sup. Ct. Rep. 221; *Ex parte Baltimore & O. R. Co.* 106 U. S. 5, 27 L. ed. 78, 1 Sup. Ct. Rep. 35; *Hawley v. Fairbanks*, 108 U. S. 548, 27 L. ed. 822, 2 Sup. Ct. Rep. 846; *Tupper v. Wise*, 110 U. S. 399, 28 L. ed. 190, 4 Sup. Ct. Rep. 26; *Oliver v. Alexander*, 6 Pet. 143, 8 L. ed. 349; *Ballard Pav. Co. v. Mulford*, 100 U. S. 147, 25 L. ed. 591; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93.

Upon the same principle, neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount.

Gibson v. Shufeldt, 122 U. S. 37, 30 L. ed. 1087, 7 Sup. Ct. Rep. 1066.

[607] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

Along with an argument upon the merits, counsel for the appellees have presented a motion to dismiss this appeal as to all the appellees, because of the absence of any controversy involving the requisite jurisdictional amount. This motion we find to be well taken.

The decree appealed from affected only the defendants, who, as attaching creditors, had prosecuted actions in the Maryland court upon their claims against their debtor, Scott, and had by ancillary proceedings subjected real estate owned by their debtor to the satisfaction of the judgments obtained in the actions referred to.

Recovery of land or its value was not the relief sought by the bill below against the attaching creditors, for said creditors did not hold or assert title to the land. The value of the land, therefore, was clearly not the subject-matter of dispute between the complainants and the said attaching creditors. The relief prayed against the latter was the enjoining of the enforcement against real estate in Maryland of the judgments obtained by the appellees, or the bringing into

[608] court of any *moneys realized from said land by virtue of the proceedings. But the appellees, as attaching creditors, were not jointly asserting their claims against Scott or his property, nor were they claiming under a common right. Their claims and the judgments based thereon were separate and distinct, the one from the other, and in no

case did the amount of the judgments obtained by either of the appellees equal \$5,000. The case presented is clearly within the principle of the decision in *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066, and cases there cited. The *Gibson Case* was a suit brought by general creditors to set aside as fraudulent a conveyance in trust for the benefit of preferred creditors. The decree set aside the conveyance as fraudulent so far only as it affected the rights of the plaintiffs. But one of such general creditors held a claim amounting to \$5,000. A motion to dismiss the appeal as to all other plaintiffs was sustained, the court holding that the sole matter in dispute between the defendants and each plaintiff was as to the amount which the latter should recover, and that the motion to dismiss the appeal of the defendants as to all the plaintiffs, except the one whose debt exceeded the jurisdictional amount, should be granted. Had the appellants recovered against the appellees the amount collected by the latter upon their judgments, it is clear that the amount in dispute for the purpose of determining jurisdiction would be the amount of recovery assessed against each defendant separately. *Henderson v. Wadsworth*, 115 U. S. 264, 29 L. ed. 377, 6 Sup. Ct. Rep. 40; *Friend v. Wise*, 111 U. S. 797, 28 L. ed. 602, 4 Sup. Ct. Rep. 695. As stated in the *Henderson case*, neither codefendant nor coplaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal. If, therefore, the appellees could not, if recovery had been had against them, unite their separate interests for the purposes of an appeal, the appellants cannot do so for the purpose of asserting the existence of appellate jurisdiction in this court.

In the case at bar, we repeat, in effect, the substantial relief sought against the attaching creditors, and the matter in dispute between them, was the defeat of the distinct and separate claims of each attaching creditor so far as it respected the real *estate[609] owned by Scott, and, as already shown, no defendant was asserting claims which aggregated the amount required to confer jurisdiction upon this court.

Dismissed for want of jurisdiction.

AMELIA L. HOWARD *et al.*, *Appts.*,
v.

P. DE CORDOVA *et al.*

(See S. C. Reporter's ed. 609-614.)

Federal court—jurisdiction to set aside judgment of state court—amendment of pleading to aver citizenship.

1. A Federal court may take jurisdiction of a suit to set aside a judgment of a state court

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478.

in the same state, when it is attacked for fraud and want of jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit.

2. A defect in a bill in a Federal court, which fails to aver the citizenship of a party, may be cured by amendment.

[No. 246.]

Argued and Submitted April 17, 1900. Decided May 14, 1900.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Texas dismissing a bill for want of jurisdiction. *Reversed.*

Statement by Mr. Justice **White**:

[609] *By their original bill the complainants, alleging themselves to be citizens of the state of Louisiana, complained against P. De Cordova, a citizen of the state of Texas residing in Travis county, W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, citizens of Texas and residents of Freestone county, and against Joseph Smolenski, as to whom it was merely alleged he "is not an inhabitant of or found within this district." The grounds for relief which it is necessary to notice for the purposes of the questions before us, averred in the original bill and an amendment thereto, were as follows: That the complainants were the sole legal heirs of J. W. Zacharie, their deceased father, who during his lifetime was a citizen and resident of the state of Louisiana; that their said deceased ancestor owned a tract of 11 leagues of land

[610] situated in Freestone and Anderson counties, Texas, which had been granted to Manuel Riondo, by the states of Coahuila and Texas; that on the 26th of February, 1852, their said father made a contract with Jacob and Phineas De Cordova by which the two last-named persons agreed to have the grant above mentioned properly placed upon the records, to endeavor to effect compromises with certain parties holding claims by junior locations covering some of the land in the grant; that by the agreement in question all expenses except the taxes were to be paid by the two Cordovas, and in consideration of their services they were to receive one third of the receipts derived from the sale of all the land which might be covered by the compromises to be effected as aforesaid. It was alleged that in pursuance of the contract the two De Cordovas made various compromises with persons claiming under junior grants, and that the land thus embraced, the exact amount of which was not alleged, although it probably equalled 10,000 acres, was sold, and they received their share of the proceeds resulting from the sale. It was charged that in 1860 Jacob De Cordova acknowledged in writing that a full settlement had been made with him by Zacharie for all the lands as to which compromises had been made, and he therefore declared that all and every right which had vested in him by the contract in question had been liquidated and settled. It was then averred that on the 9th of November,

1895, Phineas De Cordova, with the object of defrauding complainants of their right and title to the land aforesaid, filed in the district court of Freestone county, Texas, a suit in partition, in which he falsely alleged himself to be the owner of an undivided one-sixth of the land situated in the Riondo grant; that this suit was brought against the unknown heirs of J. W. Zacharie, deceased, and against Joseph Smolenski, whose residence was also in said suit alleged to be unknown. At the time this suit was thus brought by De Cordova it was averred that both he and Boyd, the attorney who represented De Cordova in the suit, knew who were the heirs of J. W. Zacharie and where they resided, but that in order to defraud and to avoid notice to them of the suit, and to obtain summons by publication as required by the law of Texas, an affidavit was *made by William R. Boyd, the attorney, that [611] the heirs of Zacharie and their residences were unknown; that, predicated upon this affidavit, the order for publication was given by the court; that, instead of publishing the notice at the county seat, it was inserted in a newspaper in a remote portion of the county, and that the complainants had no knowledge whatever of the suit until long after its termination; that in this suit for partition an attorney was subsequently appointed to represent the unknown and absent defendants; that the law of the state of Texas required that a statement of facts should be made by the judge, but that one was prepared by Boyd, representing De Cordova, and the attorney who had been appointed to represent the absent defendants, which had for its effect to produce upon the mind of the court the impression that under the contract aforesaid, made between the Cordovas and Zacharie, the Cordovas were entitled as owners to one third of the 11 leagues of land; that being misled to that conclusion, after proceedings as required in partition suits, a decree of partition was entered. The complaint as amended made other charges of fraud and deception which it is unnecessary to recapitulate. As to the other defendants to the bill, except Smolenski, it was averred that they had acquired, with full notice of the fraud which it was charged had been operated upon the Zacharie heirs by the partition suit as aforesaid, portions of the land in question. Smolenski was made a party to the bill because of the following averments: After the adjustment alleged to have been made between Zacharie and De Cordova, it was stated that Zacharie had sold all the land in August, 1865, to Smolenski for the price of \$15,000, evidenced by his notes as follows: One for \$3,000 dated May 1, 1866, and twelve notes of \$1,000 each, payable yearly thereafter, with 8 per cent interest per annum from May 1, 1866; that in the deed to Smolenski it was stipulated that a vendor's lien should be retained on the land to secure the payment of the notes, and it was provided that if any of the said notes should remain unpaid for six months after maturity, the vendor should have *ipso facto* the right to cancel and annul the sale,

and re-enter and take possession of said lands. It was then averred that none of the [612] notes given by Smolenski *had ever been paid, although past due for twenty or thirty years.

The prayer of the bill was that the proceedings in partition and the decree directing the same be adjudged to be fraudulent and void, that the sales made to the other defendants be also declared fraudulent and void, and that the deed made by Zacharie to Smolenski be set aside and canceled, and the cloud thereby "cast on your orators' title to said land be removed."

To the bill and the amendment thereto the defendants demurred on the following grounds:

"First. It appears from the face of plaintiff's amended bill that the bill seeks to set aside, cancel, and annul the judgment of the district court of Freestone county, state of Texas, and this court has no jurisdiction or power to cancel, set aside, or annul the judgment of the state court, said court having jurisdiction both over the subject-matter and of the persons in said suit, said suit being a partition suit and the proceedings one *in rem*.

"Second. The amended bill shows upon its face that the object of the bill is to obtain a new trial in this court in cause No. 1960, tried and determined in the district court of Freestone county, Texas, as shown by the exhibits to the bill, under and in accordance with article 1375 of the Revised Statutes of Texas.

"That this proceeding is but a continuation of said suit, and this court has no jurisdiction of the same, but the district court of Freestone county, Texas, alone has jurisdiction of the same.

"Third. That the judgment of the district court of Freestone county, Texas, is valid and binding upon all of the parties to this suit, and this court has no jurisdiction, power, or authority to review or to cancel and annul the same for the pretended fraud, as set out in plaintiff's bill, or for any other cause therein stated."

After hearing, the court sustained the demurrer and dismissed the suit "for want of jurisdiction of the subject-matter in controversy," and the correctness of its action in so doing is the question which arises on this appeal.

Mr. F. C. Zacharie argued the cause and filed a brief for appellants.

Mr. R. H. Ward submitted the cause for appellees. **Mr. Ashby S. James** was with him on the brief.

[613] ***Mr. Justice White**, after making the foregoing statement, delivered the opinion of the court:

That the court erred in sustaining the demurrer and dismissing the suit for want of jurisdiction over the subject-matter of the controversy has been in effect conclusively settled by this court in a case decided since the action of the court below was taken. *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506. In that case suit

had been brought in a court of the state of Texas, in the ordinary form of trespass to try title, by Peter McGræel against Stewart Newell, the defendant. It was alleged in the suit that the plaintiff was a resident of Texas, and that the defendant was also a resident and citizen of that state. An answer was filed in the cause by an attorney at law in the name of the defendant, and the suit proceeded to judgment. The controversy decided in *Cooper v. Newell* thus arose: Newell filed his bill in the circuit court of the United States in and for the eastern district of Texas, in the ordinary form of trespass to try title to recover the land to which the suit of *McGræel v. Newell* had related. He charged that the defendants claimed title under the judgment rendered in that suit, but that they had no title because he, Newell, had never resided in the state of Texas, had not authorized any attorney to appear for him in the suit, and that, therefore, the proceedings in *McGræel v. Newell* were as to him *res inter alios acta*, and wholly void. The controversy turned on whether Newell could be heard in the circuit court of the United States to attack the judgment of the state court, it being contended that the fact that Newell was represented by an attorney at law, who appeared and filed an answer in his name, was conclusively established by the judgment, which could not be assailed collaterally in a court of the United States, however much it might be subject to direct attack for fraud in the courts of the state of Texas. The contention was *not maintained, [614] it being decided that, as the charges went to the jurisdiction of the state court, such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. The alleged facts in the case before us bring it directly within this ruling. By chapter 95, §§ 13 and 14, Laws of Texas 1847 and 1848, page 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residences is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill, which were admitted by the demurrer. Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defense to the charges of fraud contained in the bill, as to which we express no opinion, were not adequate to defeat the jurisdiction of the circuit court of the United States. In other words, they address themselves, not to the jurisdiction of the court, but to the merits of the cause. *Huntington v. Laidley*, 176 U. S. 668, ante, 630, 20 Sup. Ct. Rep. 526.

Whilst the demurrer which the court below maintained was predicated solely on the fact that there was a want of jurisdiction because of the proceedings had in the state

court, which the bill assailed for want of jurisdiction and fraud, we have observed that the citizenship of Smolenski is not averred in the bill. This defect was curable by amendment, and it was not only within the power, but the duty of the court, on its attention being called to the fact, to have allowed such an amendment to be made. It follows that *the judgment must be reversed*, and the cause be remanded for further proceedings in conformity with this opinion, and it is so ordered.

[615]*CINCINNATI, HAMILTON, & DAYTON
RAILROAD COMPANY, *Plff. in Err.*,
v.

BENJAMIN F. THIEBAUD, Administrator
of the Estate of Chris. Sweetman, De-
ceased.

(See S. C. Reporter's ed. 615-621.)

Appeal—questions certified—constitutional question first raised by assignment of error—concurrent writs of error from circuit court of appeals and Supreme Court.

1. A question as to the constitutionality of a state statute, first raised in the assignment of errors in the circuit court of appeals, with nothing to present it in the circuit court except a general exception to an instruction in favor of the plaintiff's right to recover under the statute, will not sustain a writ of error to the circuit court of the United States from the Supreme Court under the act of Congress of March 3, 1891, chap. 517, § 5.
2. A writ of error from the Supreme Court of the United States to a circuit court will be dismissed if taken while a prior writ of error from a circuit court of appeals is pending in that court.

[Nos. 259, 271.]

No. 259 Argued April 24, 1900. No. 271
Submitted April 24, 1900. Decided May
14, 1900.

ON A CERTIFICATE in No. 259 from the United States Circuit Court of Appeals for the Sixth Circuit, and IN ERROR in No. 271 to the Circuit Court of the United States for the Southern District of Ohio, to determine a question as to the constitutionality of a state statute. Question certified answered in the negative and writ of error dismissed.

Statement by Mr. Chief Justice Fuller:

[615] *The certificate in No. 259 reads as follows:

"This was an action brought by Benj. F. Thiebaud, a citizen of Indiana, as administrator of Chris. Sweetman, deceased, appointed by the circuit court of Fayette county, Indiana, against the C. H. & D. R. R. Co., a corporation and citizen of Ohio, to recover damages for the wrongful death of said Chris. Sweetman, who, while employed as a locomotive engineer by said company,

on an engine drawing its pay car, was, without *fault on his part, killed in a collision [616] between his engine and that of a freight train. The collision was caused by the negligence of the conductor and engineer of the freight train. The court charged the jury, among other things, that inasmuch as the deceased had been killed through the negligence of fellow servants, the defendant would probably not be liable at common law, but that it was liable for the negligence charged and admitted under the act of the general assembly of Indiana, approved March 4, 1893, entitled 'An Act Regulating the Liability of Railroad and Other Corporations, except Municipal, for Personal Injuries to Persons Employed by Them,' etc. Laws of Indiana, 1893, p. 294; Ind. Rev. Stat. §§ 7083-7087. Upon which act the plaintiff relied for recovery; to which charge the defendant excepted.

"The record does not show upon what ground said exception was taken, and does not show that said exception was upon the ground that the statute contravenes the Constitution of the United States, or that the constitutionality of the statute was otherwise raised or considered or decided by the circuit court. The statute is not mentioned in any of the pleadings. The record shows other exceptions taken, duly assigned for error, which do not raise any constitutional question, and which may require the reversal of the judgment of the circuit court without reference to any constitutional question.

"The jury rendered a verdict in favor of the plaintiff, and judgment was entered thereon.

"Thereafter the defendant brought the case, by writ of error, to this court, and assigned for error:

"1. That the court erred in charging the jury that the defendant was liable under the act of the general assembly of Indiana, approved March 4, 1893.

"2. That said act is in contravention of the Fourteenth Amendment of the Constitution of the United States.

"3. That said act is in contravention of the Constitution of the state of Indiana, and especially of article 11, § 23, of article 4, §§ 19 and 23 thereof.

"4. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

*"5. That the court erred in refusing to [617] permit the defendant to put the following question to the witness, Charles M. Cist: 'Where were those personal effects at the time you made your application?'

"6. That the court erred in ruling out and excluding the testimony offered by the defendant to show that plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

"Thereupon the defendant in error moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a state is in contravention of the Constitution of the United States, and that, therefore, un-

der § 5 of the act of Congress approved March 3, 1891 (26 Stat. at L. 826, chap. 517), the writ of error should be taken from the Supreme Court of the United States, and not from this court.

"The court is in doubt whether the case is within the provisions of said section of the act of Congress, and therefore, upon the foregoing statement of facts it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:

"1. Has the circuit court of appeals jurisdiction of a writ of error to the circuit court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

"2. Has the circuit court of appeals jurisdiction of a writ of error to the circuit court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to such constitutional question?

"3. Does a record showing an instruction by the circuit court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed [618] that the *law of a state is in contravention of the Constitution of the United States, within the meaning of § 5 of the act of March 3, 1891, where the record of the circuit court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the circuit court?

"4. If it be considered that such record in the circuit court does not disclose a case in which a law of a state is claimed to be in contravention of the Constitution of the United States, but such claim is made, so far as the record shows, for the first time in the circuit court of appeals by assignment of error, and is insisted upon at the bar, has the circuit court of appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?"

No. 271 is a writ of error to the circuit court of the United States for the southern district of Ohio to review the judgment referred to in the certificate. In the petition for the writ, defendant set forth that "having duly prosecuted the writ of error heretofore allowed by the court to the United States circuit court of appeals for the sixth circuit, the plaintiff in this case, being the defendant in error, filed a motion in said

circuit court of appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States; instead of to the United States circuit court of appeals, and that said circuit court of appeals was therefore without jurisdiction upon said writ of error. Said circuit court of appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States circuit court of appeals was properly allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the circuit court of appeals has jurisdiction thereof, now prays for a writ *of error to the Supreme Court of the [619] United States, and assigns for error:" [Here followed the assignment of errors.]

Thereupon the circuit court entered this order:

"This cause came on to be heard upon the defendant's petition for the allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the circuit court of the United States for the sixth circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States circuit court of appeals, said petition is now granted, and a writ of error, as prayed, is allowed to the Supreme Court of the United States."

The cases came on to be heard, and were argued and submitted together.

Mr. Lawrence Maxwell, Jr., argued the cause and filed a brief for plaintiff in error in No. 259:

An assignment of errors cannot be used to import a constitutional question into a cause, which the record does not show was raised and decided below, so as to give the Supreme Court jurisdiction under the act of March 3, 1891, § 5.

Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *Northern P. R. Co. v. Amato*, 144 U. S. 468, 36 L. ed. 508, 12 Sup. Ct. Rep. 740; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969.

Mr. Harlan Cleveland argued the cause and, with *Messrs. Charles M. Cist* and *Edgar W. Cist*, filed a brief for defendant in error:

The third question should be answered in the affirmative, as this court has frequently held that it is proper for the circuit court to direct a verdict for the plaintiff where there is no question of fact for the jury, or where it is clear that he is entitled to recover, or where the evidence is undisputed or is so conclusive that the court would set

aside a verdict returned in opposition to it, or where all the defenses relied upon involve questions of law only.

Robertson v. Edelhoff, 132 U. S. 614, 33 L. ed. 477, 10 Sup. Ct. Rep. 186; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433.

This court has frequently held under a somewhat analogous, though much stricter, provision in regard to the review of the decisions of the highest court of a state on a writ of error, that it is not always necessary that the Federal question which gives this court jurisdiction upon such review should appear affirmatively on the record or in the opinion of the state court, if an adjudication of such question was necessarily involved in the disposition of the case by the state court.

Willson v. Black-bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *New Orleans Water-works v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

So here, in instructing the jury that the plaintiff was entitled to recover under the Indiana statute, while it does not affirmatively appear that the exception was based in whole or in part upon the claim that that act was unconstitutional, that must necessarily have been adjudicated by the circuit court when it charged that the defendant was liable under that act.

Mr. Lawrence Maxwell, Jr., submitted the cause for plaintiff in error in No. 271.

Messrs. Harlan Cleveland, Jr., and **Charles M. Cist** submitted the cause for defendant in error. **Mr. Edgar W. Cist** was with them on the brief.

Plaintiff in error, having elected to prosecute his writ of error in the circuit court of appeals, must abide by his election, and cannot thereafter bring the same case into this court by subsequent writ of error.

Columbus Constr. Co. v. Crane Co. 174 U. S. 601, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721.

[619] ***Mr. Chief Justice Fuller** delivered the opinion of the court:

When our jurisdiction is invoked under § 5 of the judiciary act of March 3, 1891 [26 Stat. at L. 826], chap. 517, on the ground that the case falls within the fourth, fifth, or sixth of the classes of cases therein enumerated, it must appear that a title, right, 177 U. S.

privilege, or immunity was claimed under the Constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the Constitution or law of a state was distinctly claimed to be *in contravention of the Constitution of [620] the United States; and it is not sufficient that the point is raised in the assignment of errors. *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

The certificate shows that no question as to the constitutionality of the statute of Indiana, relied on by the plaintiff below, was raised or considered or decided in the circuit court, but that the objection made its appearance for the first time in the assignment of errors in the circuit court of appeals.

In *Carter v. Roberts*, 177 U. S. 496, ante, 861, 20 Sup. Ct. Rep. 713, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the circuit court of appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891. *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Holt v. Indiana Mfg. Co.* 176 U. S. 68, ante, 374, 20 Sup. Ct. Rep. 272; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Benjamin v. New Orleans*, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298.

The third question propounded in the certificate must be answered in the negative, and we do not deem it necessary to answer the others.

The writ of error in No. 271 was brought while the case was pending in the circuit court of appeals on writ of error from that court. The whole case was open on each writ for review on the merits.

In *Columbus Constr. Co. v. Crane Co.* 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721, it was laid down that the act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to or from two appellate courts; and as the record disclosed in that case that two writs of error to the judgment of the circuit court

[621]*were pending, one in the circuit court of appeals and the other and subsequent writ in this court, the latter was dismissed. The writ of error in No. 271 falls within this rule.

The third question propounded in No. 259 is answered in the negative.

The writ of error in No. 271 is dismissed.

Mr. Justice **Harlan** and Mr. Justice **White** were not present at the argument and took no part in the decision.

ROBERT S. LEOVY, *Petitioner*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 621-637.)

Navigable waters—obstruction of—by dam—violation of act of Congress—navigability of pass or crevasse caused by overflow of river—decision of jury—utility of stream for interstate commerce—judicial notice as to matters of health.

1. A pass or crevasse caused by the overflow of the Mississippi river, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of willows and timber may have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such a sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands and rendering them fit for cultivation will constitute an obstruction in navigable waters, within the prohibition of the act of Congress of September 19, 1890, against such obstructions without authority of the Secretary of War.
2. The decision of a jury as to the fact of the navigability of water is not binding upon the appellate court, so as to preclude a consideration of the instructions and definitions under which the jury found the verdict.
3. The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States, which the act of Congress of September 19, 1890, makes it a misdemeanor to obstruct, unless the channel is substantially useful to some purpose of interstate commerce.

NOTE.—As to what waters are navigable—see *Willow River Club v. Wade* (Wis.) 42 L. R. A. 305 and note. See also note to *Gibson v. United States*, 41 L. ed. U. S. 997.

For a discussion of navigable waters of the United States as distinguished from navigable waters of the states—see note to *Willow River Club v. Wade* (Wis.) 42 L. R. A. 325.

As to obstruction of navigation—see *Fulmer v. Williams* (Pa.) 1 L. R. A. 604 and note; *Harold v. Jones* (Ala.) 3 L. R. A. 406 and note; *South Carolina S. B. Co. v. South Carolina R. Co.* (S. C.) 4 L. R. A. 209 and note; *Swanson v. Mississippi & R. River Boom Co.* (Minn.) 7 L. R. A. 673 and note. See also notes to *Gaston v. Mace* (W. Va.) 5 L. R. A. 393; *The Imperial* (D. C. D. Or.) 3 L. R. A. 235.

4. The court may take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands.
5. The failure of an order by a police jury for the construction of a dam, to say anything about the subject of health, does not preclude the defense against an indictment for obstructing a navigable stream, that it was done in order to promote the health of the community.

[No. 238.]

Argued April 12, 16, 1900. Decided May 14, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment of conviction for building a dam across a navigable stream. *Reversed.*

See same case below, 92 Fed. Rep. 344, 34 C. C. A. 392.

Statement by Mr. Justice **Shiras**:

*At the April term of the circuit court of [622] the United States for the eastern district of Louisiana an indictment was found, charging Augustus F. Leovy and Robert S. Leovy, both of the parish of Plaquemines, state of Louisiana, with, on the 16th of November, 1895, unlawfully, wilfully, knowingly, and without permission of the Secretary of War, building and causing to be built a dam in and across a certain navigable stream of the United States known as Red Pass, and outside of any established harbor lines, which said Red Pass flows in the Gulf of Mexico from a certain navigable stream of the United States, known as the Jump, which said Jump is an outlet of the Mississippi river into the Gulf of Mexico; that said dam has been continued by the defendants since the same was built, and still remains in and across said Red Pass, whereby the navigation of and commerce over and through Red Pass was then and there, and has been ever since, impaired and obstructed; they, the said defendants, well knowing the said Red Pass to be a navigable stream of the United States, in respect of which the United States then and there had jurisdiction, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

The defendants entered a plea of not guilty; and the cause was tried before the district judge, and a jury. The trial resulted, June 6, 1891, in a verdict of not guilty as to Augustus F. Leovy, and of guilty as to Robert S. Leovy; whereupon it was adjudged that said Robert S. Leovy pay a fine of \$200 and costs of prosecution.

Several bills of exception on behalf of Robert S. Leovy were seasonably presented, and signed and allowed by the trial judge, who likewise, on June 16, 1898, allowed a writ of error, and the cause was taken to the United States circuit court of appeals for the fifth district, which court, on February —, 1899, affirmed the judgment of the circuit court.

The case was then brought to this court on a writ of certiorari to the United States circuit court of appeals for the fifth circuit.

Mr. Victor Leovy argued the cause and, with **Messrs. Henry J. Leovy** and **Alexander Porter Morse**, and **Messrs. Rouse & Grant**, filed a brief for petitioner:

The reserved police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 471, 24 L. ed. 530; *Slaughter House Cases*, 16 Wall. 62, 21 L. ed. 404; *Cooley*, Const. Lim. p. 715.

The police power is universally conceded to include everything essential to the public safety, health, and morals.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

Neither the 14th Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its "police power," to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having those objects in view must often be had in certain districts,—such as for draining marshes and irrigating arid plains.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The absence of an express exception of state police power does not conclude the matter; nor will police acts be deemed to be included within the general terms of the prohibition.

United States v. Kirby, 7 Wall. 485, 19 L. ed. 280; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Powell v. Pennsylvania*, 127 U. S. 673, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Patterson v. Kentucky*, 97 U. S. 505, 24 L. ed. 1117.

Power to regulate small streams and bayous which run through every part of the state has been recognized for many years as necessary for redeeming large and valuable tracts of land.

Boykin v. Shaffer, 13 La. Ann. 131; *Egan v. Hart*, 45 La. Ann. 1358, 14 So. 244.

To render waters navigable in the legal sense, commerce must be carried on over them which is of an essentially valuable character.

Am. & Eng. Enc. of Law, p. 241.

Mr. George Hines Gorman argued the cause and filed a brief for respondent:

Where there is some evidence tending to establish a fact in issue, the jury must be the sole judges of its sufficiency.

Richardson v. Boston, 19 How. 263, 15 L. ed. 639; *Mutual L. Ins. Co. v. Snyder*, 93 U. S. 393, 23 L. ed. 887.

The appellate court can only look at the evidence to determine its competency. If competent, the fact found by the jury, and all inferences deducible from the fact, are binding upon the appellate court.

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Hepburn v. Dubois, 12 Pet. 345, 9 L. ed. 1111; *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; *Singer Mfg. Co. v. Brill*, 7 U. S. App. 601, 54 Fed. Rep. 380, 4 C. C. A. 374.

To render a stream navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream.

St. Anthony Falls Waterpower Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

Rivers constitute navigable waters of the United States within the meaning of the acts of Congress, in contra-distinction from the navigable waters of the states, where they form, in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; *The Montello*, 11 Wall. 411, 20 L. ed. 191; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

Private persons, for their own aggrandizement, cannot, at their own private expense, under the pretense of the authority of a police jury of a parish or state, dam up a navigable river of the United States in order to improve their farm lands.

United States v. Bellingham Bay Boom Co. 176 U. S. 211, *ante*, 437, 20 Sup. Ct. Rep. 343.

No definition of the police power, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

The case of *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, relied upon by petitioner, was a fishery case involving the right of a state to pass a law to preserve from extinction fisheries in the lake waters within its jurisdiction, by prohibiting exhaustive methods of fishing or the use of destructive instruments. The common-law right of fishery is entirely distinct and separate from the right of navigation, and may or may not exist in the same waters at the same time.

Gould, Waters, 2d ed. § 54; *Leeonfield v. Lonsdale*, L. R. 5 C. P. 665; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

***Mr. Justice Shiras** delivered the opinion of the court: [623]

On March 2, 1849, the Congress of the United States by an act of that date, entitled

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"An Act to Aid the State of Louisiana in Draining the Swamp Lands therein," enacted: "That to aid the state of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are, hereby granted to that state." 9 Stat. at L. 352, chap. 87.

Similar grants have been made by Congress to other states within whose boundaries were undrained swamp and overflowed lands belonging to the United States. Act of September 28, 1850 (9 Stat. at L. 519, chap. 84). This legislation declares a public policy on the part of the government to aid the states in reclaiming swamp and overflowed lands unfit for cultivation in their natural state, and is a recognition of the right and duty of the respective states, in consideration of such grants, to make and maintain the necessary improvements.

By the act of September 19, 1890 (26 Stat. at L. 454, chap. 907), it is provided:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers, and abutments, causeway, or other works over or in [1624] any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers, and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers, and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state."

The tenth section of the same act provided as follows:

"Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, 916

and on conviction thereof shall be punished by a fine not exceeding \$5,000 or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

In the river and harbor act of 1892 (27 Stat. at L. pp. 88, 110, chap. 158), section 7 of the act of 1890 was amended and re-enacted so as to read as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may *be estab-[625] lished, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers, and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States under any act of the legislative assembly of any state until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers, and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state."

Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the state of Louisiana has full power to authorize the construction and maintenance of levees, drains, and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits. The pivotal question in the present case is whether Red Pass is a navigable water of the United States in such a sense that a dam erected therein for the purpose, and with the effect, of reclaiming overflowed lands and rendering them fit for cultivation, could be

constructed without the previous authorization of the Secretary of War, it being admitted that no such authority was ever applied for or procured.

[626] Evidence was tendered, on behalf of the defendants, tending to show that the dam in question was built by Robert S. Leovy, *who was the syndic or official of the contiguous ward, in pursuance of a resolution of the police jury of the parish of Plaquemines, dated July 1, 1890, directing such syndic to have Red Pass closed, and also tending to show an approval and ratification of the work by the levee board of the district and by the police jury at a meeting held February 8, 1898, and a direction to the attorney of the board to take such steps as should be necessary to prevent said Red Pass from being reopened. Some of these offers were rejected by the trial court, and exceptions were taken by the defendants. It is evident, however, that the court rejected the offers only because it was the opinion of the court that such evidence was immaterial, inasmuch as if Red Pass was not a navigable water of the United States, within the meaning of the statutes, the defendants would be entitled to a verdict of not guilty, regardless of the action of the police jury and of the levee board, and if Red Pass was such a navigable stream, the action of the state or parish authorities, unauthorized by the Secretary of War, would not avail the defendants. Indeed, the trial judge, in his charge, instructed the jury as if the evidence had been admitted, in the following terms:

"I charge you gentlemen that the police jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because, in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States without the previous authorization of the Secretary of War. Therefore, as it was not contended, in this case, that there was any authority from the secretary, but on the contrary there is proof tending to show there was no such authority, then it results that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged authority from the police jury of the parish of Plaquemines. The police jury of the parish of Plaquemines could not legally have dammed it. Therefore Mr. Leovy could not."

[627] We think, therefore, that we are warranted in regarding the dam in question as constructed under the police power of the state, and within the terms and purpose of the grant by Congress. There was evidence tending to show the character of *the country affected by floods from Red Pass—that it was swamp land and sea marsh from the Mississippi river to the gulf. The testimony inclosed in the record, of Shoenberger, president of the police jury and of the levee board; of Lewis, of the state board of engineers; of Wilkerson, ex-president of levee board; and of De Armas,—showed that the

closing of this pass has resulted in the redemption of large tracts of land, greatly increasing their value; that the property in the fifth ward, before Red Pass and Spanish Pass were closed, was valued at \$5,000, and at this time it is valued at \$100,000; and that if those passes are kept closed for five years more it will be three times as much; and that, if this pass be opened again, by the removal of the dam, the orange property will be ruined.

It is conceded that Red Pass is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi river. This crevasse seems to have been formed some time before the grant by the United States to Louisiana, and the fact that by this and similar breaks through the banks of the river large tracts of land were rendered worthless, was, it may be assumed, well known to Congress, and was, indeed, the actuating cause of the grant.

As respects navigation through Red Pass, there was some evidence, on the part of the government, that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to any other state than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it.

The evidence on the part of the defendants showed that for many years these crevasses or passes have been steadily growing shallower and narrower, and that at the time of closing Red Pass few of the smallest craft attempted to pass through it, and that the so-called mouth, or end of Red Pass next the gulf, had closed up and become a mere marsh. The trifling use that was made of that pass was restricted to the river end of the crevasse.

We cannot accept the contention of the government's counsel *that, because the jury [628] was left to determine whether the pass was in fact navigable, and found the defendant guilty, the decision of the jury is binding upon the appellate court. We have a right to consider under what instructions and definitions, given by the trial court, the jury found their verdict.

Before we examine the charge of the court, we shall briefly review some of the cases from which may be derived a definition of "navigable waters of the United States," within the meaning of the statutes under which this indictment was brought.

In the case of *Boykin v. Shaffer*, 13 La. Ann. 131, it was said by the supreme court of the state of Louisiana:

"Were the mere fact that a steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression of the soil on the banks of the Mississippi would then become a navigable stream, and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the

banks of the river. It is well known that the state has, for a number of years, been closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land."

In the case of *Egan v. Hart*, 45 La. Ann. 1358, 14 So. 244, there was considered the right of the board of state engineers of the state of Louisiana to build a dam across an alleged stream, designated as Bayou Pierre. It was alleged that it was a purely private undertaking which the board of state engineers was not authorized to do at public expense, and that the dam would obstruct the navigation of Bayou Pierre, and would therefore violate the statute of Congress which forbade the construction of any bridge or other works over or in any navigable waters of the United States, unless approved by the Secretary of War. The trial judge, as to the contention that Bayou Pierre was a navigable stream, said:

[629] "From Grande Ecore, where it (Bayou Pierre) enters Red river, to a point some miles below its junction with Tonre's Bayou, —a stream flowing out of the river,—Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated, and is *unnavigable. Between these two points it is nothing but a highwater outlet, going dry every summer at many places, choked with rafts, and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water."

And accordingly it was found by the trial court that Bayou Pierre was not a navigable water of the United States. Its judgment was affirmed by the supreme court of Louisiana, and the case was brought to this court and the judgment of the court below affirmed. *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

In *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357, a judgment of the supreme court of Ohio, affirming a judgment of a trial court, ordering the defendant, an Ohio corporation, to absolutely remove a bridge or modify its structure over the Ashtabula river, a stream wholly within the state of Ohio, was brought to and affirmed by this court. The case was thus stated in the opinion delivered by Mr. Justice White:

"Both the pleadings and the errors here assigned deny the jurisdiction of the state of Ohio or its courts to control the subject-matter of the controversy, on the theory that the determination of whether the defendant possessed the right to erect the bridge and to continue it, although constructed without authority, is a Federal, and not a state, question. This contention is predicated on §§ 4, 5, and 7 of the act of Congress of September 19, 1890 (26 Stat. at L. 426, 453, chap. 907).

"The contention is that the statute in question manifests the purpose of Congress to de-

prive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined." *Willson v. Black-bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816; *Cardwell v. American Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; **Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Shively v. Bowlby*, 152 U. S. 33, 38 L. ed. 343, 14 Sup. Ct. Rep. 548, and cases there cited.

"Indeed the argument at bar does not assail the rule settled by the foregoing cases, but asserts that as the power which it recognizes as existing in the states is predicated solely upon the failure of Congress to exert its paramount authority, therefore the rule no longer obtains, since the act of 1890, relied on, substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a state."

After quoting the language of the statute, the opinion proceeded:

"On the face of this statute, it is obvious that it does not support the claim based upon it. Conceding, without deciding, that the words 'waterways of the United States,' therein used, apply to all navigable waters, even though they be wholly situated within a state, and passing, also without deciding, the contention that Congress can lawfully delegate to the Secretary of War all its power to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. . . . It follows, therefore, that even conceding, *arguendo*, that the words 'navigable waters,' as used in the act, were intended to apply to streams wholly within a state, its obvious purpose was not to deprive the states of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

In the case of *The Daniel Ball*, 10 Wall. 563, *sub nom. The Daniel Ball v. United States*, 19 L. ed. 1001, the following definition of the term "navigable waters" was expressed:

"Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tidewater, and some of them are navigable for great distances by large vessels which are not even affected by the tide at any point during their entire length. . . . A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their *navigable capacity. Those rivers must be regarded as

public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be conducted in the customary modes of trade and travel on water."

In the case of *The Montello*, 20 Wall. 441, sub nom. *United States v. The Montello*, 22 L. ed. 394, the following language was used:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river."

In *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816, this court said:

"The act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the state, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the state, or might be productive of a change in the value of private property."

"Neither the [Fourteenth] Amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, . . . to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

[632] *It is a safe inference from these and other cases to the same effect which might be cited, that the term, "navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express "power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" and with reference to which the observation was made by Chief Justice Marshall, that "it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state.

or between different parts of the same state, and which does not extend to or affect other states." *Gibbons v. Ogden*, 9 Wheat. 194, 6 L. ed. 69.

While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of "navigable waters of the United States," or to define what traffic shall constitute "commerce among the states," so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the state of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.

The trial judge instructed the jury as follows:

"What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey, that is a navigable water of the United States. It is so called in contradistinction to waters which arise and come to an end within the boundaries of the state. . . . But, if from the water in one state you can travel by water continuously to another state, and the water is a navigable water, then it is a navigable stream of the United States. . . . If it was navigable, [633] and connected with waters that permitted a journey to another state, then it is a navigable water of the United States." And again: "But the fact I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the gulf, because if, from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi river."

If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees to restrain overflowing rivers within their banks, or in reg-

ulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

[634] We also think that these instructions are open to the further *criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi river on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable." But in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture. [*Rowe v. Granite Bridge Corp.*] 21 Pick. 344.

We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted thereon. A few fishermen testified that they occasionally went through this pass with small vessels, carrying oysters for planting, and one or two cargoes of willows and timber were spoken of. None of these witnesses pretended to have carried produce or oysters out of the state. Nor can it be contended that the Red Pass, at the time the dam was built, was open to the gulf. It was shown that the gulf end of the pass had closed up, so that to get to the sea it was necessary to go out of Red Pass into Tiger Pass, Tontine Pass, and Grand Pass, which are open to the gulf. And accordingly the trial judge instructed the jury that it was not necessary, in order to find Red Pass to be a navigable water of the United States, that they should find that it was navigable out to the gulf; that it was sufficient if boats could reach the Mississippi river.

We think the defendant was entitled to the instruction asked for, but refused, that the jury should be satisfied from the evidence that Red Pass was at the time it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce. The instruction actually given was as follows:

"If Tontine Pass and Red Pass are avail-

able for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find that it connected with other waters over which *a continuous[635] journey could be made to other states, then it would be a navigable water of the United States.

"I repeat to you that, under my view of the case, all you have to decide is whether Red Pass was a navigable water of the United States, and as you decide that the case will go, because it is conceded that Mr. Leovy dammed it."

It is plain, therefore, that the attention of the jury was not directed at all to the question of any existing interstate commerce, and that the learned judge was of opinion, and so ruled, that the physical possibility of passing by a boat out of Red Pass into the Mississippi river constituted the pass a navigable water of the United States.

The court refused to give the following instruction:

"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi river from its natural channel, the result of which was to overflow a large portion of Plaquemines Parish, to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the state, in the exercise of its police power delegated to the police jury of the parish of Plaquemines, had a right to close it."

Perhaps this instruction ought to have been qualified or accompanied by a prayer that the acts of Congress relied on by the government were not applicable to the case suggested in the instruction asked for. But we think, in the circumstances disclosed by the evidence, the instruction should have been given, at least as so qualified.

The circuit court of appeals, in dealing with the error assigned for the refusal of the trial judge to so charge, said [92 Fed. Rep. 344, 34 C. C. A. 392]:

"There is no legitimate evidence in the record tending to show that the police jury of the parish of Plaquemines ordered Red Pass closed for the purpose of affecting or promoting the peace, morals, education, health, or good order of the people; but the case does show that the pass was ordered closed, and was closed, for the sole purpose of reclaiming swamp lands. Under the power to regulate commerce, Congress having forbidden the closing of any navigable river without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits *of the state, can be closed under the[636] exercise of the police power of the state for any purpose whatever, but where the purpose only is the reclamation of swamp lands, there is no doubt the police power of the state must give way to the authority of Congress."

We think that the trial court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by

everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances. The defendant was not deprived of the defense that the act which he was charged with was performed in order to promote the health of the community, by the fact, if fact it was, that the order under which he acted did not say anything about the subject of health, but simply authorized the erection of the dam, so as to exclude the overflow from the river.

Nor are we disposed to concur in the doubt expressed whether any navigable water wholly within the limits of a state can be closed under the exercise of the police power for any purpose whatever. Such a doubt might be justified if there was express legislation of the United States forbidding the act proposed. But, as we have seen, in the present case the reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the state, in consideration of the grant of the public lands. And, for the reasons already given, we do not construe the acts of Congress under which this indictment was brought as intended to apply to the case of a stream of the history and character disclosed in this record. Hence, the state authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned.

[637] It can scarcely be contended that if, by a sudden breach of the banks of the Mississippi river in the lowlands of Louisiana, a stream of water across agricultural lands was created, endangering the health and welfare of the inhabitants, that the case would be within the meaning and operation of the acts of Congress relied on in this case. It may be that in such a case, if the state declines to act or, rather, permits such a stream to become a highway of commerce among the states, the Federal control over it might attach. Thus Grand Pass, of which Red Pass is a branch, might, in view of the volume of its water and of the nature and amount of the commerce carried on it, be held to be a navigable water of the United States. However that may be, our conclusion, upon the record now before us, is that Red Pass, in the condition it was at the time when this dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested, that, upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal.

It is claimed by the counsel for the plaintiff in error that the act of July 13, 1892, so far amended and repealed the act of September 19, 1890, that the penal section of the latter was repealed, and that hence, as no penalty is provided in the act of 1892, the indictment and conviction of the plaintiff in error was without authority of law. It is also contended that the policy of Congress

in respect to the authority of the Secretary of War in the matter of obstruction to navigation, has been greatly changed and modified by the act of March 3, 1899. Fifty-fifth Cong., Session 3 [30 Stat. at L.] chap. 425, § 9, p. 1151.

It is also suggested that whatever may be the powers of Congress over streams wholly within a state, they cannot be legitimately enforced by criminal prosecution of officers and agents of the state for acts done under state authority, but that, in such cases, the proper remedy would be found in bills in equity.

But in the view we take of the case in hand, we are not called upon to express any opinion on such questions.

The judgment of the circuit court of appeals is reversed, the judgment of the circuit court is likewise reversed, and the cause is remanded to that court, with directions to award a new trial.

*THE KNAPP, STOUT, & CO. COMPANY, [638]
Plff. in Err.,
v.

JOHN McCAFFREY.

(See S. C. Reporter's ed. 638-648.)

Lien for towage—jurisdiction of state court—proceedings in personam or in rem—questions of local law.

1. A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in the complainant's possession, where the suit is brought against individual defendants, seeking a decree against them, and, in default of the payment thereof, a sale of the property to satisfy it, is not a proceeding *in rem* within the exclusive admiralty jurisdiction of the Federal courts, but is a suit *in personam* to enforce a common-law remedy, which may be brought in a state court by virtue of U. S. Rev. Stat. § 563, saving the suitor's right of a common-law remedy in all cases where the common-law is competent to give it.
2. Questions as to the right to a possessory lien upon a raft under state laws, and the extent thereof, as well as the existence of possession, are local questions dependent upon the law of the state, in respect to which the Federal courts will follow the state decisions.
3. The enforceability in equity of a lien for the enforcement of which there is no special statutory provision is a matter as to which the Federal courts will recognize the practice of the state courts as expressive of the local law.

[No. 263.]

Submitted April 24, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of the State of Illinois affirming a judgment sustaining a bill to foreclose a lien for towage upon a raft of lumber. *Affirmed.*

See same case below, 178 Ill. 107, 52 N. E. 898.

Statement by Mr. Justice **Brown**:

[638] *This was a bill in equity filed in the circuit court for the county of Mercer, Illinois, by the defendant in error, John McCaffrey, against the Knapp, Stout, & Co. Company (hereinafter called the Knapp Company), and the Schulenburg & Boeckler Lumber Company (hereinafter called the Schulenburg Company), and its assignees, to enforce a lien for towage upon a half raft of lumber then lying at Boston Bay, in Mercer county.

The suit arose from a contract made April 6, 1893, by McCaffrey with the Schulenburg Company, in which, after reciting that McCaffrey had purchased of this company three steam tow boats for the sum of \$17,500, it was agreed that McCaffrey was to tow all the rafted lumber such company would furnish him at or below their mill at Stillwater, Minnesota, to St. Louis, and deliver the same there to the company in quantities not exceeding one half a raft at a time, for which service he was to be paid \$1.12½ per thousand feet, board measure, for the lumber contained in the raft. The other provisions of the contract, of which there were many, were not material to the present controversy. After towing a number of rafts for the company, the charges for which remained unpaid, one of McCaffrey's steamers, known as the Robert Dodds, left Stillwater October 13, 1894, with raft No. 10 of that year. The river being low and navigation difficult, McCaffrey was instructed to divide the raft, to bring one half to St. Louis, and to lay up the other half in some safe harbor. In compliance

[639] with these instructions *McCaffrey divided the raft on October 20 at Boston Bay harbor in Mercer county, leaving one half there, while the other half was towed to St. Louis and delivered to the lumber company on November 2. The company paid the clerk of the boat \$1,250 without directions as to its application, and McCaffrey applied it on the amount due him for the towage of other rafts. The steamer returned to Boston Bay the morning of November 4, and laid up outside the raft for the winter.

On the next day, November 5, the Schulenburg Company sold the half raft in Boston Bay to the Knapp Company for \$15,000, part in cash and the remainder in a note due in four months, which was paid at maturity. A bill of sale was given for the lumber, and a letter written to the watchman in charge of the raft informing him of the sale. On November 9 the Schulenburg Company made a voluntary assignment in St. Louis for the benefit of creditors. McCaffrey, hearing of the assignment, offered both companies to tow the half raft to St. Louis under his contract, but the Knapp Company informed him that they did not wish him to do so, saying that they did their own towing; whereupon McCaffrey, claiming to be still in possession of the half raft and believing that the company was about to take it from him by force, filed this bill to foreclose his lien for towage. The Knapp Company gave a bond for the amount of the claim and took the raft away.

The case came on for hearing in the circuit

court upon pleadings and proofs, and resulted in a decree dismissing the bill without prejudice. McCaffrey appealed to the appellate court, which reversed the decree of the circuit court, and remanded the cause with directions to enter a decree for the sum of \$3,643.17, with interest thereon. The Knapp Company appealed to the supreme court of the state, which affirmed the judgment of the appellate court (178 Ill. 107, 52 N. E. 898); whereupon defendant sued out a writ of error from this court.

Mr. Charles P. Wise submitted the cause for plaintiff in error:

The contract being maritime, to enforce the lien for towage of the raft the United States admiralty courts have exclusive jurisdiction.

The Genesee Chief v. Fitzhugh, 12 How. 457, 13 L. ed. 1064; *Jackson v. The Magnolia*, 20 How. 296, 15 L. ed. 909; *The Moses Taylor*, 4 Wall. 411, sub nom. *The Moses Taylor v. Hammons*, 18 L. ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *The Belfast*, 7 Wall. 624, sub nom. *The Belfast v. Boon*, 19 L. ed. 266; *The Eagle*, 8 Wall. 15, sub nom. *The Eagle v. Fraser*, 19 L. ed. 365; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

The admiralty jurisdiction extends to the entire navigable-river system of the United States.

The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; *McGinnis v. The Pontiac*, 5 McLean, 359, Fed. Cas. No. 8,801; *The Montello*, 20 Wall. 430, sub nom. *United States v. The Montello*, 22 L. ed. 391; *Jackson v. The Magnolia*, 20 How. 296, 15 L. ed. 909; *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434.

This suit does not come within the clause of the act of 1789. It is not an action at common law, but a suit in equity.

The Moses Taylor, 4 Wall. 431, sub nom. *The Moses Taylor v. Hammons*, 18 L. ed. 402; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

Messrs. Charles E. Kremer and Guy O. Scott submitted the cause for defendant in error:

The lien for the towage of the raft, if enforceable in admiralty at all, is of the same nature as the lien on cargo for carrying it. It is the common-law lien of the bailee for his hire. It is a possessory lien, which, unlike the ordinary maritime lien, is defeated by the delivery of the property to which it attaches.

The Kalorama, 10 Wall. 205, sub nom. *Pendergast v. The Kalorama*, 19 L. ed. 942; *Westerdell v. Dale*, 7 T. R. 312; *Justin v. Ballam*, 1 Salk. 34; *Watkinson v. Bernadiston*, 2 P. Wms. 367; 3 Kent. Com. 169; 177 U. S.

Maude & P. Ship, 64; *The Zodiac*, 1 Hagg. Adm. 320; *Spartali v. Benecke*, 10 C. B. 223.

McCaffrey has a lien by virtue of the common law and the maritime law, only in case he has possession.

4,885 *Bags of Linseed*, 1 Black, 112, *sub nom. Sears v. Wills*, 17 L. ed. 37; *The Ed- dy*, 5 Wall. 481, *sub nom. Mordecai v. Lind- say*, 18 L. ed. 486.

But it must clearly appear that there was an intention to abandon the lien, before the courts will consider a delivery absolute and unconditional so as to divest the lien.

151 *Tons of Coal*, 4 Blatchf. 368, Fed. Cas. No. 10,520; *Kimball v. The Anna Kimball*, 2 Cliff. 15, Fed. Cas. No. 7,772; *The Volun- teer*, 1 Sumn. 551, Fed. Cas. No. 16,991; *Certain Logs of Mohogany*, 2 Sumn. 589, Fed. Cas. No. 2,559; *Webb v. Anderson*, Taney, 518, Fed. Cas. No. 17,318.

The suit in this case is one strictly *in per- sonam*, with the bond which was voluntarily given to pay any indebtedness or lien that McCaffrey had on the raft, in place of the latter.

Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 477, 7 Sup. Ct. Rep. 254.

[640] *Mr. Justice Brown delivered the opin- ion of the court:

Defendants set up in their answers and in- sisted, both before the appellate court and the supreme court of Illinois, that, if plain- tiff had any lien upon the raft at all for his towage services, it was a maritime lien, en- forceable only in the district court of the United States as a court of admiralty. This is the only Federal question presented in the case.

By article 3, § 2, of the Constitution, the judicial power of the general government is declared to extend to "all cases of admiralty and maritime jurisdiction;" and, by § 9 of the original judiciary act of 1789 (1 Stat. at L. 76, chap. 20), it was enacted "that the district courts shall have, exclusively of the courts of the several states, . . . exclu- sive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." This language is substantially repeated in subdivi- sion 8 of Rev. Stat. § 563, wherein it is expressly stated that "such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seiz- ures is given to the circuit courts."

The scope of the admiralty jurisdiction under these clauses was considered in a number of cases, arising not long after the district courts were established, notably so in that of *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3776, wherein Mr. Justice Story brought his great learning to bear upon an exhaustive examination of all the prior au- thorities upon the subject both in England and in America.

But the exclusive character of that juris- diction was never called to the attention of this court until 1866, when the states had 177 U. S.

begun to enact statutes giving liens upon vessels for causes of action cognizable in ad- miralty, and authorizing suits *in rem* in the state courts for their enforcement. The va- lidity of these laws had been expressly ad- judicated in a number of cases in Ohio, Ala- bama, and California. The earliest case arising in this court was that of *The Moses Taylor*, 4 Wall. 411, *sub nom. The Moses Taylor v. Hammons*, 18 L. ed. 397, in which was considered a statute of California cre- ating a lien for the breach *of any contract [641] for the transportation of persons or prop- erty, and also providing that actions for such demands might be brought directly against the vessel. The act further provid- ed that the complaint should designate the vessel by name; that the summons should be served upon the master, or person in charge, the vessel attached, and, in case of judgment recovered by the plaintiff, sold by the sheriff. An action having been brought by a passenger before a justice of the peace of the city of San Francisco for failure to furnish him with proper and necessary food, water, and berths, the defense was inter- posed that the cause of action was one of which the courts of admiralty had exclusive jurisdiction. The case finally reached this court, where the defense was sustained, the court holding that the contract for the trans- portation of the plaintiff was a maritime contract; that the action against the steam- er by name, authorized by the statute of California, was a proceeding in the nature and with the incidents of a suit in admiralty. Upon this point Mr. Justice Field observed: "The distinguishing and characteristic fea- ture of such suit is that the vessel or thing proceeded against is itself seized and im- pleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made un- der its decrees validity against all the world. By the common-law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Un- der a sale, therefore, upon a judgment in a common-law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold." The court also held that the statute of Califor- nia to the extent to which it authorized ac- tions *in rem* against vessels for causes of action cognizable in admiralty, invested her courts with admiralty jurisdiction, and to that extent was void.

At the same term arose the case of *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451, in which a statute of Iowa giving a lien for injuries to persons or property, and provid- ing a remedy *in rem* against the vessel, was held to be obnoxious to the exclusive juris- diction *of the Federal courts. Speaking of [642] the common-law remedy, saved by the stat- ute, Mr. Justice Miller observed: "But the remedy pursued in the Iowa courts in the case before us is in no sense a common-law remedy. It is a remedy partaking of all the 923

essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the western states." The same principle was applied in the case of *The Belfast*, 7 Wall. 624, *sub nom. The Belfast v. Boon*, 19 L. ed. 266, to a statute of Alabama under which contracts of affreightment were authorized to be enforced *in rem* in the state courts by proceedings the same in form as those used in the courts of admiralty. This was also held to be unconstitutional.

The principle of these cases was restated in *The Lottawanna*, 21 Wall. 558, 579, *sub nom. Rodd v. Heartt*, 22 L. ed. 654, 663, although the question settled by that case was that materialmen furnishing repairs and supplies to a vessel in her home port do not acquire thereby a lien upon the vessel by the general maritime law. To the same effect is *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498, in which a lien by a state law for such repairs and supplies was given precedence of a prior mortgage. Finally, in the case of *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930, it was held that the enforcement of such a lien upon a vessel, created by a statute of Massachusetts, for repairs and supplies in her home port, for which a remedy *in personam* may be had in admiralty, was exclusively within the admiralty jurisdiction of the courts of the United States, and that the statute of Massachusetts, to the extent that it provided for a proceeding *in rem*, and for a sale of the vessel, was unconstitutional and void. See also *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either [643] *in rem* or *in personam*, proceedings **in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction,—*The Jefferson (People's Ferry Co. v. Beers)*, 20 How. 393, 15 L. ed. 961; *The Capitol (Roach v. Chapman)*, 22 How. 129, 16 L. ed. 294,—we held in *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487, that, in respect to such contracts, it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their en-

forcement *in rem*. The same principle was applied in *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254, to a statute of Illinois giving a lien upon a vessel for "damage done to a building abutting on the water, upon the ground that the court had previously held that there was no jurisdiction in admiralty for damage done by a ship to a structure affixed to the land. *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125; *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. There was really another sound reason for the decision in the fact that the suit was *in personam*, with an attachment given upon the property of the defendant, which, as we shall see hereafter, is quite a different case from a proceeding *in rem*.

To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit *in rem* within the cases above cited, and not within the exception of a common-law remedy, which § 563 was never designed to forestall.

The first of these conditions may be readily admitted. That a contract to tow another vessel is a maritime contract is too clear for argument, and there is no distinction in principle between a vessel and a raft. Whether the performance of such a contract gives rise to a lien upon the raft for the towage bill admits of more doubt; indeed, the authorities, as to how far a raft is within the jurisdiction of admiralty, are in hopeless confusion, *but for the purposes of this [644] case we may admit that such lien exists. But, if existing, it would not oust or supplant the common-law lien dependent upon possession.

The real question is whether the proceeding taken is within the exception of "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." It was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common-law *remedy*; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as "the means employed to enforce a right, or redress an injury." While, as stated by him, remedies for non-fulfilment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abate-

ment; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action.

Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus, in *The Moses Taylor*, 4 Wall. 411, 431, *sub nom. The Moses Taylor v. Hammons*, 18 L. ed. 397, 402, it is said of the saving clause of the judiciary act: "It is not a remedy in the common-law courts which is saved, but a common-law remedy." To same effect is *Moran v. Sturges*, 154 U. S. 256, 276, 38 L. ed. 981, 987, 14 Sup. Ct. Rep. 1019.

[645] In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are *paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug. But whatever might be our own opinion upon the subject, the supreme court of Illinois, having held that under the laws of that state the plaintiff had a possessory lien upon this raft, that such lien extended to so much of the raft as was retained in his possession, for the entire bill, and that under the facts of this case plaintiff did have possession of the half raft until he surrendered it under order of the court for its release upon bond given, we should defer to the opinion of that court in these particulars as they are local questions dependent upon the law of the particular state.

Whether a bill in equity will lie to enforce a possessory lien may admit of some doubt, and the authorities are by no means harmonious. That a person having a lien upon chattels has no right himself to sell such chattels in the discharge of his lien is well settled (*Doane v. Russell*, 3 Gray, 382; *Jones v. Pearle*, 1 Strange, 557; *Lickbarrow v. Mason*, 6 East, 21, note; *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626; *Indianapolis & St. L. R. Co. v. Herndon*, 81 Ill. 143; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387); and in the case of the *Thames Iron Works Co. v. Patent Derrick Co.* 1 Johns. & H. 93, it was held by Vice Chancellor Wood that ship builders, having a lien upon the ship built by them according to the contract for the purchase money, could not enforce their lien by sale. But in some jurisdictions, and notably so in Illinois, it is held that liens for the enforcement of which there is no special statutory provision are enforceable in equity. *Black v. Brennan*, 5 Dana, 310; *Charter v. Stevens*, 3 Denio, 33, 177 U. S.

45 Am. Dec. 444; *Dupuy v. Gibson*, 36 Ill. 197; *Cushman v. Hayes*, 46 Ill. 145; *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116; *Bar-chard v. Kohn*, 157 Ill. 579, 29 L. R. A. 803, 41 N. E. 902. Such being the practice in Illinois, we recognize it as expressive of the local law. There were circumstances in this case which appealed with peculiar force to the discretion of a court of equity. The defendant disputed McCaffrey's lien and right of possession to the raft, and announced its intention of towing it to St. Louis itself. It was in a position where it might have been taken away by a superior force, unless the plaintiff incurred the expense of employing a gang of men to watch it. Under such circumstances it was not only natural, but just, that he should have applied to a court of equity for relief in the enforcement of his common-law remedy.

We have held in several cases that analogous proceedings were no infringement upon the exclusive admiralty jurisdiction of the Federal courts. Thus, in *Leon v. Galceran*, 11 Wall. 185, 20 L. ed. 74, three sailors brought suits in a state court against the owner of a schooner to recover their wages, and had the schooner, which was subject to a lien or privilege in their favor, according to the laws of Louisiana, similar in some respects to the principles of the maritime law, sequestered by the sheriff of the parish. The writ was levied upon the schooner, which was afterwards released upon a forthcoming bond. This was held to be an ordinary suit *in personam* with an auxiliary attachment of the property of the defendant, and no infringement upon the admiralty jurisdiction. Said Mr. Justice Clifford: "They brought their suits in the state courts against the owner of the schooner, as they had a right to do, and, having obtained judgment against the defendant, they might levy their execution upon any property belonging to him, not exempted from taxes or execution, which was situated in that jurisdiction."

In *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369, a steamboat owned by the company ran over a sail boat containing the plaintiff's intestate, and killed him. His administrator brought suit against the company in a state court of Rhode Island, under an act making common carriers responsible for deaths occasioned by their negligence, and providing that the damages be recovered in an action on the case. Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was *held to be un- [647] sound. So, also, in *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95, it was held that courts of admiralty had no exclusive jurisdiction of suits *in personam* growing out of collisions.

In the case already cited of *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30

L. ed. 447, 7 Sup. Ct. Rep. 254, a petition was filed by the elevator company against the owner of a tugboat for injuries done by the jibboom of a schooner in tow of the tug to the wall of plaintiff's warehouse. The petition prayed for a writ of attachment against the defendant, commanding the sheriff to attach the tug, summon the defendant to appear, and for a decree subjecting the tug to a lien for such damages. The statute under which the proceedings were instituted gave a lien for all damages arising from injuries done to persons or property by such water craft. It was held that the damage having been done upon the land, there was no jurisdiction in admiralty, and that the suit was *in personam* with an attachment as security, the attachment being based upon a lien given by the state statute. Said the court: "There being no lien on the tug by the maritime law for the injury on land inflicted in this case, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce." It would seem that even if the suit had been *in rem* against the vessel, it would have been sustained, as the injury was not one for which an action would have lain in admiralty.

In the case under consideration the suit was clearly one *in personam* to enforce a common-law remedy. It was no more a suit *in rem* than the ordinary foreclosure of a mortgage. The bill prayed for process against the several defendants; that they be required to answer the bill; that plaintiff be decreed to have a first lien upon the raft for the amount due him; that the defendants be decreed to pay such amount, that in default of such payment the raft be sold to satisfy the same; and, that in case of such sale the purchaser have an absolute title, free from all equity of redemption and all claims of the defendants, and that they be debarred, etc. This is the ordinary prayer of a foreclosure bill. The decree of the appellate court reversed that of the circuit court, and directed

[648] a recovery of a specified *amount. It resembles a decree *in rem* only in the fact that the property covered by the lien was ordered to be sold. Such sale, however, would pass the property subject to prior liens, while a sale *in rem* in admiralty is a complete divestiture of such liens, and carries a free and unencumbered title to the property, the holders of such liens being remitted to the funds in the registry which are substituted for the vessel. *The Helena*, 4 C. Rob. 3.

The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against

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the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (§ 563) of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction.

The decree of the Supreme Court of Illinois is therefore affirmed.

*JAMES BRYAR, JR., *et al.*, Appts., [649]
v.

THOMAS CAMPBELL.

(See S. C. Reporter's ed. 649-655.)

Appeal—in bankruptcy—delay in taking—objection made too late—res judicata—jurisdiction of state court after decree in Federal court—equitable ejectment as affected by decree for conveyance.

1. An objection that an appeal in bankruptcy was not claimed and notice given within the time prescribed by the rules is made too late in the Supreme Court of the United States after a lapse of sixteen years, where it does not seem to have been called to the attention of the lower court, in which a motion was made to declare the appeal deserted.
2. A judgment rendered by a state court against plaintiff in an action of equitable ejectment, sustaining a defense based on title obtained through sales under mortgages, was not without jurisdiction because the plaintiff had obtained a prior decree in a Federal court against one of the ejectment defendants before the defense sustained by the state court had arisen, when this decree was not set up in the state court as a bar.
3. A suit in a Federal court, which the successful plaintiff abandoned pending appeal, in order to bring a new action in a state court, which was unsuccessful, cannot be resuscitated, after the lapse of sixteen years, for the purpose of defeating the action of the state court, in which the decree of the Federal court was not set up as a bar, and which sustained a defense arising after the Federal decree was rendered.

[No. 227.]

Argued April 12, 1900. Decided May 14, 1900.

APPEAL from a decree of the United States Circuit Court of Appeals for the Third Circuit affirming a decree of dismissal. *Affirmed.*

See same case below, 62 U. S. App. 435, 90 Fed. Rep. 690, 33 C. C. A. 236.

Statement by Mr. Justice Brown:

*This was a suit in equity instituted in [649] the district court for the western district of Pennsylvania, April 30, 1877, by Jane Bryar against James Bryar, her husband, and Robert Arthurs, his assignee in bankruptcy, to

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478.

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enjoin the latter from partitioning or offering for sale an undivided half of 7 acres of land in the city of Pittsburgh, for which, as she alleged, a conveyance had been made by mistake to her husband, though she had paid the purchase money with her own individual funds. Notwithstanding the pendency of this bill the assignee proceeded to sell the land at assignee's sale to the defendant Thomas Campbell, subject to the two mortgages hereinafter mentioned. On August 15, 1878, Campbell was permitted to intervene and defend *the bill, the bill being amended by a new prayer that the defendants make, execute, and deliver to the plaintiff a deed for the property in question.

[650] The case was heard upon pleadings and proofs, and on June 26, 1879, a decree was rendered in favor of the plaintiff, declaring her to be the equitable owner of the land in suit; that defendant Campbell was chargeable with notice of her rights, and was bound to convey according to the prayer of the bill. An appeal was immediately taken by Arthurs and Campbell to the circuit court, where the case was docketed August 30, 1879. Here the case rested, without further action, for sixteen years, and until December 20, 1895.

Meantime, however, and in February, 1880, Jane Bryar, and her husband in her right, began an action of ejectment in the court of common pleas of Allegheny county against Thomas Campbell, John W. Beckett, and William B. Rodgers, for the land in controversy, which resulted, May 19, 1881, in a verdict for the defendants, and a writ of error from the supreme court of Pennsylvania, which, on November 14, 1881, affirmed the judgment of the court of common pleas. 30 Pittsb. L. J. 12.

Nothing further appears to have been done until December 30, 1895, when Mrs. Bryar moved the circuit court for the western district of Pennsylvania for an order declaring the appeal of Thomas Campbell from the decree of the district court deserted, upon the ground that the appellants had failed to bring up the record from the district court, to pay the entry costs, or to prosecute their appeal to the next term of the circuit court. Campbell filed an answer to this motion, setting up his purchase of the land at assignee's sale, and stating that he had not prosecuted his appeal because he had purchased a mortgage made by James Bryar to Edward R. James, upon which mortgage the property had been sold to his attorney, William B. Rodgers, who had conveyed to him; that he went into possession of the land; that the petitioner and her husband had brought the action of ejectment against him above referred to, and a verdict had been rendered in favor of the defendants; that he believed the result of the ejectment case [651] made it unnecessary *for any further proceedings upon the appeal, and that he and his vendees had ever since been in undisputed possession of the land. The motion to dismiss the bill, or rather to declare the appeal deserted, was denied, and the death of the plaintiff Jane Bryar being suggested, it was 177 U. S.

ordered that her heirs at law, the appellants, be substituted as plaintiffs.

The appeal subsequently went to a hearing in the circuit court upon the former testimony, and new testimony put in by Campbell in support of his answer, and resulted in a reversal of the district court, and a dismissal of the bill. Plaintiffs appealed to the circuit court of appeals, which affirmed the decree of the circuit court (62 U. S. App. 435, 90 Fed. Rep. 690, 33 C. C. A. 236), whereupon plaintiffs appealed to this court.

Messrs. Lowrie C. Barton and Edward Campbell argued the cause and filed a brief for appellants.

Mr. W. B. Rodgers argued the cause and filed a brief for appellee:

Campbell, being pursued by Mrs. Bryar in the state court, had at least good reason to suppose that Mrs. Bryar had elected to desert her first suit. Therefore his omission to take further action in the appeal in the circuit court was excusable.

Grigsby v. Purcell, 99 U. S. 506, 25 L. ed. 354.

Abandonment of the bill by Mrs. Bryar is to be conclusively presumed as against her and her heirs, by reason of her and their long acquiescence and laches. Campbell was in possession. His title was declared by the supreme court to be a paramount title, and she or her heirs made no move to assert any claim under the decree for over fourteen years.

Waring v. Pennsylvania R. Co. 176 Pa. 172, 35 Atl. 106; *Biddle v. Girard Nat. Bank*, 109 Pa. 349.

Campbell was compelled to defend the ejectment suit instituted in the state court. He had no option in the matter. He could not set up as a defense the pendency of the bill in equity in the circuit court.

Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983, and cases cited.

*Mr. Justice **Brown** delivered the opinion [651] of the court:

Plaintiffs ask for a reversal of this decree upon the grounds, first, that the appeal from the district court to the circuit court in bankruptcy was not claimed and notice given to the clerk of the district court within the time prescribed by the rules; and, second, because it affirmed the decree of the circuit court upon its merits.

1. If there be anything in the defense that the appeal from the district court to the circuit court in the bankruptcy proceedings was not taken within the time prescribed by law, it comes too late. It is true that Rev. Stat. § 4981, declares that "no appeal shall be allowed in any case from the district to the circuit court, unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed *from." It appears that the decree of the [652]

district court was entered June 26, 1879, and that a petition for an appeal was addressed to the judge of the circuit court, the jurat to which was dated June 28, and on June 30 a bond for costs on appeal was filed. The appeal, however, to the circuit court was not allowed and filed until July 16, twenty days after the decree of the district court, and it does not appear that any notice was given to the clerk of the district court, or to the defeated party, as required by § 4981; but it further appears that the petition for appeal, the allowance thereof, a copy of the docket entries and a bond for costs were filed in the circuit court, August 30, 1879. Here the matter rested until December 20, 1895, when Mrs. Bryar, the prevailing party, moved the circuit court not to dismiss the appeal for the reason that it was not taken in time, but, stating that it had been "duly allowed," to obtain an order declaring it deserted, for the reason that the appellants had failed to bring up the record from the district court, pay the entry costs, or prosecute their appeal. This was apparently treated as a motion to dismiss, and was denied. After a lapse of sixteen years it is now too late to ask this court to hold that the appeal should have been dismissed for a reason which does not seem to have been called to the attention of the circuit court, when the original motion was made to declare the appeal deserted. If the plaintiffs in that case had intended to insist upon their rights under the decree, they should either have moved to dismiss the appeal within a reasonable time, or pressed it to a hearing in the circuit court, instead of abandoning it and bringing a new suit upon the same cause of action in the state court.

2. The case upon the merits depends upon the effect to be given to the judgment in favor of Campbell in the ejectment suit brought by Mrs. Bryar in the state court. Mrs. Bryar appears, for some unexplained reason, to have abandoned her original suit in the district court, notwithstanding the decree in her favor, and to have elected to begin an action in ejectment in the state court. To this action Campbell appears to have set up a new defense, which had accrued since the decree in the district court, arising upon two mortgages executed in 1874 by [653]*James Bryar, namely, one to Thomas McClintock for \$3,000, the other to E. R. James for \$2,000, which mortgages were, in 1878, foreclosed and judgment entered. In the opinion of the supreme court of the state it is stated that William R. Rodgers, one of the defendants in the ejectment action, as the attorney for Campbell, purchased the judgments obtained upon the mortgages, issued execution, sold the 7 acres at sheriff's sale, and bought the same for \$50. A deed was made by the sheriff to Rodgers, who gave a memorandum to Campbell, stating that he would convey to anyone Campbell might wish, when requested so to do. It was not disputed that Rodgers bought and held in trust for Campbell whatever title he obtained by the sheriff's deed.

Upon this state of facts the court held that the mortgages were valid liens, and the fact
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that the mortgagees were entirely unaffected by any notice of the secret equity of Mrs. Bryar being undisputed, it necessarily followed that, whether Campbell had notice or not, he stood in their shoes when he purchased the title derived from them. "It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so they were extinguished. But unless he expressly or by necessary implication agreed to pay them, he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them." It will be seen from this that Campbell did not rely upon his purchase at the assignee's sale, as to which the district court seems to have held that he had notice of Mrs. Bryar's equity in the premises, but upon the purchase of the rights of the mortgagees, who appear to have taken the mortgages, supposing the property to belong to James Bryar, in whose name it stood upon the record.

We are advised of no substantial reason why the judgment of the state court does not operate as *res judicata* in this case. The original suit in the district court was begun by Mrs. Bryar, one of the original plaintiffs in the ejectment suit, for the purpose of compelling the defendant Thomas Campbell to convey to her as the equitable owner thereof the premises now in dispute. *The ejectment [654] suit was begun by her and her husband, in her right, upon the same title against three defendants, one of whom was Campbell, to obtain possession of the same property. The action was brought by Mrs. Bryar upon her equitable title, a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity. *Peterman v. Huling*, 31 Pa. 432; *Winpenny v. Winpenny*, 92 Pa. 440. Such procedure, though not authorized by the practice of the Federal courts, will be respected when the question arises upon the effect to be given the judgment. *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; *Miles v. Caldwell*, 2 Wall. 36, 17 L. ed. 755; *Faber v. Hovey*, 117 Mass. 107, 19 Am. Rep. 398. While it appears from the opinion of the supreme court of the state that the decree of the district court was called to its attention, it was not set up as a bar to the ejectment in the state court for the obvious reason that Mrs. Bryar had abandoned it by bringing suit in the state court, and there was no object in pleading it, while Campbell did not plead it because it was adverse to him. It would seem, too, that under the practice in Pennsylvania a decree cannot be used as *res judicata* pending an appeal to a higher court. *Souter v. Baymore*, 7 Pa. 415, 47 Am. Dec. 518. He could not even plead the pendency of the former suit. *Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448; *Stanton v. Embrey*, 93 U. S. 548, 554, 23 L. ed. 983, 984.

It is now contended that the existence of this prior decree ousted the jurisdiction of the state court. Indeed, the only object of Mrs. Bryar in endeavoring to have the ap-

peal dismissed seems to have been to reinstate the original decree in her favor more effectually, and to insist that it was a final disposition of the matters in controversy between herself and Campbell. The question is whether, having abandoned the original decree for a new action in the state court in which she was defeated, her heirs can now claim that the original decree in the district court, though not set up as a bar by either party, and notwithstanding the appeal, can be resuscitated after a lapse of sixteen years for the purpose of defeating the action of the state court. To state this proposition is to answer it. The state court was at liberty to proceed to dispose of the [655] case upon the issues made by the parties, and as neither party saw fit to set up the former decree as a bar to the action, the state court was not bound to notice it. It did not affect in any way the jurisdiction of that court. In addition to this, however, Campbell relied upon a wholly different defense from that set up by him in the former suit, and one which had accrued to him after the decree in that court was rendered. Whether the decree, if properly pleaded, would have operated as a bar it is unnecessary to determine. As the same issues are presented here as were presented in the state court, it is entirely clear that they cannot be relitigated.

The judgment of the state court was conclusive upon these issues, and the *decree of the Circuit Court of Appeals* to that effect was correct, and it is affirmed.

THE CARLOS F. ROSES.

(See S. C. Reporter's ed. 655-691.)

Prize—ownership of cargo on enemy's vessel—burden of proof—pledge of bills of lading—secret liens or private engagements.

1. The presumption is that a cargo on an enemy vessel is enemy property.
2. A cargo shipped by neutral commission merchants on an enemy vessel, to an enemy port, though on a voyage commenced before war was declared, where the invoices state that the goods were shipped "to order for account and risk and by order of the parties noted below," who are, in addition to the consignor, the owners of the vessel and other subjects of the enemy, while the bills of lading state that the goods are taken "for account of whom it may concern," and there is no charter party, will be deemed to be the property of the consignees during the voyage, so as to be subject to capture,—especially when no claim to any part of the cargo is made by the consignor.
3. Evidence of enemy interest in a captured cargo, arising on the face of the documents, is not overcome in favor of neutral claimants in another country by proof that, before war was declared and during the voyage, they accepted drafts on security of the bills of lading and without any other indemnity than the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their rights, where it appears that the claim-

ants sent a part of the bills of lading to bankers at the port where the cargo was, and that these were received several months afterwards, without showing from whom they were then received, and that the claimants retained other bills of lading "pending the disposal of the cargo," but the evidence fails to show whether the insurance contemplated a war risk or why a portion of the bills of lading were retained by the claimants, and fails to set forth the relations, transactions, or correspondence existing and passing between the claimants and the enemy owners of the cargo.

4. The presumption as to ownership arising from a bill of lading may be explained or rebutted by other evidence showing where the real ownership lies.
5. A pledgee to whom a bill of lading is given as security gets the legal title to the goods, only if such is the intention of the parties, and that intention is open to explanation, even as against persons who may have innocently paid value for the bill.
6. The right of capture acts on the proprietary interest of the thing captured at the time of capture, and is not affected by the secret liens or private engagements of the parties.

[No. 243.]

Argued January 12, 1900. Decided May 14, 1900.

A PPEAL from a decree of the District Court of the United States for the Southern District of Florida sustaining a claim to the proceeds of a captured cargo. *Reversed.*

Statement by Mr. Chief Justice Fuller:

*The Carlos F. Roses was a Spanish bark [656] of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic, to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York, and sent to Key West in charge of a prize crew. The bark and her cargo were duly libeled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken in *preparatorio*. Kleinwort Sons & Company, of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. In this it was alleged that *Klein- [657] wort Sons & Company were merchants in London; that the members of the firm were subjects of the United Kingdom of Great

Britain and Ireland; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau & Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau & Company; that the members of the firm of Gibernau & Company were citizens of the Argentine Republic; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war; that after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6,297, British sterling, to wit, £2,714 item thereof, upon the security of said lot of 110,256 kilos of jerked beef and 19,980 strings of garlic, and £3,583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef; that at the time of making said advances, and in consideration thereof, bills of lading covering the shipments were delivered to claimants duly indorsed in blank, with the intent and purpose that they should thereby take title to said bills of lading and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons & Company did become, and ever since have been and still are as aforesaid, the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about \$30,644.35, and that no part of the same had been paid, or otherwise secured to be paid.

[658] *The cause was heard on the libel and claims of the master of the bark and Kleinwort & Company, and the evidence taken in *preparatorio*. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership;" and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits be-

fore the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés, of Havana, a Spanish subject, the Spanish owners of the vessel, and Gibernau & Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau & Company on commission, and by them delivered to the Carlos F. Roses "consigned to order for account and risk and by order of the parties noted" in the invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60%, 165,384 kilos, "to the expedition or voyage of the Carlos F. Roses;" 40%, 110,256 kilos, "to Mr. Pedro Pagés, of Havana." The shipment of garlic was divided thus: 9,990 strings, "account of Mr. Pedro Pagés," and 9,990 strings for "account of" Gibernau & Company. Both invoices were signed by Gibernau & Company, and bore date March 11 and 12, 1898.

Harcke stated in one of his affidavits that "the said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would, by payment to or indemnification *of Kleinwort Sons & Co., or their agents in that behalf, take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments, except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right, to the extent of such payments, the insurers of the said goods."

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau & Company, "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau & Company for transportation to Havana "for account and at the risk of whom it may concern," one of the bills covering a shipment of 165,384 kilos of jerked beef, another of 110,256 kilos of jerked beef, and the third of 19,980 bunches of garlic.

March 15, Gibernau & Company drew this bill of exchange:

No. 128. Montevideo, March 15, 1898. For £2,714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2,714 13 8, value received, which you will charge to the account of Pedro Pagés, of Havana, as per advice.

Pla Gibernau & Co.

To Messrs. Kleinwort Sons & Co., London.

On the same day, Maristany drew this bill of exchange:

[660] No. 129. Montevideo, March 15, 1898. For £3,583 11 6. *Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3,583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

Ysidro Bertran Maristany.

To Messrs. Kleinwort Sons & Co., London.

This was indorsed by Gibernau & Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons & Company, and on May 9 were paid under discount by that firm. Harche alleged that at the time of the acceptance of these bills of exchange, bills of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés indorsed in blank by Gibernau & Company, were delivered to claimants as security for the payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices covering the shipment of garlic and Pagés' share of the jerked beef were mailed by Kleinwort Sons & Company to Gelak & Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak & Company, nor a copy of them, was produced. Harche further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons & Company "pending the disposal of the said cargo." On May 17, the day of the capture, Kleinwort Sons & Company cabled Gelak & Company requesting them to return the bills of lading and invoices which had been forwarded on April 9. June 9, Gelak & Company replied that the bills and invoices had not been received. On 177 U. S.

October 21 claimants produced these bills of lading, alleging that they had been received from Gelak & *Company on October 18, and [661] that neither Pagés, Gibernau & Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harche's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal.

Mr. James H. Hayden and Assistant Attorney General Hoyt argued the cause and, with Mr. Joseph K. McCammon, filed a brief for the United States and the captors:

The court having ordered further proofs, the burden of proving their ownership and the neutral character of the goods, by clear and positive evidence and beyond a reasonable doubt, rested upon the claimants.

The London Packet, 5 Wheat. 132, 5 L. ed. 52; *La Amistad De Rues*, 5 Wheat. 385, 5 L. ed. 115; *The Amiable Isabella*, 6 Wheat. 1, 77, 5 L. ed. 191, 209; *The Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454; *The Sally Magee*, 3 Wall. 451, sub nom. *Fry v. United States*, 18 L. ed. 197; *The Jenny*, 5 Wall. 183, sub nom. *United States v. The Jenny*, 18 L. ed. 693.

The portion of the cargo consigned to Gibernau & Co. was the only part of the cargo having color of neutrality. Gibernau & Co. did not claim it; therefore it should have been decreed good prize.

The Adeline, 9 Cranch, 244, 3 L. ed. 719; *The Harrison*, 1 Wheat. 298, 4 L. ed. 95; *The Staadt Embden*, 1 C. Rob. 26; 3 Greenleaf, Ev. § 443.

Capture as prize of war *jure belli* overrides all previous liens.

The Mary and Susan, 1 Wheat. 25, 4 L. ed. 27; *The Frances*, 8 Cranch, 418, 3 L. ed. 609; *The Hampton*, 5 Wall. 372, sub nom. *The Hampton v. United States*, 18 L. ed. 659; *The Battle*, 6 Wall. 498, sub nom. *The Battle v. United States*, 18 L. ed. 933.

Mr. Wilhelmus Mynderse argued the cause and filed a brief for appellee:

A transfer made by an enemy prior to the outbreak of hostilities, in respect of goods in transit, is valid.

The Vrouw Margaretha, 1 C. Rob. 336; *The Ann Green*, 1 Gall. 274, Fed. Cas. No. 414; 2 Halleck's Internat. Law, 3d ed. p. 91; Hall, Internat. Law, p. 526; Wheaton, Internat. Law, p. 485.

A cargo afloat is incapable of manual delivery, and title passes by the delivery of a symbol,—the bill of lading,—with any usual indicia of ownership in the way of indorsement.

Dows v. Greene, 24 N. Y. 638; *Anderson v. Clark*, 2 Bing. 20; *Glyn v. East & West India Docks Co.* L. R. 6 Q. B. Div. 480; *Barber v. Meyerstein*, L. R. 4 H. L. Cas. 325; *Lickbarrow v. Mason*, 5 T. R. 683.

The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Co.,

under indorsements which gave to them, and to them alone, the right of demanding delivery from the vessel.

Anderson v. Clark, 2 Bing. 20.

Liens for advances, when accompanied by possession or control of the property against which the advances are made, are recognized by the prize courts.

The St. Jozé Indiano, 1 Wheat. 208, 4 L. ed. 73; *The Amy Warwick*, 2 Sprague, 150, Fed. Cas. No. 343; 2 Black, 635, 17 L. ed. 459; *The Winifred*, Blatchf. Prize Cas. 33, Fed. Cas. No. 17,873; *The Lynchburg*, Blatchf. Prize Cas. 51, Fed. Cas. No. 8,637a.

[661] *Mr. Chief Justice Fuller delivered the opinion of the court:

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The district court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and therefore entered the decree in claimants' favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132, 5 L. ed. 52; *The Sally Magee*, 3 Wall. 451, *sub nom. Fry v. United States*, 18 L. ed. 197; *The Benito Estenger*, 176 U. S. 568, *ante*, 592, 20 Sup. Ct. Rep. 489.

[662] Further proofs on claimants' behalf were ordered to be furnished within sixty days from June 2, and the time was enlarged to August 31, and again to October 15. The proofs tendered were three affidavits of claimants' manager sworn to September 27, October 12, and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but, without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau & Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the Carlos F. Roses," and "Mr. Pedro Pagés, of Havana," all Spanish subjects. The con-

signees of the garlic were "Mr. Pedro Pagés" and "the undersigned" that is, Gibernau & Company. There were three sets of bills of lading issued by the master to Gibernau & Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau & Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau & Co. To order." The *visé* of the consul of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is *that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee, so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau & Company, and they did not claim and have not claimed it, nor was it asserted that Gibernau & Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244, 3 L. ed. 719; *The Harrison*, 1 Wheat. 298, 4 L. ed. 95. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés, of Havana." The bill of exchange drawn by Gibernau & Company named Kleinwort Sons & Company as acceptors, and directed them to charge the amount to the account of "Pedro Pagés, of Havana, as per advice." The bill drawn by Maristany also named Kleinwort Sons & Company as drawees, and directed them to charge the

amount "to P. Roses Valenti, of Barcelona, as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

[664] Hareke said that when the bills of exchange were accepted by Kleinwort Sons & Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlie were delivered to them in consideration of the acceptance of the *draft for £2,714 13 8, and that bills of lading for the 165,384 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3,583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons & Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlie were forwarded to Gelak & Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak & Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June Gelak & Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak & Company's possession; and in October duplicates were also received by claimants from Gelak & Company, with, so far as disclosed, no accompanying explanation. And Hareke's affidavits failed to set forth the relations, transactions, or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties, the orders for purchase, and the mode of payment would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners, or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity, nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove *beyond question their right and title. And still, for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and, while quasi-negotiable instruments, are
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not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferor's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *Shaw v. North Pennsylvania R. Co.* 101 U. S. 557, 25 L. ed. 892.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner in virtue of some arrangement with his customer or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of anything *to impeach [666] the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion,—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. *Sand. Inst. Just. Introd.*, xlvi.ii.; 2 *Marcadé*, *Expl. du Code Napoléon*, 350; 2 *Bouvier* (Rawle's Revision), 73; *The Young Mechanic*, 2 *Curt. C. C.* 404, *Fed. Cas. No.* 18,180.

Claimants did not obtain the *jus in rem*,

and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, 3 L. ed. 609, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeable to the principles of the common law of England, a factor has a lien upon goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created [667] by *the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel, and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, 4 L. ed. 27, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declara-

tion of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them,*and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees. [668]

In *The Hampton*, 5 Wall. 372, *sub nom. The Hampton v. United States*, 18 L. ed. 659, the schooner Hampton and her cargo had been captured, libeled, and condemned as prize of war. The master of the vessel was her owner, but interposed no claim, nor did anyone claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The bona fides of this mortgage was not disputed, nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overridden by the capture. Mr. Justice Miller said:

"The first ground on which appellant relies is that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common-law doctrine which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as the equity courts treat them, as mere securities for the debt for which they are given and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture would only have to raise a sufficient sum of money on them, by bona fide mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized the owner need not appear, because he would be indifferent, having the value of his property in his *hands [669] already. The mortgagee having an honest mortgage which he could establish in a court of prize would either have the property restored to him or get the amount of his mortgage out of the proceeds of the sale. The

only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498, *sub nom. The Battle v. United States*, 18 L. ed. 933, the steamer *Battle* and cargo were captured on the high seas as prize of war, brought into port and condemned for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials furnished and for work and labor in building a cabin on the boat. These claims were dismissed and the decree affirmed by this court, Mr. Justice Nelson, delivering the opinion, saying: "The principle is too well settled, that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cas. 331.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in *a court of prizes? . . . The person advancing money on bonds of this nature acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the *onus* is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from the neutral to a captor. It is very obvious

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that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize court."

In *The Marianna* the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was "disallowed because the claimants' interest was not sufficient to support it; and the court said:

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"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property. There must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they

are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

[672] These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, *and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano*, 2 Gall. 268, Fed. Cas. No. 12,322, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208, 4 L. ed. 73. Goods were shipped by Dyson, Brothers, & Company, of Liverpool, on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers, and Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers, & Company wrote Dyson, Brothers, and Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected, although Dyson, Brothers, & Company had the proceeds of his hides in their hands.

The Lynchburg, Blatchf. Prize Cas. 57, Fed. Cas. No. 8,638, and *The Amy Warwick*, 2 Sprague, 150, Fed. Cas. No. 343, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner *Lynchburg* with a cargo of coffee had been libeled during the Civil War as enemy property, and also for an attempt to violate blockade. Brown Brothers & Company, loyal citizens, intervened as claimants of 2,045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright, & Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright, & Company drew drafts on Brown Brothers & Company for £6,000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States

[673] attorney that 1,541 bags of the coffee *should be released to Brown Brothers & Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers & Company, in which Wortham & Co., of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value

of the 1,541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2,045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: "The claim to an absolute ownership of the 2,045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418, 3 L. ed. 609; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here, the vessel was enemy's bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the fact that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading." The 504 bags were condemned. "because, by intendment of law, that portion belonged to Wortham & Co., and was not shown by the proofs to be exempt from capture as prize." [P. 51.]

In *The Amy Warwick*, J. L. Phipps & Company, of New York, British subjects, purchased 4,700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers & Co., their firm at Rio, with funds of an enemy firm, and £2,000 of their own money by draft on Phipps & Co., their firm at Liverpool. They took from the master *a bill of lading which [674] stated that Phipps Brothers & Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers & Company indorsed the bill of lading over to J. L. Phipps & Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants

ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Franees*, *The Tobago*, *The Mariana*, and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, "for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored [675] to the neutral, not for his benefit, but *merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee." [2 Sprague, 158, Fed. Cas. No. 343.]

We agree with counsel for the United States that notwithstanding the indorsement of Gibernau & Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proved to be bona fide, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Something was said in argument in relation to the character of the cargo. It is true that, by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or parts of naval or military equipment. *The Benito Estenger*, 176 U. S. 568, ante, 592, 20 Sup. Ct. Rep. 489; *The Panama*, 176 U. S. 535, ante, 577, 20 Sup. Ct. Rep. 480; *The Peterhoff*, 5 Wall. 28, sub nom. *The Peterhoff v. United States*, 18 L. ed. 564; Grotius, De Jure Belli et Pacis, lib. III., chap. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in 177 U. S.

connection with all the other facts and circumstances, we do not place our decision upon them.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that *the decree below must be reversed*, and a decree of condemnation directed to be entered, and it is so ordered.

*Mr. Justice Shiras dissenting:

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This is an appeal from a decree of the district court of the United States for the southern district of Florida, awarding to Kleinwort Sons & Company, the claimants, the proceeds of the sale of the cargo of the Spanish bark Carlos F. Roses.

The vessel sailed under the Spanish flag, and was owned, officered, and manned by Spaniards. On or about March 14, 1898, Pla Gibernau & Company, a firm of commission merchants doing business at Montevideo, in the Republic of Uruguay, shipped on board the bark, then lying at Montevideo, a cargo consisting of about 275,000 kilos of jerked beef and 20,000 strings of garlic. The property was consigned upon three bills of lading to the order of the shippers; and two bills of exchange, at ninety days, were drawn upon the claimants, Kleinwort Sons & Company, British subjects, domiciled and doing business as bankers at London, England. One of these bills, for £2,714 3 8, was drawn by Pla Gibernau & Company to the order of the London & River Plate Bank, Limited, a banking concern doing business in Montevideo; the other, for £3,583 11 6, was drawn by the master of the Carlos F. Roses to the order of Pla Gibernau & Company, and was by them indorsed to the order of the London & River Plate Bank, Limited.

The bills of exchange and the bills of lading came that day, March 15, 1898, into the possession of the London & River Plate Bank, which cashed the drafts, and forwarded them for acceptance to Kleinwort Sons & Company at London, who accepted them on April 6, 1898, and paid them when due. At the time these bills of exchange were accepted the bills of lading, indorsed by Pla Gibernau & Company, came into the possession of the claimants.

The vessel sailed from Montevideo for Havana on March 16, 1898. On April 25, 1898, war between Spain and the United States was declared, and on May 17, when in the Bahama channel, on her course to Havana, the Carlos F. Roses was captured by a war vessel of the United States, and sent in charge of a prize crew to Key West.

*On June 2, 1898, the district court con-[677] demned the vessel as enemy's property, seized upon the high seas. On February 9, 1899, the district court held that, as it satisfactorily appeared from the proof that both the title and the right of possession to the cargo were in a neutral at the time of the capture, as evidenced by the indorsed bills of lading and the paid bills of exchange presented at the hearing, the claim should be allowed, and it was so ordered. Thereupon the United States took this appeal.

It is admitted that, if the cargo in question belonged to a neutral, and was not contraband of war, it was not liable to confiscation, though found in an enemy's vessel; this upon well-established principles of international law, and as within the President's proclamation of April 26, 1898, expressly declaring that "neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

It can scarcely be pretended that, in this instance, the cargo consisted of articles contraband of war. They were the ordinary products of the Republic of Uruguay, a country with which the United States were at peace, and were purchased and shipped six weeks before war was declared. Little, if anything, is left for the commerce of neutrals if such goods, shipped in such circumstances, are not within the protection of the President's proclamation.

The question is whether the district court erred in finding that the goods in question were neutral goods and exempt, as such, from condemnation.

The first contention, on behalf of the United States, is that the affidavits and exhibits relied on by the claimants to prove their title were not competent evidence, and it is urged that the evidence should have been in the form of depositions, taken under a commission, and of documents duly proved.

We think it is a sufficient reply to this objection that the proofs were received and considered by the district court upon the trial entirely without objection on the part of the United States or the captors; and that the action of the court in receiving the evidence was not among the assignments of error made and filed under the appeal.

[678] *"If, however, evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the district court; and we should not, therefore, incline to reject the further proof, even if we were of opinion that it ought not, in strictness, to have been admitted." *The Pizarro*, 2 Wheat. 241, 4 L. ed. 229, per Mr. Justice Story.

Rule 13 of this court is as follows:

"In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is next contended that the claimant's evidence, regarded as a whole, does not support the decree of the court below. It is said that the burden of proof is upon the claimants, and that this burden has not been sustained.

This was not the view of the district court, which, as we have heretofore stated, held that it appeared satisfactorily from the proof

that both the title and right of possession were in a neutral at the time of capture.

What are the matters urged against this finding of the court below?

It is argued that, because it appears in the invoices and in the manifest that the shipments were made partly on account of "the expedition or voyage of the Carlos F. Roses," partly on account of "Mr. Pedro Pagés, of Havana," and partly on account of the shippers, that is, Gibernau & Company, it is a reasonable inference that it must have been known to the master that the consignees were, as to some of the cargo, enemies, and that it must be concluded, on the face of the papers, that when the goods were delivered to the vessel they became the property of the consignees named in the invoices.

Such a view loses sight of the decisive and indisputable facts that the money used by Gibernau & Company in the purchase *of the [679] goods was procured from the London & River Plate Bank, which cashed the drafts drawn on Kleinwort Sons & Company, the claimants, and that when the latter company, on April 6, accepted the drafts they were furnished with the bills of lading covering the entire shipment; that the said bills of lading, at the time of such delivery, were duly indorsed in blank by Gibernau & Company, the shippers, and to whose order the said cargo was by the terms of the bills of lading to be delivered, all with the intent and result of entitling Kleinwort Sons & Company to the said bills of lading and to the cargo described therein as security for their acceptance of the drafts. It hence was entirely immaterial whether the ultimate consignees were, as to some of the cargo, residents of the enemy's country, and whether that fact was known to the master. Under the facts proved by the claimants the latter, through the London & River Plate Bank, had furnished the money used in the purchase of the goods, before the sailing of the vessel. This is made plainly to appear by the invoices furnished by the shippers, and wherein is stated that the master received the goods from Pla Gibernau & Company, and wherein also there is a statement of the cost of the goods and of the commissions charged by Gibernau & Company, corresponding in amount to the drafts.

The fact that the claimants' proofs do not set forth the correspondence between the claimants and the ultimate consignees is made a matter of unfavorable comment. But the transactions were substantially described in the affidavits, and it is not easy to see what further light would have been afforded by such correspondence, if, indeed, there was such correspondence.

The purchase of the goods, the drawing and cashing of the drafts, the indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel.

No counter evidence was offered by the United States, although the case was pending in the district court from June 6, 1898, to February 9, 1899, when the decree in favor of the claimants was entered. It is, of [680] course, true that the burden *of proof was on the claimants, but when the government elected to stand on the proof adduced by the claimants, every fair and reasonable intentment must be made in favor of that proof. If the case so made out is consistent with the rightfulness of the claim, it should not be defeated by mere suggestions and suppositions, not founded on evidence. "All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just government." *Prize Cases*, 2 Black, 635, *sub nom. Preeiat v. United States*, 17 L. ed. 459.

The final contention on behalf of the United States is that, even if the facts of the case were as set forth in the claimants' proofs and as found by the district court, yet, as matter of law, the claimants cannot succeed, because "the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens of private engagements of the parties; that hence prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading; . . . that claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior."

To sustain this proposition the following cases are cited: *The Mary and Susan*, 1 Wheat. 25, 4 L. ed. 27; *The Frances*, 8 Cranch, 418, 3 L. ed. 609; *The Sally Magee*, 3 Wall. 451, *sub nom. Fry v. United States*, 18 L. ed. 197; *The Hampton*, 5 Wall. 372, *sub nom. The Hampton v. United States*, 18 L. ed. 659; *The Battle*, 6 Wall. 498, *sub nom. The Battle v. United States*, 18 L. ed. 933; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, 1 Spinks Prize Cas. 331.

The Mary and Susan was a case where an American house had ordered the purchase of goods in England before the declaration of war, and where their English agents had assigned the goods to certain brokers to secure advances made by them. The goods were captured *en route* to America, and were libeled in the district court of the district of New York as prize of war. But it was held, both in the circuit court and in this court, that the property had vested in the American firm, who were the claimants, before and at the time of shipment, and was not divested by a mere request made by the shippers to the consignees to remit the purchase money to the bankers, although in the invoice it was stated that the goods were the property [681] of the bankers. *The transaction was regarded, not as a transfer of the goods, but as merely intended to transfer the right to the debt due from the consignees. No bills of exchange were drawn on the consignees in favor of the English bankers, nor were any bills of lading indorsed to them. The evidence of the transaction was found only in letters addressed to the consignees by the shippers, requesting them to pay the purchase money to the bankers; and this court held, after a careful examination of the evidence, that there was no intention to secure the bankers by any transfer of the title of the property, but only to secure them by a transfer of the debt due from the consignees.

The case of *The Frances* was an appeal from the sentence of the circuit court of Rhode Island, condemning certain British goods, captured on board the *Frances*, and which were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of lien. It was stated by Mr. Justice Washington that "it is not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned, . . . in consequence of an advance made to the shippers, in consideration of the consignment, by his agent in Glasgow; and . . . in virtue of a general balance of account due to him as their factor." And it was held that while, according to the common law, a factor has a lien upon the goods of his principal in his possession, for the balance of account due him, and likewise a consignee for advances made by him to the consignor; yet that this doctrine is unknown in prize courts, unless in very peculiar circumstances. And the court referred to the case of *The Tobago*, 5 C. Rob. 218, where it was held that a lien on a vessel created by a bottomry bond was not protected from capture.

It will be seen that in this case of *The Frances*, as in the case of *The Mary and Susan*, there was no question of the effect of a transfer of title by bills of lading, but a mere assertion of a lien by virtue of common-law principles.

The Sally Magee is the next case cited. This was the case of an enemy's vessel bound for an enemy's port. A portion of the cargo was claimed by Fry, Price, & Company for Coleman & *Company, a Rio firm, because, as [682] was alleged, Coleman & Company, as factors and commission merchants, had been directed to purchase and ship for the account of Davenport & Company, of Richmond, Virginia, a cargo of coffee, if procurable at not over 10½ cents per pound; that Coleman & Company did make the shipment of the cargo claimed to the consignment of Davenport & Company, but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause Davenport & Company had refused to receive it as purchased for their account, or otherwise than on account of the shippers, Coleman & Company, and as agents of necessity for them; and that Davenport & Company had authorized to receive it in their place and behalf. Another claim related to the residue of the cargo, also coffee, consigned to Dunlap & Company, of Richmond. It was not denied that this portion of the cargo was enemy's property, but the claim-

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ants alleged a lien because of a balance due claimants by Dunlap & Company.

In respect to the first claim, it was held that if Coleman & Company, as factors, bought the coffee at a price exceeding the limit prescribed by Davenport & Company, and the latter, on learning the fact, repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made; but that there was an entire failure, on the part of the claimants, to prove the facts as alleged, although more than two years had elapsed between the filing of the claim and the time when the decree was rendered. Accordingly, the decree of condemnation as to that portion of the cargo was affirmed.

The language of the court in disposing of the second claim was as follows:

[683] "The other claim relates to the coffee consigned to Dunlap & Co. of Richmond, and it is not denied that this was enemy's property. The claimants allege a lien. The claim states that Dunlap & Co. owed them a balance of upward of \$35,326, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the *balance for the account of the debtor firm. The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply upon the subject. It is to be inferred, also, that the letters were written after the shipment of the cargo, and, indeed, after the capture. In either case, the arrangement was made too late to have any effect.

"The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and everything done thereafter, designed to encumber the property or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought."

It will be observed that there was no effort in this case to claim property vested or transferred by bills of lading. Indeed, it appeared that the bills of lading were made out in favor of the consignees at Richmond, and it was said by the court that the legal effect of a bill of lading was to vest the ownership in the consignees, citing *Lawrence v. Minturn*, 17 How. 100, 15 L. ed. 58, in which it was said that "the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded."

Next comes the cited case of *The Hampton*, libeled and condemned as prize of war in the supreme court for the District of Columbia.

It was held that mortgages on vessels captured *jure belli* are to be treated only as *liens*, subject to be overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captor.

Then comes the case of *The Battle*, where there were claimants against the proceeds of sale of an enemy's vessel for supplies furnished and for materials furnished and for work and labor. The claims were dismissed by the district court of the United States, and on appeal that decree was affirmed by this court, *which, through Justice Nelson, [684] said: "The principle is too well settled, that capture as prize of war *jure belli*, overrides all previous liens, to require examination," citing the cases of *The Hampton* and *The Frances*.

These are all the American cases cited, and it is to be observed that, in none of them, was the court called upon to decide the question whether bills of lading made or indorsed to neutrals, before the declaration of war, on account of money furnished to purchase cargoes, are protected as neutral goods from capture, within the general international rule, and the President's proclamation, protecting such goods, when not contraband, from condemnation as prize of war. The doctrine of these cases simply amounts to the proposition that bottomry bonds, mortgages, and private agreements that factor's balances and advances should be preferred claims, are mere *liens*, which create no property rights in vessels or cargoes, superior to the captor's rights.

Let us now examine the English cases cited.

The first is that of *The Tobago*, 5 C. Rob. 218. This was the case of a bottomry bond, and it was held that such a bond confers no property in the vessel; that the property continues in the former proprietor, who has given a right of action against it, but nothing more. In the case of *The Marianna*, 6 C. Rob. 24, there was a claim against a Spanish vessel for unpaid purchase money on the vessel which had been sold by an American owner to a Spanish merchant, but which was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. Sir William Scott said:

"A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property for the payment of the purchase money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a court of prize."

In respect to the goods which were said to have been pledged to secure the payment of the purchase money of the ship, Sir William Scott said:

"Then as to the title of property in the goods, which are said to have been going as the funds out of which the payment for *the [685] ship was to have been made. That they were going for the payment of a debt will not alter the property. There must be something more. Even if bills of lading are

delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

It will be noticed that the shipper of the goods in this case was the Spanish merchant, an enemy.

Finally, the case of *The Ida* is relied on. 1 Spinks Prize Cas. 331. The statement of the case was as follows:

"The claim of neutral merchants for 2,650 bags of coffee, consigned to them on the credit of advances made by them, was disallowed. The claim is that of *lien*, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the court by simulated papers."

In considering the evidence in the case, Dr. Lushington said:

"Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this court that where there are contradictory papers the burden of proof lies on the claimant to show that the contradiction is not inconsistent with the rights of a belligerent power; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not."

In discussing the law of the case, Dr. Lushington said:

"It has been contended by counsel that the property is in Behrens & Company by virtue of the indorsement of the bills of lading; and cases from common law have been cited in support of this. I believe that, under some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this court that the claimant must show that he has not only a legal, but an equitable, title. If a mere legal title would justify the court in restoring property the consequences would be most alarming; *for nothing would be more easy than to cover enemies' property from one end of the Kingdom to the other. I strongly object to the doctrine that if a legal title be shown this court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this court."

Upon the whole, the learned judge was of the opinion that the property belonged to an enemy, subject to claimant's charges, and that it was not possible to doubt for a single moment that there was an intention in the case, by means of colorable bills of lading, to deceive and defraud Great Britain of its belligerent rights, by attempting to cover enemy's property as neutral.

The case of *The Ida* can therefore be cited as conceding that, if the claimants had vested in them the legal title to the goods by virtue of the indorsement of the bills of lading, and

had also an equitable title, they would be entitled to a judgment of restoration. But the court was of opinion that there was no evidence whatever of any portion of the cargo belonging to a neutral. While it was true that the claimants exhibited a bill of lading indorsed to them, yet another bill of lading not indorsed was found on capture in possession of the master. Such a state of facts justly created a belief that the transaction was essentially fraudulent, as an attempt to cover enemy's property.

We shall now consider some of the cases cited on behalf of the claimants.

The Amy Warwick, 2 Sprague, 150, Fed. Cas. No. 343, 2 Black, 635, 17 L. ed. 459, is, in several respects, a leading case, and is decisive of the present one. It was there held that, where a neutral commission merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, having a legal title and a beneficial interest, a prize court should award him the amount of his advances, although the residue of the property will be condemned as enemy's.

After a full statement of the facts, the conclusion was thus stated by Judge Sprague:

"The claim of J. L. Phipps & Co. was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure, & Co. *and partly [687] by £2,000 of their own money; that the legal title has always remained in them, 'and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure, & Co.'

"These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority.

"The counsel for the captors contend that the claimants had only a lien on this cargo, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine and the reasons on which it is founded are stated by the supreme court in *The Frances*, 8 Cranch, 418, 3 L. ed. 609. It is there said that 'cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud.' Similar reasons are given by Lord Stowell in *The Marianna*, 6 C. Rob. 25, 26, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be de-

livered to J. L. Phipps & Co. that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an encumbrance on the property of another. Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid. . . . The case of *The St. Jozse Indiano*, 1 Wheat. 208, 4 L. ed. 73, has been cited by the counsel for the claimants, and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2,000 which the claimants invested or advanced *in the purchase; but I do not think that it authorizes me to go further."

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This case was taken to the circuit court and there affirmed. No appeal was taken to the supreme court from that part of the decree which allowed the claim of Phipps & Company. The decree of condemnation of the residue was affirmed. 2 Black, 635, 17 L. ed. 459.

The bark Winifred was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4,200 bags of coffee, had been purchased by Phipps & Company in Rio, as agents for Crenshaw & Company, Richmond merchants. Phipps & Company advanced their own funds to the extent of three eighths of the cargo. The consignment formally was to shipper's order, but the bills of lading were sent forward indorsed to Crenshaw & Company. Subsequently, Phipps & Company made further advances of \$20,622 on April 26, while the goods were in transit, and, after the outbreak of hostilities, taking a reassignment of the bills of lading. The district court ordered a restoration of three eighths of the cargo to Phipps & Company, but refused to allow their claim for the further advances on the other five eighths of the cargo, citing *The Marianna*, 6 C. Rob. 24, and *The Frances*, 8 Cranch, 418, 3 L. ed. 609. But on appeal the circuit court, while affirming the decree allowing the claim against the three eighths of the cargo, reversed that part of the decree which refused the claim for the further advances, allowed further proofs, and on December —, 1863, allowed the entire claim of Phipps & Company, with interest. *The Winifred*, Blatchf. Prize Cas. page 35, and note, Fed. Cas. No. 17,873.

The Lynchburg was captured with her cargo in May, 1861, at the mouth of Chesapeake bay. Two thousand and forty-five bags of coffee, part of her cargo, had been purchased by Maxwell, Wright, & Company as agents for Wortham & Company, of Richmond. Maxwell, Wright, & Company took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley, & Company, of London, for £6,090, who accepted the drafts and subsequently paid them. The entire cargo was destined ultimately for enemies. Wortham

& *Company, of Richmond, claimed 504 bags of this shipment, subject to the lien of Brown, Shipley, & Company. The district court restored to Brown, Shipley, & Company 1,541 bags, but condemned the 504 bags claimed by Wortham & Company as enemy's property. Judge Betts said:

"The claim to an absolute ownership of the 2,045 bags was placed before the court in the oral argument and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimant is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418, 3 L. ed. 609; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24."

On appeal the circuit court affirmed as to the allowance of the claim of Brown, Shipley, & Company for the 1,541 bags, but reversed the refusal of their further claim for 504 bags, allowed the claimants to give further proofs, and ultimately the 504 bags were restored by consent to the claimants. *The Lynchburg*, Blatchf. Prize Cas. 51, and note on p. 52.

The exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise, and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading, in respect to which, and replying to the question whether at law the property of goods at sea passes by the indorsement of a bill of lading, Buller, J., said, in his opinion in *Lickbarrow v. Mason*: "Every authority which can be adduced, from the earliest period of time down to the present hour, agrees that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee." *Smith, Lead. Cas. vol. 1, pt. 11, 7th Am. ed. *869, under the head of *Lickbarrow v. Mason*.

The conclusion warranted by the cases is that, as well advances made for the purchase of goods, as an absolute purchase, are protected by bills of lading, whether made out directly to the party purchasing or making the advancements, or indorsed to him by the shipper.

While possession of the bills of lading imports a legal title to the goods, yet in prize cases it is permitted for the courts to go behind the bills of lading, if there is evidence tending to show that the party in whose name they are issued, or to whom they have been indorsed, has no equitable interest or is a mere cover to an enemy. In the present case there was no transfer of the property

from an enemy to a neutral. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Company. They transferred it to the London & River Plate Bank, Limited, who in turn transferred it to Kleinwort Sons & Company, who produced the bills of lading at the hearing and moved the payment by them, before the capture of the vessel, of the drafts whose negotiation furnished the moneys used in the purchase of the goods. The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Company, under indorsements which gave to them only the right to demand delivery from the vessel.

The case falls plainly within the law as administered in *The Amy Warwick*, *The Winifred*, and *The Lynchburg*.

If the rule asked for by the captors in this case should be upheld, namely, that bills of lading indorsed to neutrals, acting in good faith, who have advanced money to purchase goods shipped long before the declaration of war, do not create a right of property in the goods, there would be very little room left for the operation of the President's proclamation exempting neutral goods from condem-

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nation. Such a rule would be very unfortunate as respects the commerce of the United States in case of hostilities between European countries. Owing to the limited amount of merchant shipping owned in the United States, the greater part of their products, whether breadstuffs or manufactured goods, has to be carried in foreign vessels, and *it is quite evident that bankers and capitalists could not afford to advance the moneys needed to make purchases, if they could not be protected against seizure by foreign belligerents, by the indorsement to them of bills of lading. Only those who actually own the goods could safely ship them on vessels owned by belligerents, and, what constitutes the larger part of international trade, the purchase and shipment of merchandise by factors with moneys advanced by banking houses would, in case of war, have to cease.

The decree of the district court should be affirmed.

Mr. Justice **Brewer** concurs in this dissent.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[693]***EDWARD CLIFFORD, Appellant, v. CARL H. REUMPLER, Sheriff, etc.** [No. 561.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

No counsel for appellant. *Mr. James S. Erwin* for appellee.

April 16, 1900. Order affirmed with costs, on the authority of *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Clifford v. Heller*, 172 U. S. 641, 43 L. ed. 1181, 19 Sup. Ct. Rep. 874; *Clifford v. Ruempler* (mem.) 175 U. S. 723, ante, 337, 20 Sup. Ct. Rep. 1024; and *Brown v. New Jersey*, 175 U. S. 172, ante, 119, 20 Sup. Ct. Rep. 77.

FRED BELL, Plaintiff, v. STATE OF MISSISSIPPI. [No. —, Original.]

Motion for Leave to File Declaration.

April 16, 1900. Denied on the authority of *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842.

STREATOR CATHEDRAL GLASS COMPANY et al., Petitioners, v. WIRE GLASS COMPANY et al. [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Horace K. Tenney for petitioners. *Messrs. Lysander Hill and Charles Howson* for respondents.

March 26, 1900. Denied.

AMERICAN SUGAR REFINING COMPANY, Petitioner, v. UNITED STATES. [No. 559.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

March 26, 1900. Granted.

WATERBURY MANUFACTURING COMPANY, Petitioner, v. HARRIOTT H. WALES. [No. 560.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. John K. Beach and Edmund Wetmore for petitioner. *Mr. Roger Foster* for respondent.

April 9, 1900. Denied.

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***OLIVER S. KELLY et al., Petitioners, v. SPRINGFIELD RAILWAY COMPANY et al.** [694] [No. 552.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Julian C. Dowell and F. P. Fish for petitioners. *Messrs. T. B. Kerr and Drury W. Cooper* for respondents.

April 9, 1900. Denied.

GEISER MANUFACTURING COMPANY, Petitioner, v. FRICK COMPANY. [No. 567.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. John G. Johnson for petitioner. *Messrs. F. P. Fish and Francis Rawle* for respondent.

April 9, 1900. Denied.

JAMES W. OAKFORD, Petitioner, v. FRANCES A. HACKLEY. [No. 568.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. John G. Johnson and Maxwell Evarts for petitioner. *Messrs. H. W. Palmer and R. C. Dale* for respondent.

April 9, 1900. Denied.

TENNESSEE COAL, IRON, & RAILROAD COMPANY, Petitioner, v. FRANK H. PIERCE. [No. 569.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Walker Percy and W. I. Grubb for petitioner. *Mr. W. A. Gunter* for respondent.

April 9, 1900. Denied.

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, Petitioner, v. CHARLES N. MIDDLETON, Administrator. [No. 573.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Edward K. Jones for petitioner. *Messrs. George Whitfield Betts, Jr., and J. Parker Kirlin* for respondent.

April 9, 1900. Denied.

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY, *Petitioner*, v. E. T. CLEMENTS. [No. 576.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. John W. Fewell for petitioner. *Mr. Hoke Smith* for respondent.

April 16, 1900. Denied.

THAMES TOWBOAT COMPANY, *Petitioner*, v. HENRY A. HAINES, Master, etc. [No. 582.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. James Emerson Carpenter and Floyd Hughes for petitioner. *Messrs. T. S. Garnett and R. M. Hughes* for respondent.

April 16, 1900. Denied.

FRANK L. NEALL, *Trustee, Petitioner*, v. THAMES TOWBOAT COMPANY, Claimant. [No. 589.]

[695] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Henry Galbraith Ward for petitioner. *Mr. Samuel Park* for respondent.

April 16, 1900. Denied.

HENRY CLEWS *et al.*, *Petitioners*, v. MALCOLM M. JAMIESON *et al.* [No. 595.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

April 16, 1900. Granted.

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ALBERT H. WAITE, *Petitioner*, v. SANTA CRUZ. [No. 598.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

April 23, 1900. Granted.

LOUIS LOEB, *Petitioner*, v. TRUSTEES OF COLUMBIA TOWNSHIP, OHIO. [No. 602.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. J. W. Warrington for petitioner. *Mr. S. M. Johnson* for respondent.

April 23, 1900. Denied.

LAKE STREET ELEVATED RAILROAD COMPANY, *Petitioner*, v. WILLIAM ZIEGLER *et al.* [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Henry S. Robbins for petitioner. *Mr. John J. Herrick* for respondents.

April 23, 1900. Denied.

SPRING VALLEY COAL COMPANY, *Petitioner*, v. ALEXANDER PATTING. [No. 606.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Henry S. Robbins for petitioner. No opposition.

April 23, 1900. Denied.

CHARLES P. COLES, *Petitioner*, v. COLLECTOR OF CUSTOMS OF THE PORT OF SAN FRANCISCO. [No. 607.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Sidney V. Smith and Calderon Carlisle for petitioner. *Solicitor General Richards* for respondent.

April 23, 1900. Denied.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1899.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT
OCTOBER TERM, 1899.

[1] *JOHN ROEHM, *Petitioner*,
v.

PAUL R. G. HORST, E. Clemens Horst, and
Louis A. Horst, Late Trading under the
Firm of Horst Bros., to the Use of E.
Clemens Horst and Louis A. Horst.

(See S. C. Reporter's ed. 1-21.)

*Contracts—breach by renunciation before
performance is due—right of immediate
action.*

- I. An unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach which will entitle the injured party to bring his action at once.
2. The damages for breach of a contract by renunciation thereof before performance is due are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

[No. 188.]

*Argued March 15, 16, 1900. Decided May
14, 1900.*

ON WRIT OF CERTIORARI to the United
States Court of Appeals for the Third Cir-
cuit to review a decision affirming a judg-
ment for plaintiffs in an action on contract.
Affirmed.

NOTE.—As to right to rescind or abandon
contract because of other party's default—see
Lake Shore & M. S. R. Co. v. Richards (Ill.)
30 L. R. A. 33, and note.

As to rescission or breach of executory con-
tract; accrual of right to sue—see Marks v.
Van Eeghen, 30 C. C. A. 210, and note.

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See same case below, 62 U. S. App. 520, 91
Fed. Rep. 345, 33 C. C. A. 550.

Statement by Mr. Chief Justice **Fuller**:

This was an action for breach of four cer-
tain contracts, brought *by Paul R. G. Horst [2]
and others against John Roehm in the cir-
cuit court of the United States for the east-
ern district of Pennsylvania, in January,
1897, and was tried under a stipulation,
waiving a jury, before Dallas, circuit judge,
who made a special finding of facts, and, on
the facts so found, gave judgment for plain-
tiffs. 84 Fed. Rep. 565. The case was ear-
ried by defendant to the circuit court of ap-
peals for the third circuit, and the judgment
of the circuit court was affirmed. 62 U. S.
App. 520, 91 Fed. Rep. 345, 33 C. C. A. 550.
Thereupon Roehm applied to this court for
a writ of certiorari, which was granted, and
the cause subsequently heard here.

The circuit court found that—

"On August 25th, 1893, the firm of Horst
Brothers, composed of Paul R. G. Horst, E.
Clemens Horst, and Louis A. Horst, the legal
plaintiffs, entered into four written con-
tracts with John Roehm, the defendant, of
which the following are copies:

"Hop Contract.

"Memorandum of agreement made and en-
tered into by and between Horst Brothers,
doing business in the city of New York, par-
ties of the first part, and John Roehm, party
of the second part.

"Witnesseth: That the said parties of the
first part agree to sell and deliver to the par-
ty of the second part, and that the party
of the second part agrees to purchase, pay
for, and receive from the party of the first
part, one hundred (100) bales, prime Pacific
coast hops of the crop of 1896. Three and
one half pounds tare to be deducted on each
bale. Said hops to be delivered ex dock or

store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

"Time of shipment, 20 bales each month, October, November, December, January, and February, except as hereafter provided.

"If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality [3] and condition shall be submitted, *and, in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within thirty days after receipt of written notice of such decision, submit samples or tender delivery to the party of the second part, other hops, in fulfilment of this agreement, and party of the second part agrees to receive same.

"In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893. Horst Bros.

John Roehm."

[Here followed a second, third, and fourth contract, of same tenor and under same date, the second for 100 bales of the crop of 1896, to be shipped 20 bales each month, in the months of March, April, May, June, and July; the third for 100 bales of the crop of 1897, to be shipped 20 bales each month, in the months of October, November, December, January, and February; and the fourth for 100 bales of the crop of 1897, to be shipped 20 bales each month, in the months of March, April, May, June, and July.]

"The months named in each of these contracts respectively, as 'time of shipment,' must, under the custom of the trade, be understood as meaning the months so named, which would follow next after the summer months of the year of the crop referred to in the particular contract.

"On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst, in the said contracts.

"Upon June 23d, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"June 23, 1896.

"Dear Sir: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

"Respectfully yours, Horst Brothers."

[4] "To this, under date of June 27th, 1896, the defendant replied, saying: . . . 'I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, . . . which, of course, you cannot fulfil. I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts.' In answer to this,

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Horst Brothers in liquidation addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Brothers; and in which it was further stated that, 'so far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims. It does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you.' This communication was not replied to.

"In October, 1896, the first shipment of 20 bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who, on October 24th, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27, 1896, declined to receive the hops.

"At the time of the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of 9 cents per pound for 'prime Pacific coast hops of the crop of 1896,' and of 11 cents per pound for like hops of the crop of 1897; and the differences between the prices fixed by the contracts sued on and those above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows:"

[Here followed the computation resulting in the amount for which judgment was rendered.]

The opinion of the circuit court of appeals stated the case thus:

*"In August, 1893, Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of 1,000 bales of prime Pacific coast hops, to be delivered at various dates in the future, at a uniform price of 22 cents per pound. Of the whole quantity 600 bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered 400 bales. These were deliverable at the rate of 20 bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation, and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date and are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners,

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who continued the business under the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract canceled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm, as follows:

"Dear Sir: Will you please write us whether you wish us to ship the hops under your contract direct to your city? The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"Very truly, Horst Brothers."

[6] "To this letter Roehm replied, under date of September 14, 1896:

"Dear Sirs: In response to your letters dated 3d and 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"Very truly, John Roehm."

"On October 9, 1896, Horst Brothers advised Roehm of the shipment of 20 bales of hops for the October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"Gentlemen: Yours of October 9, inclosing bill of lading and bill of particulars per 20 bales of hops forwarded me under the terms of contract of August 25, 1893, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"Very truly yours, John Roehm."

"No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this action was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs."

The contention that Roehm was entitled to treat the contract as determined by the retirement of one of the members of the firm of Horst Brothers, and the assignment of his interest to his copartners, was not renewed in this court.

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Mr. Samuel Dickson argued the cause and, with Messrs. R. O. Moon and Richard C. Dale, filed a brief for petitioner:

The rule allowing recovery for breaches of contract to accept and pay for goods, before the time fixed by the contract for their delivery, though in accordance with the decisions of English courts and of the courts of many of the states, has never been sanctioned and adopted by this court.

Dingley v. Oler, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850; *Marks v. Van Eeghen*, 57 U. S. App. 149, 85 Fed. Rep. 853, 30 C. C. A. 208; *Pierce v. Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; *Clark v. National Benefit & Casualty Co.* 67 Fed. Rep. 222.

And this rule has been repudiated by the courts of Massachusetts and North Dakota.

Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938.

The proper measure of damages was the difference between the contract and the market price upon the day appointed for performance.

Brown v. Muller, L. R. 7 Exch. 319; *Roper v. Johnson*, L. R. 8 C. P. 167.

Mr. Frank P. Prichard argued the cause and, with Mr. John A. Garver, filed a brief for respondents:

The decision in *Hochster v. De la Tour*, 2 El. & Bl. 678, is not inconsistent with the principles or precedents of the common law and is inherently reasonable.

Pollock, Principles of Contract, 6th ed. 410; 5 Viner's Abridg. 224; Co. Litt. § 358; *Sir Anthony Main's Case*, 5 Coke, 21a; *Griffith v. Goodhand*, T. Raym. 464; *Bowdell v. Parsons*, 10 East, 359; *Amory v. Broderrick*, 1 Dowl. & R. 361; *Ford v. Tiley*, 6 Barn. & C. 325; *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, 8 Q. B. 371; *Newcomb v. Brackett*, 16 Mass. 161; *Cort v. Ambergate, N. & B. & E. Junction R. Co.* 17 Q. B. 127; *Elderton v. Emmons*, 6 C. B. 160, Affirmed on appeal, 4 H. L. Cas. 624.

This doctrine has become the settled law of England as applied to executory contracts for the manufacture or sale of goods, and has been almost universally accepted by the courts of the United States.

Roper v. Johnson, L. R. 8 C. P. 167; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434; *Wharton, Contr.* § 885a (1882); *Bishop, Contr.* § 1428 (1887); *Lawson, Contr.* § 440 (1893); *Clark, Contr.* p. 645 (1894); *Anson, Contr.* 8th ed. (1895) with American notes, p. 290; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Zuck v. McClure*, 98 Pa. 541; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Hosmer v. Wilson*, 7 Mich. 291, 74 Am. Dec. 716; *Crabtree v. Mcssersmith*, 19 Iowa, 179; *McCormick v. Basal*, 46 Iowa, 235; *Fox v. Kitton*, 19 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Davis v. Grand Rapids School-Furniture Co.* 41

W. Va. 717, 24 S. E. 630; *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *Hancock v. New York L. Ins. Co.* 13 Am. L. Reg. N. S. 103, Fed. Cas. No. 6,011; *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708; *Dingley v. Oler*, 11 Fed. Rep. 372; *Foss-Schneider Brewing Co. v. Bullock*, 16 U. S. App. 311, 59 Fed. Rep. 83, 8 C. C. A. 14; *Edward Hines Lumber Co. v. Alley*, 43 U. S. App. 169, 73 Fed. Rep. 603, 19 C. C. A. 599; *Marks v. Van Eeghen*, 57 U. S. App. 149, 85 Fed. Rep. 853, 30 C. C. A. 208; *Mountjoy v. Metzger*, 12 Am. L. Reg. N. S. 442.

Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, is contrary to the spirit both of the earlier and the later Massachusetts decisions, if it is not directly opposed to them.

Newcomb v. Brackett, 16 Mass. 161; *Heard v. Bowers*, 23 Pick. 455; *Parker v. Russell*, 133 Mass. 74; *Whitten v. New England Live Stock Ins. Co.* 165 Mass. 343, 43 N. E. 121.

The Supreme Court of the United States, while it has never passed upon the question, has repeatedly adopted and applied the principle upon which the ruling of *Hochster v. De la Tour*, 2 El. & Bl. 678, is founded.

Smoot's Case, 15 Wall. 36, *sub nom.* *United States v. Smoot*, 21 L. ed. 107; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875; *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; *Pierce v. Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335.

[7] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for 100 bales each, covering the furnishings of 1,000 bales of hops during a period of five years, of which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1,000 bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out *in extenso*, and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the con-

tract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all *liability for hops of the [8] crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In *Hochster v. De la Tour*, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June 1st, on certain terms. On the 11th of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May 22d, plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and *abso- [9] lute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed: "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined

to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court (Campbell, Ch. J., Coleridge, Erle, and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said:

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is [10] *prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this 178 U. S.

option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In *Frost v. Knight*, L. R. 7 Exch. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the exchequer chamber, overruling the decision of the court of exchequer (L. R. 5 Exch. 322), that for this breach an action was well brought during the father's lifetime. Cockburn, Ch. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention *not to perform it, as established [11] by the cases of *Hochster v. De la Tour*, 2 El. & Bl. 678, and the *Danube & B. S. Railway & K. Harbour Co. v. Xenos*, 13 C. B. N. S. 825, on the one hand, and *Avery v. Bowden*, 5 El. & Bl. 714; *Reid v. Hoskins*, 6 El. & Bl. 953, and *Barrick v. Buba*, 2 C. B. N. S. 563, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The case of *Danube & B. S. Railway & K. Harbour Co. v. Xenos*, 11 C. B. N. S. 152, is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of B on board his ship to be carried to a foreign port,—the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the orig-

inal contract. B, by his attorneys, gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion [12] to *the original contract. B had, however, in the meantime entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract; and A brought a cross action against B for refusing to ship. Upon a special case stating these facts: Held, that it was competent to A to treat B's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

Erle, Ch. J., said (p. 175): "In *Cort v. Ambergate, N. & B. & E. Junction R. Co.* 17 Q. B. 127, it was held that, upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them and sue the company for the breach of contract without tendering the goods for their acceptance. So, in *Hochster v. De la Tour*, 2 El. & Bl. 678, it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in *Avery v. Bowden*, 5 El. & Bl. 714, 6 El. & Bl. 953, where the agent of the charterer intimated to the captain that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action."

The case was heard on error in the exchequer chamber before Cockburn, Ch. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.; and the judgment of the common pleas was unanimously affirmed. 13 C. B. N. S. 825.

[13] In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, Lord Esher, Master *of the Rolls, puts the principle thus: "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the con-

tract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472): "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

*In *Smoot's Case*, 15 Wall. 36, 48, *sub nom.* [14] *United States v. Smoot*, 21 L. ed. 107, 110, Mr. Justice Miller observed: "In the case of *Phillpotts v. Evans*, 5 Mees. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: 'I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept.' And though some of the judges in the subsequent case of *Hochster v. De la Tour*, 2 El. & Bl. 678, disap-

prove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff."

In *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: "Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform [15] *it, the other party may regard it as terminated and demand whatever damage he has sustained thereby."

In *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850, it was held that the case did not come within the rule laid down in *Hochster v. De la Tour*, but within *Avery v. Bowden* and *Johnstone v. Milling*, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

So in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. ed. 920, 923, 7 Sup. Ct. Rep. 882, involving a contract for the delivery of iron ore, the court said: "The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such."

In *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."
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In *Pierce v. Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335, it was held that on discharge from a contract of employment the party discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn; and Mr. Justice Gray said: "The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to *successive actions for damages from [16] time to time; or to leave the whole of his damages to be recovered by his personal representatives after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract."

In *Hancock v. New York L. Ins. Co.* Fed. Cas. No. 6,011, *Hochster v. De la Tour* was followed by Bond, J., in the circuit court for the eastern district of Virginia; and in *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708, Drummond, J., fully approved of the principles decided in that case, and remarked: "It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards, or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages."

Again, in *Dingley v. Oler*, 11 Fed. Rep. 372, Lowell, J., applied the rule in the circuit court for the district of Maine, and, after citing *Hochster v. De la Tour*, *Frost v. Knight*, and other cases, said: "These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." And see *Foss-Schneider Brewing Co. v. Bullock*, 16 U. S. App. 311, 59 Fed. Rep. 83, 8 C. C. A. 14; *Edward Hines Lumber Co. v. Alley*, 43 U. S. App. 169, 73 Fed. Rep. 603, 19 C. C. A. 599; *Marks v. Van Eeghen*, 57 U. S. App. 149, 85 Fed. Rep. 853, 30 C. C. A. 208.

The great weight of authority in the state courts is to the same effect, as will appear by reference to the cases cited in the margin.†

†*Fox v. Kitton*, 19 Ill. 518; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *John A. Roebing's Sons' Co. v. Lock-Stitch Fence Co.* 130 Ill. 660, 22 N. E. 518; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Mountjoy v. Metzger*, 9 Phila. 10; *Zuck v. McClure*, 98 Pa. 541; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173; *Crabtree v. Messersmith*, 19 Iowa, 179; *McCormick v. Basal*, 46 Iowa, 235; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Cobb v. Hall*, 33 Vt. 233; *Davis v. Grand Rapids School Furniture Co.* 41 W. Va. 717, 24 S. E. 630; and other cases cited in the text-books and encyclopædias.

On the other hand, in *Greenway v. Gaither*, [17] Taney, 227, Fed. Cas. No. 5,788, *Mr. Chief Justice Taney, sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the chief justice to seal a bill of exceptions. *Hochster v. De la Tour* was decided in June, 1853, and the decision of the circuit court had apparently been contrary to the rule laid down in that case. The chief justice refused to seal the bill, chiefly on the ground that under the circumstances the application came too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the chief justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: "It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived."

The rule is disapproved in *Daniels v. Newton*, 114 Mass. 530, and in *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938, on elaborate consideration. The opinion of Judge Wells in *Daniels v. Newton* is generally regarded as containing all that could be said in opposition to the decision of *Hochster v. De la Tour*, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In *Nichols v. Scranton Steel Co.* 137 N. Y. 487, 33 N. E. 566, Mr. Justice Peckham, then a member of the court of appeals of New York, thus expresses the distinction: "It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and *obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives

a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of *Daniels v. Newton* was rested is that until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in *Daniels v. Newton*, though it is not there in terms decided "that *an absolute refusal to perform [19] a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." *Parker v. Russell*, 133 Mass. 74.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmaturing obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must ac-

cept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

[20] As Lord Chief Justice Cockburn observed in *Frost v. Knight*, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all *such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him; while, by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the nonfulfilment of the contract.

During the argument of *Cort v. Ambergate, N. & B. & E. Junction R. Co.* 17 Q. B. 127, Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster v. De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the

continued breach of the other party down to the time of complete performance, less any abatement by *reason of circumstances of [21] which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.

*H. C. OSBORNE, William Knapp, A. Bar-[22]
ber, et al., Appts.,
v.

SAN DIEGO LAND & TOWN COMPANY
OF MAINE.

(See S. C. Reporter's ed. 22-40.)

Bill of review—water rights—power to increase.

1. A bill of review will lie for errors in a de-

NOTE.—As to bill of review; nature of; when may be brought; who may maintain; time within which to be brought; what it should contain—see note to *Bank of United States v. Ritchie*, 8 L. ed. U. S. 890.

As to when a bill of review may be brought and for what—see note to *Shelton v. Van Kleeck*, 27 L. ed. U. S. 269.

As to necessity of leave to file bill of review after decision on appeal—see *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 55, and note.

As to right to maintain bill of review as dependent upon interest—see *Thorington v. Thorington* (Ala.) 36 L. R. A. 385, and note.

As to legislative regulation of water rates—see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

cree that are apparent on the face of the record.

2. The annual rates for water as first fixed are not made irrevocable by a contract for the sale of water rights for a fixed sum, providing in addition for the payment of annual rates, to "be fixed by the party of the first part [the water company] as allowed by law."
3. The power of a water company to increase its annual water rates, in the absence of any attempt by the board of supervisors to fix such rates, is not precluded by Cal. act 1885, §§ 5, 8, giving the supervisors power to fix such rates, and providing that until so established, or after they shall have been abrogated by the board of supervisors, "the actual rates established and collected" by those who furnish water shall be deemed and accepted as the legal established rates thereof.
4. The court will not fix the amount of water rates on holding that the rates charged are unreasonable, but, under Cal. act 1885, resort must first be had to the body designated by the law to fix proper rates, which is the board of supervisors.

[No. 201.]

Argued March 19, 1900. Decided May 14, 1900.

A PPEAL from a decree of the Circuit Court of the United States for the Southern District of California dismissing a bill of review. *Affirmed.*

See same case below, 76 Fed. Rep. 319.

Statement by Mr. Justice **McKenna**:

[22] *This is a bill in equity to review and reverse a decree entered in the United States circuit court for the southern district of California in a suit in which Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, was complainant, and appellants herein were respondents, and in which the appellee was substituted before decree as complainant in lieu of said Lanning.

The bill is extremely voluminous, reciting all the pleadings and proceedings in the original suit.

The following is a condensed summary of them:

The bill, in addition to the incorporation of the company and the appointment of a receiver of its assets and affairs, alleged that it was the owner of valuable water, and water rights, reservoirs, and an entire water system for furnishing water to consumers, and that it had a franchise for impounding, sale, and disposition of the waters owned and stored by it to the respondents and other consumers, and to the city of National City and its inhabitants.

[23] The company's supply of water came from the Sweetwater river, a small stream about 5 miles from the city of National City, and its means of distributing the water, which were described, *could supply but a limited amount of territory, consisting of farming lands within and outside of said city, and in part of the residence portion of the city.

The company in procuring the water and its distributing system had expended up to January 1, 1896, the sum of \$1,022,473.54,

which was reasonably necessary for the purposes.

By the said expenditure it had procured and owned, "subject to the public use and the regulation thereof by law," water and water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons, and had constructed mains necessary to supply the defendants and their lands, and had constructed and put in the mains and pipes necessary therefor, and was at the time mentioned in the bill furnishing the defendants and each of them with water.

The defendants are the owners respectively of tracts of land under the system of the company, most of them of only a few acres each, and each became the owner of a water right to a part of the water of the company necessary to irrigate his tract of land, and became liable to pay for a yearly rental such as the company was entitled to charge and collect.

The annual expense of the system and its operation, including interest on its bonds, and excluding the natural and necessary depreciation, was \$33,034.77, and to pay this expense and income of 6 per cent on the amount invested on the 1st of January, 1896, it was necessary that the rates for water be fixed to realize \$119,791.66.

The amount realized outside of the city of National City for that year was about \$15,000, and no more than that sum could be probably realized for the year ending January 1, 1897.

The mains and pipes were perishable, and required to be replaced at least once in sixteen years, and required frequent repairs.

To acquire the water and construct the system, the company was compelled to borrow \$300,000, and to pay interest in the sum of \$21,000 annually, which must be realized from the sale of its water, and was part of its operating expenses, and the share of its revenues which should be raised in the city of National City was about one third, and the amount which could *be raised from said city [24] at the rates which prevailed under the ordinance mentioned in the bill was about \$10,715 per annum, and no more.

The value of its water franchises and system was \$1,100,000.

No other person or corporation was furnishing water to defendants, nor was there any other system by which they could be furnished, but the franchises and the rights of the company were not exclusive.

The city of National City was a municipal corporation of California, of the sixth class, and the board of trustees thereof, claiming to act under the Constitution and laws of the state, passed an ordinance fixing the rates to be charged for water sold and furnished by the company to consumers of the city.

The company commenced to furnish water in the year 1887, and was informed by its engineer that its system and supply of water would furnish to consumers sufficient to irrigate 20,000 acres, and in addition what would be necessary for domestic use inside and outside of said city. The company was unfamiliar with the operation of the plant

and system constructed and the cost of operating and maintaining them, and relying upon the estimates of the engineer, and believing that an annual rate of \$3.50 per acre would be sufficient, fixed the rate at such sum, and had charged it until January 1, 1896, but instead of being able to supply sufficient water to irrigate 20,000 acres, it had been demonstrated by actual experience that the system would not supply sufficient to irrigate to exceed 7,000 acres, together with water demanded for domestic use, and it was believed not to exceed 6,000 acres, although there were about 10,000 acres under the system susceptible of irrigation.

At the rate of \$3.50 per acre, even if all the lands of the system should be supplied with water and the rates in National City should be maintained, the company would not be able to pay operating expenses and maintain its plant, and the money invested in it would be lost, and the company would be compelled to furnish water at a loss, as it had been furnishing water at a loss, and its system had been going gradually to decay [25] consequent *upon the want of revenue and means to replace the same.

To pay cost of operating and maintaining its system and a reasonable interest it was necessary to charge \$7 for irrigation purposes, and said sum was a reasonable rate for consumers to pay, and the smallest amount for which the company could furnish water without loss.

By the laws of California the board of supervisors might upon petition of twenty-five inhabitants and taxpayers of the county fix the yearly rental for water, but no such petition had been presented or rates fixed in the case of the company.

For the reasons above stated the company gave notice to the defendant that on January 1, 1896, it would establish a rental of \$7 per acre.

The defendants and each of them refused to pay such sum, and maintain that neither the company nor its receiver had the power to increase the rental, and that the former rate must be and remain the rental until the board of supervisors establish one as provided by law.

The increase of the rental was absolutely necessary to maintain and operate the plant.

To enforce the rental the complainant caused the water to be shut off the premises of each of the defendants, and each of them threatened and would, unless restrained by the court from doing so, commence a suit in the superior court of San Diego county, California, to compel complainant to turn on and furnish water again, claiming the use for \$3.50 per acre, and for damages. The rights of the defendants and the determination of the question of the right of the company would affect all in the same way and extent, except the quantity of land owned by the several defendants was different.

The bringing of said suits would involve complainant in a multiplicity of suits, would hinder him in the operation of the property of the company and the settlement of its [25] 178 U. S.

debts and obligations, and the questions involved could better be settled in one suit.

The increase in rates would add to the revenue of the company with the amount of land now under irrigation, not less *than [26] \$14,000 per annum, and upon the whole of the land which could be irrigated not less than \$20,000 per annum.

There were allegations of the legal character of certain of the defendants, and the bill concluded with the following prayer:

"Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the state courts or elsewhere separate actions against your orator or said land and town company; that said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require."

The answer was very long and somewhat confused by repetitions. The substance of it is given in the opinion of the circuit court. 76 Fed. Rep. 319.

It is sufficient for the purpose to say that its allegations and defenses were based on the claim that the supply and system of the company were subject "to the water rights, easements in, and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein . . . and annexed to the respective parcels of lands of these defendants. And also each such water right and easement was in freehold and was a freehold servitude imposed upon said water system for the benefit of the land to which it was appurtenant, and that all claims and demands of said company for the price or compensation therefor had been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged." And such rights extended to and included the right to have the company maintain that system efficiently to conduct the water to the premises of each of the defendants for irrigation, and other *uses, at "the annual rates to be [27] deemed and accepted as the legally established rates therefor under the facts hereinafter set forth."

These facts were, besides those stated in the opinion, that each defendant and all of them paid the full amount demanded by the company as the price of the perpetual easement of water supply from the system granted and annexed to their lands, and that they were forever discharged from the payment of any further sum to apply on the principal of

or as income upon the cost or value of the system or debt incurred for its construction or the value of their respective water rights. And that in these respects the company had put all lands on an equal footing, and they had remained on the same footing for more than five years, and in many cases had changed hands; that the value of the water rights had for more than five years entered into the market value of the lands and the price paid to their vendors by the defendants, who were their successors in title, and they were induced to purchase, improve, and settle upon their respective parcels on account of the rate of \$3.50 per acre per annum, and it entered into and became a material element of their value.

That by the Constitution of the state of 1879, it is provided in article 14, § 1, among other things, as follows, to wit:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And in pursuance of the provision the legislature passed an act approved March 12, 1885, entitled "An Act to Regulate and Control the Sale, Rental, and Distribution of Appropriated Water in the State Other than in Any City, City and County, or Town Therein, and to Secure the Rights of Way for the Conveyance of Such Water to the Places of Use."

[28] *The act provided that the sale and distribution of appropriated water was a public use, and the right to collect compensation therefor a franchise, and, except when furnished by a city or town, should be regulated and controlled by the board of supervisors of the counties of the state in the manner prescribed, and that the board might establish different rates as the case might be, and different rates for the several different uses, such as mining, irrigating, etc., for which the water should be applied, and the rates fixed should be binding and conclusive for a year, until established anew or abrogated. And it was provided that until the boards of supervisors establish rates, the rates "actually established and collected . . . should be deemed and accepted as the legally established rates."

That the rate of \$3.50 per acre was the only actual rate for irrigation which had ever been established and collected by the company or its receiver, or assented to by consumers.

That they each had since January 1, 1896, paid the rate of \$3.50 per acre to the complainant as receiver, and were willing and offered to pay the same as long as it should be legally established. And it was averred that in so far as the act of 1885 purported to prohibit the company from the sale of servi-

tudes in freehold upon its system, or to contract respecting the same, or to receive full compensation from any consumer therefor who was willing to contract for the same, and to prescribe that such easement should be used only upon the terms and conditions that the owners render net annual receipts and profits upon the value thereof in perpetuity, or to prohibit contracts respecting the annual receipts, or to extinguish and satisfy the right of the company to such net annual receipts, the same was unconstitutional and void, and in conflict with the Fourteenth Amendment of the Constitution of the United States, and § 1, article 9, of the Constitution of the state.

That the liability of the defendants to pay rates was several, not joint, and that certain of the defendants were not residents of the state, certain others not residents of the county of San Diego, and others were school districts, and that none of them were competent to make petition to the board of supervisors, as required in the act of 1885, and said act, as far as it purported *to authorize the company to increase the rates of \$3.50 per acre, was in violation of the Fourteenth Amendment of the Constitution of the United States, and deprived each of them of his or her property without due process of law, and to each of them the equal protection of the laws. [29]

That in so far as the statute of 1885 purported to authorize the company to shut off water from the lands of defendants or to increase the rate without consent of the defendants, or to permit its collection without giving the defendants a standing in court to contest the reasonableness of the increase, was also in violation of said Fourteenth Amendment. And, also, that the complainant, by shutting off water, violated that amendment.

The bill of review then averred that there were exceptions taken to the answer on the ground that it did not set forth or discover relative and material matters of fact tending to show that the bill was not true or in confession or avoidance thereof, but instead set forth immaterial and irrelevant matter.

Each exception was specific, but altogether they went to the whole answer except its admissions and certain of its denials.

It was prayed that the defendants be compelled to amend the answer, and to put in a full and sufficient one.

The exceptions coming on to be heard, they were sustained—the defendants excepted.

By order of the court, on motion of complainant, Charles D. Lanning was discharged as receiver, and the San Diego Land & Town Company of Maine was substituted as complainant—defendants excepted.

A notice was given of a motion to be made that the bill in the suit be taken *pro confesso*, and a decree of the court be taken accordingly, on the ground that the exceptions to the answer had been sustained and no amended answer had been filed within the time allowed.

The motion came on to be heard, and, pending its hearing, the defendants gave notice

[30] of a motion to dismiss the suit on the ground that the receiver had been discharged, the property had been sold under foreclosure, and had passed into the hands of another corporation; that the San Diego Land & Town Company *of Maine was not the successor of the receiver, and had no interest or right to prosecute the action, and that the board of supervisors of San Diego county had fixed the rates of the company.

The two motions came on to be heard on the 2d of January, 1898, and the motion to dismiss was denied, and the motion that the bill be taken *pro confesso* against all the defendants was granted, and a decree ordered to be entered according to the opinion of the court. The defendants excepted.

The bill of review further averred that the court caused to be entered, greatly to the prejudice of the orators, its decree which was set out at length. It further averred that the defendants had paid the costs adjudged against them, and detailed at length their exceptions to the ruling of the court. The exceptions reasserted the materiality and sufficiency of the averments of the answer, contended that the court misapprehended them, and erroneously treated and considered the exceptions as raising for discussion the merits of the case, and by expunging the answer from the records deprived the defendants of the right to have the merits of their defenses on their face regularly determined upon the setting of the cause for hearing on bill and answer or upon issues raised and proofs made.

[31] The bill of review asserted further errors against the decree in that it denied the rights alleged in the answer of defendants, and so construed and enforced the Constitution and statutes of the state as to violate § 1, art. 14 of the Constitution of the United States, in that it maintained the company and the receiver in increasing the rate, and the condition of nonpayment the right to shut off the water from the lands of the defendants, and thereby deprived them of the equal protection of the laws and of their property without due process of law. And further, because it was an exercise of judicial power to the same end, and to the deprivation of the right of contract without due process of law. Also denied to the state a republican form of government, guaranteed by § 4, art. 4, of the Constitution of the United States, in that, as enforced and applied, the state assumed the absolute control of all water *appropriated and all works for its distribution, abolished capacity to acquire property, rights, and servitudes in such water and waterworks absolutely, or with ownership of lands for irrigation, or free from the perpetual obligation to pay net revenue of not less than 6 nor more than 18 per cent per annum upon the cost or value of the water system; and abolished the right or capacity to ascertain, fix, or define, by contract or convention, the rate of compensation to be paid by any consumer for the supply of water for irrigation of land.

Error was also asserted in the decree in that it was in favor of the San Diego Land & Town Company, of Maine, although it had not become a party to the cause, by supplemental bill or otherwise, and because what interest it had did not appear, nor was its claim to any interest set forth, so that the defendant could answer or plead thereto. Also, error in that the court had no jurisdiction to entertain the cause or make any decree on the merits, and error in not dismissing the suit after the discharge of Lanning, the receiver and complainant.

The bill concluded with the following prayer:

"Wherefore, as said errors appear on the face of the record, and are greatly prejudicial to complainants and their rights in the premises, complainants pray that said decree may be reviewed, reversed, and set aside, and no further proceedings taken therein; and to that end complainants pray process by subpoena against the San Diego Land & Town Company, of Maine, requiring it to appear and answer hereunto, and show cause, if it may, why said decree should not be reviewed, reversed, and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree, as aforesaid."

The defendant (appellee) moved the court to strike the bill from the files and dismiss the suit.

The motion was denied. The water company then demurred to the bill on the grounds that it appeared therefrom that there was no error in the proceeding and decision in *Lanning v. Osborne* appearing on the face of the record or otherwise; that complainants were not entitled to the relief prayed for, or any relief; that no error appeared in said suit which could be relieved *by a bill of review or a bill in the nature of a bill of review; that the remedy of complainants was by appeal. [32]

The demurrer was sustained with leave to complainants to amend the bill in ten days.

The complainants elected to stand on their bill, and decree was entered on the demurrer as follows:

"It is therefore considered and decreed by the court that the plaintiffs take nothing by their bill herein; that said bill be, and the same is hereby, dismissed, and that the defendant have and recover of and from the plaintiffs its costs in this behalf laid out and expended, taxed at \$20.50."

The case was then brought here.

Mr. Alfred Haines argued the cause and, with Messrs. C. H. Rippey, M. L. Ward, and George Fuller, filed a brief for appellants:

A bill of review for error apparent on the record was the appropriate method of presenting questions of error assigned as committed in the procedure and upon the merits in the original cause; and such questions are substantial.

Whiting v. Bank of United States, 13 Pct. 6, 10 L. ed. 33; *Putnam v. Day*, 22 Wall. 60, 22 L. ed. 764; *Buffington v. Harvey*, 95 U.

S. 99, 24 L. ed. 381; *Ensminger v. Powers*, 108 U. S. 292, 27 L. ed. 732, 2 Sup. Ct. Rep. 643; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Clark v. Killian*, 103 U. S. 766, 26 L. ed. 607.

A bill of review will lie if the decree is not warranted by the allegations of the bill.

Thomson v. Wooster, 114 U. S. 107, 29 L. ed. 106, 5 Sup. Ct. Rep. 788; *Goodhue v. Churchman*, 1 Barb. Ch. 596; *Griggs v. Gear*, 8 Ill. 2; *Prentiss v. Paisley*, 25 Fla. 92, 7 L. R. A. 640, 7 So. 56; *Stribling v. Hart*, 20 Fla. 235; *Hurt v. Stribling*, 21 Fla. 136; *Maynard v. Pereault*, 30 Mich. 160.

Until the board of supervisors fixes maximum rates, the statute itself fixes the standard of maximum rates as being the "actual rates established and collected by the corporation," and forbids the corporation to exceed such maximum.

Cal. act 1885, §§ 5, 8.

The word "establish" means "to make stable, firm, or sure; appoint; ordain; settle or fix unalterably."

Genesis, xvii:19; Century Dict.

Could anything be more absurd than a construction which makes this mandatory statute mean that the corporation shall not exceed the established rate of \$3.50 per acre per annum, unless it elects to do so?

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

The circuit court is inherently without power to repeal such legally established rate and to establish the new rate of \$7.

Ibid.

The exception to the answer for impertinence was not the proper method for raising the question of the merits of the affirmative defenses set forth in the answer.

Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Stone v. Moore*, 26 Ill. 165; *Brown v. Scottish-American Mortg. Co.* 110 Ill. 235; *Barry v. Abbot*, 100 Mass. 396; *Grether v. Wright*, 43 U. S. App. 770, 75 Fed. Rep. 742, 23 C. C. A. 498; *Travers v. Ross*, 14 N. J. Eq. 254.

The setting the case down for hearing on bill and answer is in effect a submission of the cause to the court by the complainant, on the contention that he is entitled to the decree prayed for in his bill, upon the admissions and notwithstanding the denials of the answer.

Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, *sub nom.* *Reynolds v. First Nat. Bank*, 28 L. ed. 733, 5 Sup. Ct. Rep. 213.

Moreover, an exception will not lie to a substantive defense not responsive to the plaintiff's inquiry in the bill.

Adams v. Bridgewater Iron Co. 6 Fed. Rep. 179; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* 43 Fed. Rep. 391.

Under equity rule 64 the plaintiff, for default of a full and complete answer after exception for insufficiency allowed, is entitled only to take the bill, so far as the matter of such exception is concerned, as confessed.

Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

Not even where a defendant was guilty of contempt in disobeying an order of the court, does the court have the power to strike out his answer, and order that a decree *pro confesso* be taken against him.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

Mr. Alfred Haines also filed a separate brief for appellants in reply:

The adoption and public promulgation, by the water company, of a schedule of water rates at which it invited people to acquire the perpetual easement of the flow and use of water to their lands, and the acceptance on the part of landowners by the application of the water to their land, and by the payment of that rate for years, is sufficient to show a contract for the easement at that rate, making the rate as perpetual as the easement itself, and its constant reciprocal.

Boyd v. Brinckin, 55 Cal. 427; *Southern P. R. Co. v. Terry*, 70 Cal. 484, 11 Pac. 769; *Avila v. Pereira*, 120 Cal. 589, 52 Pac. 840.

Mr. John D. Works argued the cause and, with Messrs. Lewis R. Works, Bradner W. Lee, and Charles D. Lanning, filed a brief for appellee:

The policy of the law is that a company of this kind shall receive reasonable rates.

Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The rates must be based upon the present value of the plant of the company and the value of the services to the consumers, taking into account the cost of the plant, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary in constructing the same, and the annual depreciation of the plant.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The company was not estopped to change its rates.

Litchfield v. Goodnow, 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210.

Messrs. John Garber and Frank H. Short filed a brief as *amici curiæ*.

*Mr. Justice McKenna, after making the [32] above statement, delivered the opinion of the court:

One of the grounds of demurrer to the bill was that it appeared from the complainants' own showing that their remedy was by appeal and not by bill of review. It is not pressed with much earnestness here, and is clearly untenable. *Whiting v. Bank of United States*, 13 Pet. 6, 10 L. ed. 33; *Putnam v. Day*, 22 Wall. 60, 22 L. ed. 764; *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Ensminger v. Powers*, 108 U. S. 292, 27 L. ed. 732, 2 Sup. Ct. Rep. 642; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Story*, Eq. Pl. 10th ed. §§ 403 *et seq.*

The principal contention of the appellants is that the water rights are easements in the real estate constituting the water system. In other words (as described by appellants), "incorporal interests in the corporeal property of a water system annexed to lands irrigated by that system." Being such, the corporation may sell them, the landowner may [33] contract for them—*may buy them outright and free himself wholly from annual rates, or may stipulate for a particular rate. In other words, that the water right is an interest in the system, paid for with the land, or by the stipulated rate, and not subject to any rate or to increase beyond the stipulated rate, according to the varying expenses or valuations of the system.

It is claimed to be property, and the right to sell and to buy it is asserted respectively for the owner of the system and the consumers of its waters, and that the Constitution and laws of the state of California do not prohibit this, or if they can be construed to do so violate the Fourteenth Amendment of the Constitution of the United States by depriving appellants of their property without due process of law, and violate also certain provisions of the Constitution of the state of California.

It is further contended by appellants that conceding a contract cannot be made between "water corporations" and their customers for a particular rate which will preclude regulation by the state, that until such regulation the parties—company and consumers—may contract. And, further, that the rate of \$3.50 per acre per annum was the rate charged and collected by the company, and therefore became the rate established by law by virtue of a provision in § 5 of the statute of 1885, hereafter quoted.

It is also contended that the answer in the original suit averred the rate of \$3.50 per acre per annum was a reasonable rate, and denied that the increased rate of \$7.00 per acre was reasonable, and that on the issue thus raised, the defendants there, complainants in the bill of review, were entitled to a hearing.

The charge of error in the decrees is based on their adjudging against these contentions.

Opposing the contentions of appellants, the appellee makes a distinction between the facilities for the use and the right to use the water of its system and the actual use of it. The compensation for the former, appellee concedes, may be the subject of contract; the rate for the latter, it contends, is subject to regulation *by law, but, until so regulated, may be established by the water companies. [34]

The circuit court did not accept the distinction made by appellee. It did not accept the view contended for by appellants. It held, interpreting the Constitution and laws of the state, that the appropriation and disposition of water was a public use, the right to collect tolls or compensation for it a franchise, subject to regulation and control in the manner prescribed by law, and that such tolls and compensation could not be fixed by the contract of the parties.

If the contention of the appellee is justified, that the contracts between it and the appellants gave it the right to establish the rates, the controversy is narrowed and simplified, and we are relieved from deciding the many interesting and difficult questions pressed by appellants for judgment.

There was some difference in the way the water rights of the defendants arose, but they are assimilated in the same legal right by the allegation in the original answer that the company did "not make or claim any distinction in respect of the character and quality of the water right, or of the annual rates actually established or collected for irrigation."

It is only necessary, therefore, to say in description that some of the lands were purchased before 1892, and up to that date there was no express or separate grant of "water rights." Some were purchased after 1892, and as to them there was a specific sale of the appurtenant water right. The contracts in both cases contained an agreement to sell certain described real estate, "together with a water right to one acre foot of water per annum for each and every of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point—said water to be used exclusively on said real estate, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars."

The contracts also contained the following provisions:

"And the party of the second part further agrees and binds — *self, — heirs, executors, [35]

and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers, as the party of the first part may from time to time make."

Other lands (about 900 acres) described in the answer as "lying outside of National City" were derived, not from the company, but water rights were attached to them on the same basis as to the lands sold by the company up to 1892. After that date the company refused to furnish water, except upon the payment of a sum in gross for the water right over and above the uniform annual rate established and collected, or in lieu thereof 6 per cent annual interest upon the company's estimate of the value of such right. The price was first fixed at \$50, afterwards at \$100, and the contract in addition providing for the sale of the water right contained the following provision:

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds — self, — heirs, executors, and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things

comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water, to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.”

Under the same form of contract water rights were attached to about 400 acres of land belonging to other defendants.

[36] *To lands which lay in what is designated Ex-Mission the contracts contained the following provision:

“The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch, and subject to the same general rules and regulations.”

J. M. Ballow, one of the defendants, claimed his water right under a contract which provided as follows:

“Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part.”

The rates in Chula Vista were governed by the general contract.

It is apparent that the contracts in all things substantial to the controversy are similar. They provide for the payment of a certain sum for land and water rights, or for water rights alone, and all for the payment of annual rates besides. And provide directly or by reference that the annual rates shall “be fixed by the party of the first part (the company), as allowed by law,” to be paid whether the water is used or not. Water used for domestic purposes is also to be paid for “at the rates fixed by the party of the first part and allowed by law.”

These provisions do not leave much room for construction. For irrigation purposes and for domestic purposes the rental of water is to be paid at rates “fixed” by the company. The only qualification is “as allowed by law.” What this means we shall presently consider; but whatever it means, it does not sustain appellants’ contention that the rate of \$3.50 per acre per annum was irrevocable, secured to them free from the power of variation by the company or by law. It is not important to consider, therefore, whether, under the Constitution and laws of

the state, they could contract with the company for the price *of a water right. If the contract, they plead, gives to the company the power to fix the annual rate, the only inquiry which need be, is whether the power has been exercised “as allowed by law.” What this means can be the only controversy. [37]

The appellee concedes the power of the regulations of rates by the board of supervisors, but claims that until the power is exercised the right to fix the rates rests with it, and that those fixed by it are “allowed by law.” The appellants contend that the power of the board of supervisors is only a power to fix maximum rates, and below them the right of the parties to contract is unrestrained (a view sufficiently discussed already), and that until the board shall act “the statute itself fixes the standard of maximum rates, as being the ‘actual rates established and collected by the corporation,’ and forbids the corporation to exceed such maximum.”

The contention is claimed to be based on § 5 and § 8 of the act of 1885. Section 5 vests the power to fix rates in the board of supervisors, and provides “when so fixed by such board shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors as herein after provided.” And then follows the provision upon which appellants especially rely:

“And until such rates shall be so established, . . . or after they shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rates thereof.”

Section 8 provides that those furnishing water “shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and established by such person, company, or association, or corporation, as provided in this act.”

The deduction which appellants make is that when the company *once fixes the rates they must remain so fixed, and if changed by supervisory action recur upon the cessation of that action—inevitable always through every change of condition; if excessive, to forever remain so; if deficient, to forever remain so. [38]

The argument urged to support this is that one of the ordinary meanings of the word “actual” is “existing at the time.” “And if (to quote counsel) the lexicographer be consulted to define the word ‘established’ he will give its meaning substantially, as does the Century Dictionary, to be ‘to make stable; firm or sure; appoint; ordain; settle or fix unalterably.’” To illustrate the immutability which one of its senses conveys, counsel quote with apologetic reverence an illustra-

tion, which they say is often found in standard dictionaries: "I will establish my covenant with him for an everlasting covenant." Gen. xvii: 19.

We are not impressed with the aptness of the illustration to the case at bar.

Covenants formed and promulgated by a divine wisdom and foresight can have the attribute of immutability, and their language may be used and interpreted to express it. Human regulations are for the most part occasional and temporary. Besides, one definition of a word does not express its whole meaning or necessarily determine the intention of its use. If so, interpretation would not be difficult, and the application of the language of a law or contract would be as unerring as easy.

"Actual," of course, means existent, but it does not preclude change. Nor does the word "establish" convey the idea of permanency. As used in the statute, it has no such meaning. The power of the board of supervisors is not exhausted by one exercise, nor has its result unalterable fixity. It is beyond change only for a year. The language of the statute is "at any time after the establishment of such water rates by any board of supervisors of this state the same may be established anew or abrogated in whole or in part by such board, to take effect at not less than one year next after such first establishment."

[39] It is manifest to construe the word "establish" to mean "to *fix unalterably" would throw the powers of the board of supervisors into confusion and contradiction.

To say that the rates are unalterable for a year would prove nothing. Such effect comes, not from the use of the word "establish," but from other words, and, but for them, rates established might "be established anew" as often as the board of supervisors might choose. Nor can it be said that the word means one thing when applied to the power of the board of supervisors, and another thing when applied to the power of the company. To say so is to abandon the argument. That depends upon the meaning of the word "establish" to be "to fix unalterably,"—to mean of itself, and in its use, permanence and unchangeability. If it does not mean that of itself, there is an end of the argument, for there is nothing in the act or its purpose which would give it such meaning when expressing the power of the company, and something else when expressing the power of the board of supervisors. The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low, it surely does not intend to impose on the

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companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts. There is nothing in the act to indicate such purpose, nor does it need to have such purpose. Its dominant idea is the regulation of rates by law, not commanded to be exercised by the governing bodies as a voluntary duty as establishing rates in cities and towns, but exercised when invoked by petition. Until the necessity of that, what more natural and just than to leave the right with the water companies and recognize it as legal. This is the meaning, we think, of the provisions of §§ 5 and 8, *supra*. To so interpret them makes the scheme of regulation complete—adequate, without being meddlesome or *oppressive. The power of regulation is asserted and provided for, and ready to be exercised to correct abuse, and who doubts but that its exercise would be invoked. [40]

The appellants assign many errors upon the action of the circuit court in sustaining the exceptions to the answer made in the original suit. It would extend the opinion to too great length to consider them separately. They are reduced to and depend upon the claim that they constituted a submission of the case on bill and answer, and if the latter traversed any material allegation of the bill it could not be taken *pro confesso*, and a decree entered upon it would be erroneous. (*Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291).

The application of the principle is claimed upon the ground that the answer denies that the rate of \$3.50 per acre per annum is unreasonable or that the increased rate of \$7.00 per acre is reasonable.

The circuit court held that issue was not open to its decision. It said that if the rates established by the board of supervisors were unreasonable they could only be annulled. In no case would the court fix them. "Therefore," it was further said, "it is not for the court in the present case to go into the question of reasonableness of the rates established by the complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates, to wit, the board of supervisors of San Diego county."

We concur in this view, and finding no error in *the decree it is affirmed*.

*EBEN J. KNOWLTON and Thomas A. [41] Buffum, Executors of the Last Will and Testament of Edwin F. Knowlton, Deceased, *Plffs. in Err.*,
v.

FRANK R. MOORE, United States Collector of Internal Revenue, First Collection District, State of New York.

(See S. C. Reporter's ed. 41-111.)

War revenue act—tax on legacies and inheritances—nature of tax—constitution—

NOTE.—As to taxes on succession and collat.

ality of act—direct tax—uniformity—application to District of Columbia—degrees of relationship—progressive rate—amount of estate or of legacy.

1. The taxes upon legacies and distributive shares of personal property, which are imposed by the war revenue act of June, 1898 (30 Stat. at L. 448), §§ 29, 30, are imposed upon the transmission or receipt of such inheritances and legacies, and not upon the right of the state to regulate the devolution of property upon death.
2. The heading to a section of a statute is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury.
3. The amount of each particular legacy or distributive share, and not the sum of the whole personal estate of a decedent, is the amount on which the progressive rate of tax is imposed by the war revenue act of June, 1898, §§ 29, 30, and by which the rate is measured.
4. A particular construction of a statute which will occasion great inconvenience or produce inequality and injustice is to be avoided, if another more reasonable interpretation is present in the statute.
5. The direct taxes which must be apportioned under U. S. Const. art. 1, § 10, do not include the tax on the transmission or receipt of legacies and distributive shares of personal property, imposed by the war revenue act of June, 1898, §§ 29, 30, as that tax is a duty or excise, as distinguished from a tax on property.
6. The uniformity required by U. S. Const. art. 1, § 9, providing that "duties, imposts, and excises shall be uniform throughout the United States," is not an intrinsic uniformity relating to the inherent character of the tax as respects its operations on individuals, but is merely a geographical uniformity requiring the same plan and the same method to be operative throughout the United States.
7. An application of the war revenue act of June, 1898, to the District of Columbia is secured by § 31, which incorporates therein the laws relating to the assessment of taxes, thereby including U. S. Rev. Stat. § 3140, which requires the District of Columbia to be regarded as a state in construing the internal revenue laws.
8. A difference between the testamentary and intestacy laws of the states does not prevent the geographical uniformity of the war revenue act of June, 1898, §§ 29, 30, under which the primary right of taxation upon legacies and distributive shares depends upon the degree of relationship or want of relationship to the deceased, since the rate is the same wherever the degree of relationship or the want of relationship is the same, so that the rule is uniform, although there may be different conditions among the states as to the objects upon which the tax is levied.
9. The progressive rate feature of the war revenue act of June, 1898, §§ 29, 30, by which the rates are graded in accordance with the amounts of the legacies or distributive shares, and progressively increased as those amounts increase, cannot be held unconstitutional on the ground that it is repugnant to fundamental principles of equality and justice; but

the question whether a progressive tax is more just and equal than a proportional one, is, in the absence of constitutional limitation, a legislative, and not a judicial, question.

[No. 387.]

Argued December 5, 6, 7, 1899. Decided May 14, 1900.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York to review a decision dismissing a suit to recover an amount paid to the internal revenue collector under protest. *Reversed.*

The facts are stated in the opinion.

Mr. J. G. Carlisle argued the cause and, with Messrs. Peter B. Olney, William Edmond Curtis, Henry M. Ward, Ward B. Chamberlin, George F. Chamberlin, Julien T. Davies, Frederic R. Coudert, Jr., E. S. Mansfield, and W. S. B. Hopkins, filed a brief for plaintiffs in error.

Mr. Charles H. Otis also argued the cause and, with Mr. John G. Carlisle, filed a brief for plaintiffs in error.

Mr. Wheeler H. Peckham also argued the cause and filed a brief for plaintiffs in error.

Mr. Henry M. Ward filed a separate brief for plaintiffs in error.

Messrs. Thomas B. Reed and Thomas Thacher also filed a brief for plaintiffs in error.

Solicitor General Richards argued the cause and filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice White delivered the opinion [43] of the court:

The act of Congress of June, 1898, which is usually spoken of as the war revenue act (30 Stat. at L. 448, chap. 448), imposes various stamp duties and other taxes. Sections 29 and 30 of the statute, which are therein prefaced by the heading "Legacies and Distributive Shares of Personal Property," provide for the assessment and collection of the particular taxes which are described in the sections in question. To determine the issues which arise on this record it is necessary to decide whether the taxes imposed are void because repugnant to the Constitution of the United States, and, if they be valid, to ascertain and define their true import.

The controversy was thus engendered: Edwin F. Knowlton died in October, 1898, in the borough of Brooklyn, state of New York, where he was domiciled. His will was probated, and the executors named therein were duly qualified. As a preliminary to the assessment of the taxes imposed by the provi-

eral inheritances—see *Re Howe* (N. Y.) 2 L. R. A. 825, and note; *Wallace v. Myers* (C. C. S. D. N. Y.) 4 L. R. A. 171, and note; *Com. v. Ferguson* (Pa.) 10 L. R. A. 240; *Re Romaine* (N. Y.) 12 L. R. A. 401. See also note to

Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

As to title as aid to interpretation of statute—see note to *People ex rel. Hart v. McElroy* (Mich.) 2 L. R. A. 609.

sions of the statute, the collector of internal revenue demanded of the executors that they make a return showing the amount of the personal estate of the deceased, and disclosing the legatees and distributees thereof. The executors, asserting that they were not obliged to make the return because of the unconstitutionality of §§ 29 and 30 of the statute, nevertheless complied, under protest. The report disclosed that the personal estate was appraised at \$2,624,029.63, and afforded full information as to those entitled to take the same. The amount of the tax assessed was the sum of \$42,084.67. This was reached according to the computation shown in the table which is printed in the margin.†

[44] *It is apparent, from the table, that the collector, whilst levying the tax on the legacies and distributive shares, or the right to receive the same, yet, for the purpose of fixing the rate of the tax, took into view the whole of the personal estate of the deceased. That is, whilst the tax was laid upon the legacies, the rate thereof was fixed by a separate and distinct right or thing, the entire personal estate of the deceased. The executors protested against the entire tax, and also as to the method by which it was assessed. The grounds of the protest were as follows:

[45] "1. The provisions of the act of Congress under which it is sought to impose, assess, and collect the said tax or duty are in *violation of the provisions of article 1, sections 8 and 9, of the Constitution of the United States, and are therefore void.

"2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if such provisions be not unconstitutional and void.

"3. The legacy to Eben J. Knowlton, a brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100, and not at the rate of \$2.25 per \$100, even if said act be not unconstitutional and void."

Demand having been made by the collector for the payment, accompanied with a threat to distrain in case of refusal, the tax was paid under written protest, which repeated the grounds above stated. In the receipt given it was recited that the tax had been paid under protest to avoid the use of compulsory process. A petition for refunding was subsequently presented by the executors, in which the grounds of the protest were reiterated. The commissioner of internal revenue having made an adverse ruling, the present suit was commenced to recover the amount paid. The facts as to the assessment and collection of the taxes were averred, and the refusal of the internal revenue commissioner to refund was alleged. The petition for refunding was made a part of the pleadings. The right to repayment was based upon the averment that the sections of the statute, under authority of which the amount

†Names of persons entitled to beneficial interest in said property.	Relation-ship of beneficiary to persons who died possessed.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
Mary, Countess von Francken Sierstorpff.....	Daughter				
Furniture.....					
Cash legacy.....					
Income for life on residuary estate, amounting to \$2,348,734.67. Countess Sierstorpff became 28 years of age on July 2, 1898. Present value of her life interest in said residuary estate, estimated according to United States tables, is.....					
Total.....		\$1,731,996 35	\$1,731,996 35	2 25	\$38,969 92
George W. Knowlton.....	Brother...	100 00	100 00	2 25	2 25
Charlotte A. Batchelor.....	Sister....	5,000 00	5,000 00	2 25	112 50
Eben J. Knowlton.....	Brother...	100,000 00	100,000 00	2 25	2,250 00
Unitarian Church of West Upton, Mass.....	None.....	5,000 00	5,000 00	15 00	750 00
The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same on their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is \$717,803.30.....		717,803 30			
Total.....		\$2,559,899 65	\$1,842,096 35	\$42,084 67

had been assessed and collected, were unconstitutional. The circuit court sustained a demurrer, on the ground that no cause of action was alleged. The claim was rejected, and the suit was dismissed with costs.

The questions which arise on this writ of error to review the judgment of the circuit court are fourfold: First, that the taxes should have been refunded because they were direct taxes, and not being apportioned were hence repugnant to article 1, section 8, of the Constitution of the United States; second, if the taxes were not direct, they were levied on rights created solely by state law, depending for their continued existence on the consent of the several states, a volition [46] which Congress *has no power to control, and as to which it could not, therefore, exercise its taxing authority; third, if the taxes were not direct, and were not assessed upon objects or rights which were beyond the reach of Congress, nevertheless the taxes were void, because they were not uniform throughout the United States, as required by article 1, section 9, of the Constitution of the United States; fourth, because, although the taxes be held to have been in all respects constitutional, nevertheless they were illegal, since in their assessment the rate of the tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares, or the right to take the same, which were the objects upon which by law the taxes were placed.

Although it may be, in the abstract, an analysis of these questions in logical sequence would require a consideration of the propositions in the order just stated, we shall not do so for the following reasons: The inquiry whether the taxes are direct or indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since it becomes essential primarily to know what the law assesses and taxes in order to completely learn the nature of the burden. So, also, to solve the contention as to want of uniformity, it is requisite to understand not only the objects or rights which are taxed, but the method ordained by the statute for assessing and collecting. This must be the case, since uniformity, in whatever aspect it be considered, involves knowledge as to the operation of the taxing law, an understanding of which cannot be arrived at without a clear conception of what the law commands to be done. For these reasons we shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. Having, from a review of the history of such taxes, reached a conclusion on this subject, we shall decide whether Congress has power to levy such taxes. This being settled, we shall analyze the particular act under review, for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs. These questions [47] being disposed of, we *shall determine whether the taxes which the act imposes are void,

because not apportioned, or for the want of uniformity.

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Bearing this in mind, the exact form of the tax and the method of its assessment need not be presently defined, since doing so appropriately belongs to the more specific interpretation of the statute to which we shall hereafter direct our attention. Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe, 3 Smith, *Wealth of Nations*, London ed. 1811, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and legacy taxes are considered as levied on the "occasion of a particular isolated act." This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."

In Germany and other continental countries in various forms death duties are enforced, in the main, by way of stamp duties. They are there, both in theory and in practice, treated as resulting from the occasion of death, and hence as not legally equivalent with taxes levied on property merely because of its *ownership. Cohn, *Science of Finance* [48] (Veblen's translation), §§ 282, 283, 350; Dos Passos, *Inheritance Tax Law*, § 1.

The term "Death Duties," by which inheritance and legacy taxes, in whatever form imposed, are described in England, indicates the generic nature of such taxes. In Hanson's *Death Duties*, p. 1, it is said: "Historically, probate duty is the oldest form of death duty, having been established in 1694." The probate duty thus referred to was a fixed tax dependent on the sum of the personal estate within the jurisdiction of the probate court, payable on the grant of letters of probate by means of stamp duties, and was treated as an expense of administration to be deducted out of the residue of the estate. In 1780 this tax was supplemented by what became known as a legacy tax, at first collected by means of a stamp affixed to the receipt, evidencing the

payment of a legacy or share in the personal property of a deceased person. It is unnecessary to consider the change in the mere form of this latter tax. The tax was not deducted as an expense of administration, but was charged and collected upon the passing of the individual legacies or interests upon which it was imposed. In 1853 the probate duty tax and the legacy tax, just referred to, were supplemented by a tax known as the succession duty. This law reached interests in real estate passing or acquired by the death of a person and interests in personal property not covered by the legacy act. This also was not treated as an expense of administration, but was charged upon and collected out of the particular interests subjected to the tax.

The nature of the succession duty is shown by the second section of the act defining the same, which is thus condensed by Hanson at page 40 of his treatise:

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeable with this tax is called a succession."

By the finance act of 1894, the probate duty was superseded by what was termed the estate duty. This, like the probate *duty, was a tax distinct from those imposed by the legacy and succession duty acts upon the receipt of real or personal property, or an interest therein, although in some administrative features it modified or regulated the subject of a succession duty. This tax is payable out of the general revenue of the estate. *Re Bourne*, [1893] 1 Ch. 188, cited by Hanson at p. 354.

The principle upon which the tax rests is thus stated by Hanson at p. 63:

"The new duty imposed by the finance act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the finance act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject."

This summary suffices to indicate the origin, the development, and the theory underlying death duties. A full analysis thereof will be found in Dowell's History of Taxation, vol. 3, pp. 148 *et seq.*; in Hanson's Death Duties; and in the treatise of Dos Passos, § 4, and notes, where the various acts are referred to.

In the colonies of Great Britain death duties, as a general rule, obtain. Some of the statutes are modeled upon those of the 178 U. S.

mother country, and levy taxes on legacies, etc., passing, measured by their value and on the estate proper. Others, again, have merely the estate tax without the legacy tax. The statutes are reviewed in the appendix to Hanson's treatise, beginning at page 717.

A retrospective study of the death duty laws enacted in our own country, national and state, will show that they rest upon the same fundamental conception which has caused the adoption of like statutes in other countries; and especially in their national development do they substantially conform (to the *extent to which they go) to the [50] evolution of the system in England.

As early as 1797 Congress imposed a legacy tax. 1 Stat. at L. 527, chap. 11. This act was probably the outgrowth of a recommendation contained in a report of the committee of ways and means, presented in the House on Tuesday, March 17, 1796. Annals of Congress, Fourth Congress, 1st sess. pp. 993 *et seq.* The report recommended, 1, the collection of \$2,000,000 dollars by a direct tax; 2, the imposition of "a duty of 2 per centum ad valorem . . . on all testamentary dispositions, descents, and successions to the estates of intestates, excepting those to parents, husbands, wives, or lineal descendants;" 3, the imposition of various stamp duties; and, 4, an increase of the duty on carriages. The act of 1797 continued in force until June 30, 1802. 2 Stat. at L. 148, chap. 19. In this act, as in the English legacy duty statute of 1780 and supplementary statutes, the mode of collection provided was by stamp duties laid on the receipts evidencing the payment of the legacies or distributive shares in personal property, and the amount was, like the English legacy tax, charged upon the legacies and not upon the residue of the personal estate. The text of the statute is printed in the margin.†

*In sections 111 and 112 of chapter 119, [51] act of July 1, 1862 (12 Stat. at L. 485, chap. 119), a legacy tax was again enacted. Like in character to the act of 1797, this was a tax imposed on legacies or distributive shares of personal property. But in the same chapter was contained still another form of death duty. By section 194 a probate duty, proportioned to the amount of the estate and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, was to cause the death duties imposed by Congress to greatly resemble those then existing in

†Chapter XI., July 6, 1797.

"Sec. 1. Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That from and after the thirty-first day of December next, there shall be levied, collected, and paid throughout the United States the several stamp duties following, to wit: For every skin or piece of vellum or parchment or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . . any receipt or other discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount

England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty chargeable against the mass of the estate. The only difference between the system created by the act of 1862 and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate passing by death were subjected to a duty. A detailed reference to the provisions of the act of 1862 need not be made, because we shall have occasion to do so in considering the legislation which, in 1864, in effect re-enacted, although largely increasing the rates, both the probate duty or tax on the whole estate and the legacy tax on each particular legacy or distributive share. The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English succession duty act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—leaving out of view the differences in rates and the administrative provisions—were substantially identical, and of a threefold nature, that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property. The act of 1864 was amended in several particulars by the act of July 13, 1866 (14 Stat. at L. 140, chap. 184). These amendments, however, did not materially modify the system of taxation provided in the act of 1864.

[52]

Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, this fact was conclusively demonstrated by section 127, wherein the succession or real estate inheritance tax was defined in substantially similar terms to that contained in the English succession duty act. The identity of the conception embodied in the act of 1864 with that existing in England was observed by this court in *Scholey v. Rew*, 23 Wall. 349, 23 L. ed. 102, where, in holding that the subject-matter of the assessment of a succession tax was the devolution of the estate or the right to become beneficially entitled to the same, etc., the court said (p. 349, L. ed. p. 102):

"Decided support to the proposition that such is the true theory of the act is derived from the fact that the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction."

In the statute of August 27, 1894 (28 Stat. at L. 509, chap. 349), what was in effect a legacy tax was imposed by the provisions of

whereof shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars fifty cents; and for every further sum of five hundred dollars the additional sum of one dollar. . . . *Provided*, That nothing in this act contained shall extend to charge with a duty any legacy left by any will or other testa-

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section 28. 28 Stat. at L. 553, chap. 349. The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax, since among the items going to make up the annual income which was taxed was "money and the value of all personal property acquired by gift or inheritance." This law was not enforced. Its constitutionality was assailed on the ground that the income tax, in so far as it included the income from real estate and personal property, was a direct tax within the meaning of the Constitution, and was void because it had not been apportioned. The contention was twice considered by this court. On the first hearing, in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, it was decided that, to the extent that the income taxes included the rentals from real estate, the tax was a direct tax on the real estate, and was therefore unconstitutional, because not apportioned. Upon the question of whether the unconstitutionality of the tax on income from real estate rendered it legally impossible to enforce all the other taxes provided by the statute, the court was equally divided in opinion. 157 U. S. 586, 39 L. ed. 821, 15 Sup. Ct. Rep. 691. *On [53] a rehearing (158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912), the previous opinion was adhered to, and it was moreover decided that the tax on income from personal property was likewise direct, and that the law imposing such tax was therefore void because not providing for apportionment. The court said (p. 637, L. ed. p. 1125, Sup. Ct. Rep. p. 920):

"Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and therefore unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid."

The decision, that the invalidity of the income tax, in the particulars quoted, carried with it the other and different taxes which were included in income, was not predicated upon the unconstitutionality of such other taxes, but solely upon the conclusion that by the statute there was such an inseparable union between the elements of income derived from the revenues of real estate and personal property and the other constituents of income provided in the statute that they could not be divided. The court said (p. 637, L. ed. p. 1125, Sup. Ct. Rep. p. 920):

"We do not mean to say that an act laying by apportionment a direct tax on all real es-

mentary instrument, or any share or part of a personal estate, to be divided by force of any statute of distributions which shall be left to, or divided amongst, the wife, children, or grandchildren of the person deceased intestate, or making such will or testamentary instrument, or any recognizance, bill, bond, or other obligation or contract, which shall be made to or with the United States, or any state, or for their use, respectively."

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tate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void."

An inheritance and legacy tax imposed by one of the states (Louisiana) was considered in *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168. The opinion of the court, delivered by Mr. Chief Justice Taney, upheld the right to levy such taxes. The same subject was passed on in *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073. The *question was whether property bequeathed to the United States could be lawfully included in a succession tax. It was decided that it could be. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628, L. ed. p. 288, Sup. Ct. Rep. p. 1075):

"The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

Again (p. 629, L. ed. p. 288, Sup. Ct. Rep. p. 1075):

"That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held, both in New York and in several other states."

Yet again (p. 630, L. ed. p. 289, Sup. Ct. Rep. p. 1075):

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Once more, quite recently, the subject was considered in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. The issue for decision was this: A law of the state of Illinois imposed a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired. This progression of rates was assailed in the courts of Illinois as being in violation of the Constitution of that state, requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the Constitution of the state, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws within the meaning of the 14th

Amendment to the Constitution. These complaints were held to be untenable. In the course of its opinion the court, speaking through Mr. Justice McKenna, after briefly advertg to the history of inheritance and legacy taxes *in other countries, referred to their adoption in many of the states of the Union as follows (pp. 287, 288, L. ed. pp. 1040, 1041, Sup. Ct. Rep. p. 596):

"In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887; and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25, now repealed by chapter 174, Acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884.' Other states have also enacted them—Minnesota by constitutional provision.

"The constitutionality of the taxes have been declared, and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; *Strode v. Com.* 52 Pa. 181; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Schoolfield v. Lynchburg*, 78 Va. 366; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212; *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Dos Passos Collateral Inheritance Tax*, 20; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *Gelsthorpe v. Furnell*, 20 Mont. 299, *sub nom. State ex rel. Gelsthorpe v. Furnell*, 39 L. R. A. 170, 51 Pac. 267. See also *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege; and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them,—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of *her colonies [56] where such laws have been enacted, in the legislation of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as pro-

bate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the national government with a matter which falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively [57] within state authority. *It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. Whilst these considerations are of great weight, let us for the moment put them aside to consider the reasoning upon which the proposition denying the power in Congress to impose death duties must rest.

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privileged taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used

where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the state to regulate the transmission of property by death, there did not therefore exist a less trammelled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the states, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. The authorities which maintain this doctrine have been already referred to in the citation which we have made from *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 288, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594. An illustration is found in **United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, [58] where the right of the state of New York to levy a tax on a legacy bequeathed to the government of the United States was in part rested on the privilege enjoyed by the state of New York to regulate successions. Some state courts, on the other hand, have held that, despite the power of regulation, no greater privilege of taxation exists as to inheritance and legacy taxes than as to other property. *Cope's Estate*, 191 Pa. 1, 45 L. R. A. 316, 43 Atl. 79; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948; *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337. In *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245, the power of the legislature of Missouri to levy a uniform tax upon the succession of estates was conceded, though such tax was declared not to be a tax upon property in the ordinary sense. The court nevertheless held that the particular tax in question, which was progressive in rate, was invalid, because it violated a provision of the state Constitution; the decision, in effect, being that because the legislature had the power to regulate successions, it was not thereby justified in levying a tax which was not sanctioned by the state Constitution.

All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate

successions is vested in the states and not in Congress.

It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases*, 5 Wall. 462, 471, 18 L. ed. 497, 501, after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it [the taxing power of Congress] reaches every subject, and may be exercised at discretion." The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several states, therefore Congress is without authority to tax the [59] transmission or *receipt of property by death. This proposition is supported by a reference to decisions holding that the several states cannot tax or otherwise impose burdens on the exclusive powers of the national government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the national government in relation to the powers of the several states. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *McCulloch v. Maryland*, 4 Wheat. 431, 437, 4 L. ed. 607, 609; *New York ex rel. Bank of Commerce v. Commissioners of Taxes*, 2 Black, 620, 17 L. ed. 451; *The Collector v. Day*, 11 Wall. 124, *sub nom. Buffington v. Day*, 20 L. ed. 125; *United States v. Baltimore & O. R. Co.* 17 Wall. 327, 21 L. ed. 599; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. The thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the national government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus, imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the state cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corpora-

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tions engaged in such commerce is not the subject of taxation by the several states, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts *which arise from its ownership, [60] are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 431, 4 L. ed. 607, "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. The contention was adversely decided in the *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497, where (p. 470, L. ed. p. 500) *the court said: "We [61] come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued, for the defendants in error, that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the state in which the defendants resided; that the internal trade of a state is not subject, in any respect, to leg-

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isolation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed." The court, after thus stating the argument, decided that the license was a mere form of excise taxation; that it conferred no right to carry on the business (the selling of lottery tickets and the liquor traffic), if forbidden to be engaged in by the state, but license was applicable whenever under the state law such business was permitted to be done. Many other opinions of this court have pointed out the error in the proposition relied on, and render it unnecessary to do more than refer to them. *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. ed. 101, 104; *Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. ed. 482, 487; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 362, 19 L. ed. 701, 703; *The Collector v. Day*, 11 Wall. 113, 127, *sub nom. Buffington v. Day*, 20 L. ed. 122, 126; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 327, 21 L. ed. 597, 599; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 36, 21 L. ed. 787, 793; *California v. Central P. R. Co.* 127 U. S. 1, 40, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

We are then brought to a consideration of the particular form of death duty which is manifested by the statute under consideration. The sections embodying it are printed in the margin†

†Act of June 13, 1898, chap. 448.

Sec. 29. That any person or persons having in charge or trust as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows—that is to say: Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every \$100 of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed as aforesaid, at the rate of one dollar and fifty cents for each and every \$100 of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother,

*It is at the outset obvious that the exact [62] meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views. It is plain, however, that the statute must mean one of three things:

*1. The tax which it imposes is on the passing [63] of the whole amount of the personal estate, with a progressive rate depending upon the sum of the whole personal estate; or,

*2. The tax which it levies is placed on the [64] passing of legacies or distributive shares of personal property at a progressive rate, the amount of such rate being determined, not by the separate sum of each legacy or distributive share, but by the volume of the whole personal estate. This is the mode in which the tax was computed by the assessor, and which was sustained by the court below; or,

3. The tax is on the passing of legacies or distributive shares *of personalty, with a [65] progressive rate on each separately determined by the sum of each of such legacies or distributive shares.

On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which describes what is taxed, not as the estates of deceased persons, but as "legacies and distributive shares of personal property." This, whilst not conclusive, is proper to be considered in interpreting the statute,

or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every one hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one half, and where the amount or value of said property shall exceed the sum of \$100,000, but shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of \$500,000, but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by two and one half; and where the amount or

when ambiguity exists and a literal interpretation will work out wrong or injury. *United States v. Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. ed. 471, 477; *United States v. Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224; *Smythe v. Fiske*, 23 Wall. 374, 380, 23 L. ed. 47, 49; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689.

The opening words of section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, . . . passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, . . . shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say," etc.

Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property. This is made clearer by considering that in the very same section the tax is described as being upon any interest which may have been "transferred by deed, grant, bargain, sale, or gift, made or intended to

take effect in possession or enjoyment after the death of the grantor, bargainor, to any person or persons," etc. That is to say, whilst the law places the duty on any legacy or distributive share passing by death, it puts a like *burden on gifts which may have [66] been made in contemplation of death and otherwise than by last will and testament.

Following the paragraph from which the foregoing has been quoted, the statute makes five distinct classes or enumerations whereby the rate of the tax is varied, that is, it is made more or less, depending upon the relationship, or want of relationship, of the legatee or distributee to the deceased. But this enumeration can only be explained upon the hypothesis that the law intended to impose a greater or less tax upon a legatee or distributee, arising from his degree of relationship or his being a stranger in blood to the deceased. Thus it cannot be doubted that, in assessing the tax the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such

value of said property shall exceed the sum of \$1,000,000, such rates of duty shall be multiplied by three.

Sec. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the commissioner of internal revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by

such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by laws of any state or territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate under oath as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interest therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of

person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded. The dilemma, therefore, which is involved in the contention that the statute imposes the tax, not on each legacy or distributive share, [67] but on the whole personalty, is *this: If the tax is levied and collected according to the classifications in the statute, it is clearly on the legacy or distributive share. If, on the contrary, it is levied on the entire personal estate, then the classifications of the statute must be ignored and the construction be upheld which maintains that the act has classified the rate of tax by the relationship of the beneficiaries to the deceased, and has then disregarded the classification by collecting the tax wholly without reference to such relationship. This construction, besides eliminating a large portion of the text of the act, would do violence to its plain import, which is to make the rate of the tax depend upon the character of the links connecting those taking with the deceased. This is greatly fortified by other portions of the act. At the close of the fifth subdivision of section 29, one of the clauses creating a classification with respect to remote relationship, or want of relationship, to the deceased, it is provided as follows:

"Provided, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty."

same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or sup-

Now, mark, the word is "passing" by will, etc., which excludes a conception that the whole amount of the estate, and not the particular portions thereof which passed, is the subject of the tax. And the exemption from the tax or duty, of the legacy, etc., given to the husband or wife of a deceased, implies that the scheme of taxation is of the legacies, etc., and not of the whole personal estate. This must be so, unless it can be said that the statute in terms exempts the legacy to a husband or wife from the legacy tax otherwise imposed, although no legacy taxes resulted from the statute.

The provisions for the collection of the tax contained in section 30 of the act confirm the construction that the passing of each legacy or distributive share, and not the entire personal estate of a deceased person, forms the subject of the tax. Thus, before payment and distribution to the legatees, etc., an executor, administrator, or trustee is required to pay "the amount of the duty or tax assessed upon such legacy or distributive share,"* and to "make and render a schedule," etc., in duplicate, "of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon," and the schedule is required to "contain the names of each and every person entitled to any beneficial interest therein." [68]

Whatever be the obscurity it is illumined when the light of the previous legislation, which we have already reviewed, is thrown on it. The passing of legacies and distributive shares were the objects taxed under the English legacy act. They were the subjects taxed under the act of Congress of 1797. By the act of 1862, as we have seen, the whole estate was reached by a probate duty, whilst a distinct duty was charged upon legacies and distributive shares in personal property. When the act of 1864 was enacted there was added a succession tax on real estate, modeled, as said by this court and as shown by the act itself, upon the English succession duty act, which treated each particular gift of real estate as a distinct succession, separately liable for the duty laid by the act. The legacy tax and the succession tax were thus correlated and rested upon

posed to contain, any information concerning such property or personal estate as aforesaid, passing from any person who may die as aforesaid, shall exhibit the same at the request of the collector, or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of \$500: *Provided, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the law had been complied with by the officers of the government.* [30 Stat. at L. 464.]

the same theory; that is, both considered, they created a tax on the passing of each particular gift or distributive share of both the personal and real estate, treated as separate, one from the other, and each as forming a distinct estate subject to taxation. To assume that, when the succession duty was adopted in 1864, that the legacy tax, which was also re-enacted in that act, lost its character and became a tax levied, not on the passing of the legacies and distributive shares, but upon the whole amount of the estate before passing, would destroy the entire harmony of the system, and lead to a confession that a confusion of thought existed which cannot in reason be admitted. Indeed, it is difficult to conceive that the act of 1864 contemplated that either the legacy duty or the succession duty which it imposed should be upon the whole estate, since the tax to be paid by the whole estate was therein distinctly and separately provided for by means of the probate duty. If the tax on the whole estate can be, by implication, inserted, the same reasoning would also imply that the succession duty must be likewise treated. It would thus be that the entire [69] act of 1864 would be in force despite its *repeal and the failure to re-enact in the present law either the whole estate or succession duty.

What it was considered the act of 1864 levied the tax on is also in addition demonstrated by the amendments made to the act of 1864 in 1866. One of these amendments was: "That any legacy or share of personal property passing as aforesaid to a minor child of the person who died possessed as aforesaid shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of one thousand dollars, in which case the excess only above that sum shall be liable to said taxation." Another was that any tax paid under the provisions of sections 124 and 125 of the act of 1864 should "be deducted from the particular legacy or distributive share, on account of which the same is charged." In other words, the act expressly commanded that to be done which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential.

That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866.

As the only provisions added to the present law relate to the progressive rate upon
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the legacies, it follows that, unless these added clauses provide for a tax on the whole estate instead of the legacies, it is a demonstration that the whole estate is not taxed by the present act. That the progressive rate features inserted in the act now under review have even no tendency to bring about such a result, we proceed now to demonstrate. We reproduce such portions of section 29 as are essential, putting in *brackets [70] the words found in the act of 1898 under review, which were not contained in the corresponding provisions existing in the act of 1864:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of one [ten] thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state, or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, that is to say: [Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:]" [13 Stat. at L. 285, chap. 173, § 124.]

Immediately following this are five classifications of beneficiaries, each varying in rate. These are followed by the progressive rate clause, which is as follows:

["Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one half, and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."]

Observing closely the text, it is apparent that the clause *therein which points out [71] what is taxed is an exact copy of the act of 1864, except the substitution of the "ten" for the word "one." The subject taxed, therefore, under the present act is the same which was taxed under the act of 1864. This is the equivalent of a mathematical certainty. Coming, then, to the added provision at the end of the first paragraph, it
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says: "Where, the whole amount of said personal property shall exceed in value," etc. This, however, creates no new object of taxation, but simply provides that where said personal property, that is, the property previously specified, exceeds a certain amount, a given rate shall be imposed. So, in the further addition, pointing out the progressive feature, the law says, "where the amount or value of said property shall exceed the sum of," etc., thus clearly again referring to the objects of taxation, the property described in the first part of the act, which was identically the same thing described in the act of 1864. The demonstration, therefore, is conclusive that the progressive feature clause added in the present act creates no new subject of taxation; it simply provides for the progressive rates on the said property mentioned in the opening sentences, which is described exactly as it was in the act of 1864. Now, as the act of 1864 taxed, not the whole estate, but each particular legacy or distributive share, the conclusion cannot be escaped that the present law does the same thing, except that there is added thereto a progressive rate.

The tax being then on the legacies and distributive shares, the rate primarily being determined by the relation of the legatees or distributees to the estate, does the law command that the progressive rate of tax which it imposes on the legacies or distributive shares shall be measured, not separately by the amount of each particular legacy or distributive share, but by the sum of the whole personal estate? This, as we have said, is the interpretation of the act which was adopted by the assessor in levying the taxes under review, and which was sustained by the court below.

[72] The unsoundness of the construction that the act measures the rate of tax by the whole estate is fully shown by what we have already said, for, as under the act of 1864 the legacies and distributive *shares alone were taxed, and as in re-enacting it the exact language was retained (omitting the separate provisions in the act of 1864, taxing the whole estate by a probate duty and taxing successions), and as the progressive rates only refer to the object taxed, as provided in the act of 1864, it results that under no reasonable construction can the present act be held to provide for a rate of tax computed on the whole estate. Even, however, if all the previous history be shut out of view, and even if the omission from this act of the whole estate duty which obtained under the act of 1864 be for the moment forgotten, the text of the law, considered alone, would not support the construction that it provides for a tax upon each legacy and distributive share by a rate of tax measured by the whole estate. In order to make this clear we will briefly analyze the text. In doing so, however, we eliminate the attempt made by counsel in argument to show the significance thereof by expressions used in the course of the debate by certain members of the Senate. *Maxwell v. Dow*, 176 U. S. 581, ante, 597, 20 Sup. Ct. Rep. 448, and cases there cited.

The meaning of the act largely turns upon the following words, contained in the opening paragraph of section 29: "Where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing," etc. If these words refer to the whole amount of the estate left by a deceased person, then the words added in the act of 1898, to the end of the paragraph, viz., "where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand, dollars, the tax shall be," as stated in five classifications next enumerated, must refer to the same thing. It follows likewise that the progressive rate clause, which says, "where the amount or value of said property shall exceed the sum of," etc., must relate to the same thing; that is, the whole amount of the estate, as stated in the opening sentences of section 29. If this view be correct, then all legacies in an estate of \$10,000 are exempt, and all legacies, whatever be their amount, in an estate above \$10,000, have the original rate adjusted according to the classifications, and that rate is increased *progressively by [73] the whole amount of the estate, and not by the amount of the legacy. If, on the other hand, the words "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars," found in the first sentence of section 29, relate to the whole amount of each legacy, then legacies under \$10,000 are not taxable, and those above \$10,000 pay the original rate provided in the classifications, and become subject to the progressive increase clause, according to the amount of the legacy, and not by the whole amount of the estate.

But the pivotal words in the first sentence are not simply "the whole amount of such personal property," but the "whole amount of such personal property as aforesaid." This can only refer to the preceding part of the sentence, where what is contemplated by the words "as aforesaid" is and can alone be "any legacies or distributive shares arising from personal property . . . passing after the passage of this act. In other words, the statute itself by the reference clause establishes that the whole amount referred to is the sum or value of each particular legacy, etc., separately considered, passing from the deceased to the taker thereof. And this construction of the vital words referred to, derived from what immediately precedes them, is sustained by what immediately follows them, that is, the clause imposing the tax on "any personal property or interest therein, transferred by deed," etc., "made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. This latter clause treats each item of property given in contemplation of death otherwise than by last will and testament, as a distinct entity to be considered for the purpose of levying the tax. Each of such items, therefore, separately considered, becomes, for the purpose of the tax, the whole amount of such personal property, the

statute clearly recognizing that there may be partial and distinct interests in each item of personal property, such as an interest for life in one person with a remainder in another. Thus by the two clauses, which are linked together by the words "the whole amount of such personal property," it develops that the amount referred to is the separate and distinct *sums or items of personal property passing, and not the whole amount of the entire estate, which, as has been shown in considering the previous proposition, the act did not purport to tax as such.

[74] The subsequent provisions of the act lend cogency to this view. Thus, in section 30, it is made the duty of the executor, etc., to pay over to the collector "the amount of the duty or tax assessed upon *such* legacy or distributive share," and he is also commanded to deliver to the collector a schedule "of the amount of *such* legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon."

At the risk of repetition, we recur again to a particular feature in the prior legislation, because it very pertinently points out the error which has given rise to the assumption that the "whole personal estate as aforesaid" meant in the act of 1864, or means in this act, the whole amount of the personal estate left by the deceased, and not the whole amount of each legacy considered as a separate estate for the purpose of taxation. Attention has been called to the fact that, in accordance with the English system, the act of 1864 engrafted on the provisions of the act of 1862 a succession or real estate inheritance tax. In doing so, it was unequivocally declared in the law that each separate gift of real property was a distinct succession or estate. In other words, the statute itself announced the rule that the whole amount of each estate subject to taxation, under the succession tax, was the whole amount of each separate item of gift treated as an estate for the purpose of the levy and collection of the taxes thereon. How, then, can it be supposed that the act of 1864 contemplated that the section relating to the legacy should have one meaning, whilst the whole amount of the estate in the sections relating to succession or real estate taxes should have another? Must it not be considered that the statute provided for no such discordant and unjust discrimination, but that, on the contrary, it harmoniously expressed the rule obtaining from the beginning, that is, the levy of a legacy tax on personal estate passing by death to each particular beneficiary treated separately as the amount subject to taxation and the same rule applied to the succession tax by treating each *item of real estate as the whole amount of an estate passing separately for the purpose of taxation?

[75] It is true that in the practical execution of the act of 1864 the words "the whole amount of such personal property . . . shall exceed the sum of one thousand dollars" were administratively construed as applying to the entire personal estate left by one deceased, and not to the distinct legacies

or interests. It resulted that where an estate did not equal \$1,000, no tax was collected upon legacies or distributive shares therein, and where the estate exceeded \$1,000, all legacies and distributive shares, whatever the amount of each, were taxed. Any force resulting from this administrative view, however, is weakened by the fact that the contrary construction prevailed as to the other portions of the act of 1864, the succession duty, where the amount of the tax was determined by the amount or value of each particular item of real property. The administrative construction therefore of the act of 1864 was contradictory, since it enforced one rule on the one hand and an absolutely conflicting one on the other. Besides, the whole estate was taxed as such by the probate duty found in the act of 1864.

As we have said, the act of 1864 was repealed in 1870. 16 Stat. at L. 256, chap. 255. After the repeal, the court was called upon, in *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894, to consider whether, when one who held a life estate in a legacy died subsequent to the repeal of the act, the interest of the legatees in remainder was subject to the inheritance tax. In passing upon this question this court said (p. 690, L. ed. p. 894):

"The tax in question was imposed by section 124 of the act of June 30, 1864, chap. 173 (13 Stat. at L. 223, 285), upon legacies or distributive shares of personal property exceeding the sum of \$1,000, passing, after the passage of the act, from a decedent, either testate or intestate, in the hands of an executor, administrator, or trustee, varying in rate, as the party beneficially entitled was less or more remote in consanguinity, or a stranger in blood, to the person from whom it passed; with a proviso that legacies or distributive interests in intestate estates, passing to husband or wife, should be exempt from such tax."

*The opinion thus expressed is in conflict [76] with the assumption that the whole estate contemplated, not each legacy or distributive share, but the entire amount of personal property of the deceased, and this construction may be well considered to have been in effect adopted by the re-enactment of the act of 1864, without any change indicating an intention to the contrary.

Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the as-

serted interpretation is that the house of A, which is only worth \$1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred-fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of \$10,500, bequeaths to an hospital \$10,000. The rate of tax would be 5 per cent, and the amount of tax \$500. Another person dies at the same time, leaves an estate of \$1,000,000, and bequeaths \$10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax \$1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction *must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

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We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; *Wilson v. Rousseau*, 4 How. 646, 680, 11 L. ed. 1141, 1156; *Bloomer v. McQuewan*, 14 How. 539, 553, 14 L. ed. 532, 538; *Blane v. National Banks*, 23 Wall. 307, 320, 23 L. ed. 119, 121; *United States v. Kirby*, 7 Wall. 482, 486, 19 L. ed. 278, 280. Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below.

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By elimination, the process of reasoning which we have resorted to in order to demonstrate the unsoundness of the first two contentions as to the meaning of the statute renders it unnecessary to say anything in elaboration of the significance of the statute as embodied in the third proposition, which is, that the tax is on the legacies and distributive shares, the rate being primarily determined by the classifications and being progressively *increased according to the [78] amount of the legacies or shares. Its correctness is at once apparent when the other views are disposed of. As the "whole amount of such personal property as aforesaid" relates to the sum of each legacy or distributive share considered separately, it follows that all legacies not exceeding \$10,000 are not taxed, and that those above that amount are taxed primarily by the degree of relationship or absence thereof, specified in the five classifications contained in the statute, and that the rate of tax is progressively increased by the amount of each separate legacy or distributive share. This being the correct interpretation of the statute, it follows that the court below erroneously maintained a contrary construction, and therefore the tax assessed and collected was for a larger amount than the sum actually due by law.

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In *Scholey v. Rew*, 23 Wall. 349, 23 L. ed. 102, to which we have heretofore referred, the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said (p. 346, L. ed. p. 101):

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of *these [79] provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and pro-

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vide for the common defense and general welfare.

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

This is decisive against the contrary contention here relied on, unless it be that the decision in *Scholey v. Rew* has been overruled, and therefore is no longer controlling.

The argument is that the decision in *Scholey v. Rew* was overruled in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912. This contention is thus supported in argument.

As in the course of the opinion in *Scholey v. Rew* the court said that taxes on successions could not be distinguished in principle from an income tax, therefore the decision in the *Pollock Case*, which held that an income tax was direct, it is argued, necessarily decided that an inheritance tax was also direct. But in the *Pollock Case* the decision in *Scholey v. Rew*, was not overruled. On the contrary, the correctness of the decision in the latter case as to the particular matter which it actually decided in effect was reaffirmed. In consequence of the statement made in *Scholey v. Rew*, that an income tax and a succession tax could not be distinguished one from the other, that case was relied on in the *Pollock Case* by counsel in argument and by the members of the court who dissented, as establishing, for the reason stated, that the income tax was not direct. The court, however, treated *Scholey v. Rew* as inapplicable to an income tax, because it considered that whether an income tax was direct was not actually involved in the latter case, and hence the illustration which was [80] used in *Scholey v. Rew* as to "an income tax was held not to have been a decision on the question of whether or not an income tax was direct.

The court said (157 U. S. 577, 39 L. ed. 817, 15 Sup. Ct. Rep. 688):

"*Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99, was the case of a succession tax, which the court held to be 'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy. It was like the succession tax of a state, held constitutional in *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; and the distinction between the power of a state and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act [178 U. S. U. S., Book 44.

hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. *Re Elwes*, 3 Hurlst. & N. 719; *Atty. Gen. v. Sefton*, 2 Hurlst. & C. 362; *S. C. (H. L.)* 3 Hurlst. & C. 1023, 11 H. L. Cas. 257."

The argument now made, therefore, comes to this: Although in the *Pollock Case* the doctrine which the court considered as having been actually decided in *Scholey v. Rew* was not overruled, nevertheless, because an example which was made use of in the course of the opinion in *Scholey v. Rew* was disregarded, the *Pollock Case* therefore overruled *Scholey v. Rew*. The issue presented in the *Pollock Case* was whether an income tax was direct, within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the previous adjudications of this court had settled nothing to the contrary. The issues which were thus presented in the *Pollock Case*, it will be observed, had been expressly reserved in *Scholey v. Rew*, where it was said (23 Wall. 346, L. ed. p. 102):

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case."

The question which was thus reserved in *Scholey v. Rew*, and which was presented for decision in the *Pollock Case*, was decided in the latter case, the court holding that taxes on the income of real and personal property were the legal equivalent of a direct levy on the property from which the income was derived, and therefore required apportionment. But there was no intimation in the *Pollock Case* that inheritance taxes—which had been held in *Scholey v. Rew* not to be direct, which had from all time been considered as being imposed, not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise—were direct taxes, within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the *Pollock Case*, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct,

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because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

[82] But it is asserted that it was decided in the income tax cases that, in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the *one upon whom by law the burden of paying it is first cast can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and, hence, however obvious in other respects it might be a duty, impost, or excise, it cannot be levied by the rule of uniformity, and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment.

The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, where the court said (p. 515, L. ed. p. 791, Sup. Ct. Rep. p. 525):

[83] "The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United *States. But while yielding implicit obedience to these constitutional require-

ments, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax; where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economical or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

Concluding, then that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below \$10,000, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitution, *which provides that "duties, imposts, and excises shall be uniform throughout the United States."

[84] The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfil the requirement of equality and uniformity, as those words are construed when found in state constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that "duties, imposts, and excises shall be uniform throughout the United States," it is insisted has a different meaning from the expression "equal and uniform," found in state constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.

On the one side, the proposition is that the command that duties, imposts, and excises shall be uniform throughout the United

States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty, or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties, and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the states of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost, or excise which is not intrinsically equal and uniform in its operations *upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

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The argument as to intrinsic uniformity is asserted to find support in expressions used by some of the justices in the carriage tax case. *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556. The statements thus referred to are as follows:

Mr. Justice Paterson said (p. 180, L. ed. p. 560):

"Apportionment is an operation on states, and involves valuations and assessments which are arbitrary and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious."

Mr. Justice Iredell said (p. 181, L. ed. p. 561):

"If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term 'duty, impost, or excise,' there is no provision in the Constitution, one way or another, and then it must be left to such an operation of the power as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform, because the present Constitution was particularly intended to affect individuals, and not states, except in particular cases specified. And this is the leading distinction between the Articles of Confederation and the present Constitution."

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And the following passage from the opinion in *United States v. Singer*, 15 Wall. 111, 121, 21 L. ed. 49, 51, is also asserted to support the contention that a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said:

"The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they *shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

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In opposition to this view it is urged that the language used by the judges in the *Hylton Case* was not intended to, and does not, when properly understood, refer to the inherent character of the tax, but simply called attention to the fact that, differing from the Articles of Confederation, power was given to Congress by the Constitution to levy duties, imposts, and excises, thus acting upon individuals; and that the language in the *Singer Case*, whilst it uses the word "equal," clearly referred, not to an inherent uniformity, but to a geographical one. And this, it is argued, is rendered certain by the opinion in the *Head Money Cases*, 112 U. S. 580, 594, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247, 252, where, in considering the objection that a tax imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port was void because not levied by any rule of uniformity, the court, speaking by Justice Miller, said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed."

To overcome the construction in favor of geographical uniformity asserted by the government to arise from the language just quoted, it is, in the first place, argued that when correctly understood it does not sustain the claim so based on it, and, in the second place, that if it does, it is not binding as authority, because the *Head Money Cases* involved, not the uniformity clause of the Constitution, but that portion of clause 6 of section 9 of article 1 of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."

It is conceded that if the preference clause just referred to *and the uniform clause have the same meaning, that of course merely a geographical operation was intended. But

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it is insisted that the two clauses are distinct in import, and that the difference in language of the two manifests the distinct meanings which should be affixed to them. It is apparent that the controversy cannot be disposed of by a mere reference to prior adjudications, since reliance is, by both sides, in effect, placed upon the same decisions. But to determine which view of the cited authorities is the correct one, it will become necessary not only to analyze the facts which were at issue in the decided cases, but also to elucidate the language of the opinions which have given rise to the conflicting constructions now placed upon such language, by an examination of the subjects to which the language related. As to do this calls for a critical consideration of the provisions of the Constitution referred to in the opinions relied on, we shall, for the moment, put the cases referred to out of mind, and consider the controversy presented as one of original impression. We are, moreover, impelled to this course from the fact that as the word "uniform," or the words "equal and uniform," are now generally found in state constitutions, and as there contained have been with practical unanimity interpreted by state courts as applying to the intrinsic nature of the tax and its operation upon individuals, if it be that the words "uniform throughout the United States," as contained in the Constitution of the United States, have a different significance, the reason for such conclusion should be carefully and accurately stated.

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States," are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution.

Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect "taxes, duties, imposts, and excises; . . . , but all duties, imposts, and excises shall be uniform [88] throughout the United States." Thus, the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts, and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts, and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several states, as provided in clause 4 of section 9 of article 1 of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be

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subjected to such rule, as the requirement only relates to duties, imposts, and excises.

But the classes of taxes termed duties, imposts, and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed is, in the nature of things, the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties, and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the *Constitution in all countries in the [89] levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress.

Now, that the requirement that direct taxes should be apportioned among the several states, contemplated the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution.

In England, nowhere had the conception of a limitation on the power to levy duties, imposts, and excises by an intrinsic rule of uniformity found utterance, and the prac-

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tice which had obtained, it may be said, was commonly to the contrary. Passing without special notice the system of customs (import and export) duties existing in England from a time long prior to the Revolution, which was replete with examples of taxation not fulfilling the requirement of intrinsic equality and uniformity, we briefly refer to a few examples of the same nature afforded by statutes imposing internal taxation in the mother country.

[90] Internal taxation, in the form of excises, was introduced into England by a Parliamentary resolution passed on March 28, 1643, and carried into effect by an ordinance of the same date. 2 Dowell, History of Taxation, 9. Many of these excises were imposed with reference to the supposed ability of the *party whose property, office, etc., was assessed to pay the same. Thus, in 1747, a duty of excise was imposed upon coaches and other carriages kept for personal use. 20 Geo. II. chap. 10; 19 Stat. 31. In 1756 a duty of excise was imposed upon the possessor of plate over a certain weight. — Geo. II., chap. 14; 21 Stat. 388. In 1758 all offices of profit, other than naval and military, were subjected to the payment of duty *when the salary exceeded 100 pounds*. 30 Geo. II., chap. 22. In 1777 a duty was imposed upon employers of coachmen and other men servants. 15 Geo. III., chap. 29; 31 Stat. 372. In 1779 a duty was imposed, not upon all forms of locomotion, but upon traveling by post, the usual method of locomotion among the wealthier classes. 19 Geo. III., chap. 51; 32 Stat. 279. In 1784 a duty was laid, not uniformly with respect to all horses kept by a person, but in respect to horses kept for the saddle or driving in carriages. 24 Geo. III., chap. 31; 34 Stat. 535.

It is accurate to say that in the colonies prior to the confederation, and in the states prior to the time of the adoption of the Constitution, the wisdom of restraining the levy of duties, imposts, and excises by an express requirement of inherent equality and uniformity had likewise nowhere found expression. The state constitutions of the revolutionary period (except, perhaps, those of Massachusetts and New Hampshire) contained no provisions indicating an intent to control the bodies authorized to levy taxes and raise money in the exercise of a sound discretion as to the mode to be adopted in levying taxation. The people were content to commit to their representatives the enactment of reasonable and wholesome laws, being satisfied with the protection afforded by a representative and free government and by the general principles of the common law protecting the inalienable rights of life, liberty, and property.

[91] The Massachusetts Constitution of 1780 and that of 1788 of New Hampshire merely required that the assessments of rates and taxes should be proportional and reasonable and with a view to equality, but there was no such qualification expressed as to the authority conferred "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, *and commodities 178 U. S.

whatsoever, brought into, produced, manufactured, or being within the same."

In taxing laws of the original states prior to the convention of 1787, exemptions were allowed from a consideration of what was deemed best for the general welfare, and taxes were frequently laid from a consideration of the presumed ability of the owner to pay the tax. Discriminations and exemptions were also contained in various state taxing laws, which illustrate the discretion vested in the legislative bodies of the states in the latter part of the eighteenth century. We print in the margin a few examples.†

†In chapter 5 of the Pennsylvania Statutes of March 27, 1782, a tax was laid upon "negro and mulatto servants above the age of twelve years; horses, mares, and cattle above three years old; coaches and carriages kept by any person for his or her own use, and for the purpose of traveling or pleasure." The chaises or riding chairs of ministers of the gospel, the president, professors, or tutors of Harvard College, or grammar school masters, were exempt from duty of excises laid upon certain described coaches and other carriages, by an act passed in Massachusetts on July 10, 1783.

In a law of 1784, at page 131, of the Laws of Connecticut, the listers were required in the list of polls and ratable assets of the inhabitants of the respective counties to list polls from twenty-one to seventy years of age at 18 pounds, and polls from sixteen to twenty-one years old at nine pounds; houses were to be listed, not uniformly, but according to the number of fire-places; attorneys at law and physicians and surgeons were to be listed, the least practitioner at a certain sum, and larger practitioners higher in proportion; shopkeepers or traders, the lowest class at 25 pounds, and all others in due proportion; and each allowed and licensed tavern keeper was to be set at 15 pounds, and to be added to in proportion to their situation and profits, according to the best judgment of the listers; and persons following any "mechanical art or mystery, such as blacksmiths, shoemakers, tanners, goldsmiths, or silversmiths," and all other works and occupations followed or pursued by any person by which profits arise, except business in any public office, husbandry, and common labor for hire, were to be assessed by the best judgment of the listers.

The general assembly of New Jersey, by the act (chap. 400) December 22, 1783, for the purpose of raising 10,000 pounds for the support of government and the contingent expenses for the year 1784, enumerated a large number of items of persons and articles which were made taxable by the act, to be valued and rated by the assessors within stated sums. Single men who kept a horse were to be rated at not exceeding 10 shillings, while single men who did not keep a horse were to be rated at not exceeding 5 shillings. Male slaves were to be taxed at not exceeding 5 shillings, but it was provided "that no slave is to be taxed who is unable to work, or that may appear to the assessors to be no profit to his master or mistress." Fisheries where fish were caught for sale, and sawmills that sawed timber for sale or hire, were to be rated not exceeding 2 pounds.

In South Carolina, by an act passed March 28, 1787 (6 Stat. at L. 24), entitled "An Act for Raising Supplies for the Year 1787," a tax of 9 shillings and 4 pence was laid upon free negroes and mulattoes from sixteen to fifty years of age, while the tax upon free white men was upon those neither lame nor disabled, and who were between twenty-one to fifty years of age, while the tax was to be 10 shillings per head.

[92] *It cannot be therefore supposed that the framers of the Constitution, in using the words "uniform throughout the United States," contemplated to confer the power to levy duties, imposts, and excises, and yet to accompany this grant of authority with a restriction which had never found expression as to such taxes at that time anywhere, and which was contrary to the practice which had uniformly obtained both in the mother country and in the colonies and in the states prior to the adoption of the Constitution. But one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts, and excises the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. Take, for a general example, *specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the Constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon, without reference to the value thereof.

[93] Indeed, tariff duties have not only varied with different articles, but have varied with the different valuations of the same article. We cite a few instances of the latter character, found in the tariff acts of August 5, 1861 (12 Stat. at L. 293, chap. 45), and August 27, 1894 (28 Stat. at L. 530, chap. 349), respectively. In the act of 1861 a duty was imposed—

"On all silks valued at not over one dollar per square yard, thirty per centum *ad valorem*; on all silks valued over one dollar

And a tax of 1 per cent was laid on the profits of faculties and professions, clergymen, schoolmasters, and schoolmistresses excepted.

In Delaware, by a law passed in the sixteenth year of the reign of Geo. II. (Laws of Delaware, Adams' ed., pub. 1797, p. 257), and apparently in force when the Constitution of 1792 was adopted (Id. pp. 396, 429), unsettled tracts and parcels of land were exempted from taxation, and the assessors were directed in assessing persons to have due regard "to such as are poor and have a charge of children," the poorest sort of such not to be rated under 8 pounds. Single men without visible estate were to be rated at not less than 12 pounds nor more than 24 pounds, excepting, however, single men under twenty-one years of age, and apprentices and such as had not been out of apprenticeship more than six months.

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per square yard, forty per centum *ad valorem*; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard or under, thirty per centum *ad valorem*; valued at over three dollars per square yard, forty per centum *ad valorem*."

In the act of 1894 occurs the following paragraph:

"280. On woolen and worsted yarns made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, valued at not more than forty cents per pound, thirty per centum *ad valorem*; valued at more than forty cents per pound, forty per centum *ad valorem*."

So also a single paragraph of the tariff acts has frequently contained an elaborate system of minimum classifications and compound duties, as well as exemptions for importations below a certain value. See provisions discussed in *Arthur v. Vietor*, 121 U. S. 572, 575, 32 L. ed. 201, 202, 8 Sup. Ct. Rep. 1125; *Hedden v. Robertson*, 151 U. S. 520, 521, 38 L. ed. 257, 14 Sup. Ct. Rep. 434; *Arthur v. Morgan*, 112 U. S. 495, 498, 28 L. ed. 825, 826, 5 Sup. Ct. Rep. 241.

Nor can it be said that these illustrations relate to legislation enacted long after the adoption of the Constitution, when by *lapse [94] of time an erroneous conception as to the meaning of the Constitution had arisen, for the examples to which we have just referred are but types of many forms of taxation by way of duties, imposts, and excises which were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation. Excise taxes were largely used during the administration of President Washington, and again during and after the war of 1812. It may properly be said of these excises that none of them were uniform according to the principles now contended for, yet no constitutional question in this regard was ever raised about them. A partial list of some of the earlier acts is inserted in the margin.† We do not cite from

†Federal excises during the first generation after the Constitution.

I. Washington's administration.

March 3, 1791, chap. 15, §§ 14, 15, on distilled spirits; not uniform or proportionate to strength. No tax on country distilleries using homemade materials.

May 8, 1792, chap. 32, § 1, on distilled spirits; country distillers taxed differently from those in cities, towns, and villages; § 11, no drawback on any quantity less than 100 gallons.

June 5, 1794, chap. 45, § 1, on carriages. Contain some exemptions. (Discussed in *Hyton v. United States*, 3 Dall. 171, 1 L. ed. 536.)

June 5, 1794, chap. 48, on licenses for making certain sales of wines or foreign distilled spirituous liquors.

June 5, 1794, chap. 51, §§ 1, 2, on snuff and refined sugar; § 14, no drawback on any quantity less than \$12 worth. (Discussed in *Pennington v. Cox*, 2 Cranch, 33, 2 L. ed. 199.)

June 9, 1794, chap. 65, § 1, on auction sales:

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[95] the latter revenue acts, *because of the numerous and familiar instances of such legislation which abound therein.

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning. *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 558, 39 L. ed. 811, 15 Sup. Ct. Rep. 673.

[96] The paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the government needs no more than statement. And the proceedings of the Congress during the confederation afford abundant evidence of the constant effort which was made to overcome this situation by attempts to obtain authority from the states for Congress to levy the taxes deemed by it essential, and thus relieve it from the embarrassment occasioned by the fact that all demands for revenue depended for fulfilment wholly upon the action of the respective states. Despite the constant agitation as to the subject and the abundant discussions which took place *in relation to it during the period of the confederation, in the whole of the proceedings not a word can be found which can give rise to even the suggestion that there was then any thought of restraining the taxing power with reference to the intrinsic operation of a tax upon individuals. On the contrary, the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective states; in other words, the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state.

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States,"

which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression "to operate generally throughout the United States." The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. We shall, however, make a few references on the subject.

The view that intrinsic uniformity was not then conceived is well shown by remarks by Mr. Wilson upon a proposition submitted by him to the Continental Congress on March 18, 1783 (5 Elliot, Debates, 67), that Congress be empowered to lay and impose "a tax of one quarter of a dollar per hundred acres on all located and surveyed lands within each of the states." He said, speaking of the proposed tax, "that it was more moderate than had been paid before the Revolution, and it could not be supposed the people would grudge to pay, as the price of their liberty, what was formerly paid to their oppressors."

As early as February, 1781, a resolution was proposed authorizing Congress to levy certain taxes and duties, which resolution contained the proviso, "and the same articles shall bear the same duty and impost throughout the said states without exemption." 1 Elliot, Debates, p. 92.

Though this resolution failed of passage, a report of the committee of the whole was agreed to on the same day, in the form *of a [97] resolution recommended to the several states to levy for the use of the United States a duty of 5 per cent upon imports, with certain exceptions, and a duty of 5 per cent upon all prizes and prize goods. As late as December, 1782, however, some of the states had failed to comply with this resolution. 5 Elliot, Debates, 13.

On January 25, 1783 (5 Elliot, Debates, 31), a resolution was proposed declaring that Congress would "make every effort in their power to obtain, from the respective states, *general* and substantial funds ade-

with exemption of judicial sales, sales of goods distrained or in insolvency; and of sales of produce of land, when sold on the land where produced, etc.; and of sales "of any farming utensils, stock, or household furniture by persons removing from the place of their former residence, where the amount . . . shall not exceed \$200."

March 3, 1795, chap. 43, § 1, on mortars and pestles, etc., in snuff mills; § 8, no drawback on any exports of snuff less than 300 lbs.

May 28, 1796, chap. 37, § 1, on carriages, with exemptions.

II. Period of war of 1812.

July 24, 1813, chap. 21, § 1, on refined sugar.

July 24, 1813, chap. 24, § 1, on carriages, with exemptions.

July 24, 1813, chap. 25, § 1, on licenses for distilling liquors.

July 24, 1813, chap. 26, § 1, on auction sales; $\frac{1}{4}$ of 1 per cent on sales of vessels; 1 per cent on other sales of goods, etc., with exemptions.

August 2, 1813, chap. 39, § 4, on licenses for

retailing wines, etc.; one rate for cities, towns, and villages, another for the country.

August 2, 1813, chap. 53, §§ 1, 2, on bank notes, etc., graduated but not *ad valorem*; commutable at $1\frac{1}{2}$ per cent on dividends.

December 15, 1814, chap. 12, § 1, on carriages, graduated but not *ad valorem*.

December 21, 1814, chap. 15, § 1, on distilled spirits.

December 23, 1814, chap. 16, § 1, on auction sales; § 3, on retailers' licenses.

January 18, 1815, chap. 22, § 1, on domestic manufactures. Various specific and *ad valorem* rates, with exemptions, as umbrellas under \$2, boots under \$5 a pair.

January 18, 1815, chap. 23, § 1, on household furniture kept for use (annual duty) with minimum of \$200, graduated but not *ad valorem*. The unit is the family: § 13, exemption of books, etc.; § 14, exemption of certain charitable, religious, or literary institutions.

February 27, 1815, chap. 61, on plate.

April 19, 1816, chap. 58, § 4, on licenses for distilling liquors.

quate to the object of funding the whole debt of the United States; . . .” The word “general” was stricken out, because susceptible of being considered as implying that every object of taxation within the states should be embraced. That is to say, in order to remove any impression that the word “general” might imply the obligation to levy on all articles, the phraseology of the previous resolution was changed so as to cause the word to have merely a geographical significance, *viz.*, to require that whatever subject of taxation was assessed, the same subject should be taxed in every state, or, in other words, that the particular tax should operate generally throughout the United States. Two days later, a new resolution having been introduced declaring it to be the opinion of Congress that *general* funds should be established, to be collected by Congress, the same objection was repeated (5 Elliot, Debates, 34), and the proposition was amended so as to read “establishment of permanent and adequate funds to operate generally throughout the United States.” There being controversy as to whether Congress should be allowed to collect the taxes (5 Elliot, Debates, 34), the debates record the following proceedings:

“On the motion of Mr. Madison, the whole proposition was new modeled, as follows:

“That it is the opinion of Congress that the establishment of permanent and adequate funds to operate generally throughout the United States, is indispensably necessary for doing complete justice to the creditors of the United States, for restoring public credit, and for providing for the future exigencies of the war.”

“The words ‘to be collected under the authority of Congress’ were, as a separate question, left to be added afterwards.”

[98] *Mr. Madison, after commenting on the demerits of the plans just referred to, prefaced his subsequent remarks with the following (5 Elliot, Debates, p. 36): “It remains to examine the merits of a plan of general revenue operating throughout the United States, under the superintendence of Congress.”

On March 11, 1783 (5 Elliot, Debates, 64), a vote was taken upon three questions, the first being: “Shall any taxes to operate generally throughout the states, be recommended by Congress, other than duties on foreign commerce?” The matter culminated on April 18, 1783, in the adoption of a resolution by nine states, recommending to the several states that Congress be vested with the power to levy, for the use of the United States, certain duties, as well specific as *ad valorem*, upon goods imported into the states from any foreign port, island, or plantation. 5 Elliot, Debates, 93.

In an address which submitted the resolution to the states it was observed (5 Elliot, Debates, 97):

“To render this fund as productive as possible, and, at the same time, to narrow the room for collusions and frauds, it has been judged an improvement of the plan to recommend a liberal duty on such articles as are most susceptible of a tax according to their

quantity, and are of most equal and general consumption; leaving all other articles, as heretofore proposed, to be taxed according to their value.”

It was also stated in the address that “to bring this essential resource (a tax on imposts) into use . . . a concerted *uniformity* was necessary;” and “that this *uniformity* cannot be concerted through any channel so properly as through Congress.”

Thus it is apparent that the expression “uniform throughout the United States” was at that time considered as purely geographical, as being synonymous with the expression “general operation throughout the United States,” and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory.

The reasons advanced by those who opposed the various resolutions to which we have referred are, if anything, more decisive *than are the matters to which we have called [99] attention. Those reasons were predicated upon the inequality among the states which might arise from the granting to Congress the power to lay duties, imposts, and excises. That is, if a particular article was levied on generally throughout the various states by an excise or duty, as a greater quantity of that article might be found in one state than in other states, it was asserted the burden would be unequal because the former state would pay a greater proportion of the tax. This form of objection is well illustrated by what was said by Mr. Rutledge and Mr. Lee against the grant of power to Congress to lay duties or excises to operate generally throughout the United States. We quote from 5 Elliot, Debates, p. 34, as follows:

“Mr. Rutledge objected to the term ‘*generally*,’ as implying a degree of *uniformity* in the tax which would render it unequal. He had in view, particularly, a land tax, according to quality (quantity? See note p. 37), as had been proposed by the office of finance.

“Mr. Lee seconded the opposition to the term ‘*general*.’ He contended that the states would never consent to a uniform tax, because it would be unequal.”

Again (5 Elliot, Debates, p. 37), Mr. Rutledge complained “that those who so strenuously urged the necessity and competency of a general revenue, operating throughout all the United States at the same time, declined specifying any general objects from which such a revenue could be drawn.” And the same reason was urged for refusing the authority to lay imposts throughout the United States, as is shown by the objections made, to which we shall now refer. Thus, with respect to duty on imported salt, it was argued that it would bear injuriously on the eastern states “on account of salt consumed in the fisheries, and that, besides, it would be injurious to the national interest by adding to the cost of fish.” 5 Elliot, Debates, 61. So, also, Rhode Island protested against the grant of the power to impose duties recommended by the resolution of April 18,

1783, previously referred to, on the ground "that the proposed duty would be unequal in its operation, bearing hardest upon the [100] most commercial states, *and so would press peculiarly hard upon that state which draws its chief support from commerce." 1 Elliot, Debates, 101. And the nature of this objection caused it to come to pass that in the subsequent discussions in Congress, the claim that it was essential to confer upon Congress the authority to lay duties, imposts, and excises to be uniform throughout the United States, became associated in the discussion with the asserted necessity that Congress should have the power to establish uniform regulations of commerce to prevent the discrimination resulting from the laying of duties, imposts, and excises by the respective states. 1 Elliot, Debates, 112. The association of the two subjects evolved by their natural relation is well shown by a resolution of Mr. Madison, introduced in the Virginia house of delegates in 1784 (5 Elliot, Debates, 114), "wherein it was proposed that the delegates from the state of Virginia should be instructed to propose in Congress a recommendation to the states in Union, to authorize that assembly to regulate their trade," on principles and under qualifications stated in the following paragraphs:"

"1st. That the United States in Congress assembled be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports thereof, or to impose any duties on such vessels and their cargoes which may be judged necessary; all such prohibitions and duties to be *uniform throughout the United States*, and the proceeds of the latter to be carried into the treasury of the state within which they shall accrue.

"2d. That no state be at liberty to impose duties on any goods, wares, or merchandise, imported, by land or by water, from any other state, but may altogether prohibit the importation from any state of any particular species or description of goods, wares, or merchandise, of which the importation is at the same time prohibited from all other places whatsoever."

It will be noticed that the words "uniform throughout the United States" are the same which were subsequently adopted in the clause of the Constitution under consideration, and that the term uniformity, in the resolution of Mr. Madison, was applied not only to duties, but to *regulations and prohibitions respecting external commerce*, which were designed to be *the same* all over the Union.

[101] *Though the resolution of Mr. Madison was not adopted, it led to the sending by Virginia of commissioners to Annapolis to meet commissioners from the other states, the result of which meeting was the Federal convention of 1787.

Considering the proceedings of the convention, the same observation is pertinent which we have previously made as to the Continental Congress, *viz.*, that, despite the struggles and controversies which environed the final adoption of the Constitution, not a single word is found in any of the debates, or in 178 U. S.

any of the proceedings or historical documents contemporaneous and concurrent with the adoption of the Constitution, which give slightest intimation that any suggestion was ever made that the grant of power to tax was considered from the point of view of its operation upon the individual. The struggles which were flagrant in the Continental Congress were transferred to the convention. The question of the undue proportion of taxation which might fall upon one or more states if direct taxes were laid was solved by the principle of apportionment of direct taxes; duties, imposts, and excises were only subjected to the requirement of uniformity throughout the United States, these words, as we have shown, having acquired at that time an unquestioned meaning.

Without going into minute detail, the mention of a few salient particulars will serve to show how the result of the convention brought together the provisions as to the uniformity of duties, imposts, and excises throughout the United States and the restriction against discriminating commercial regulations by Congress, just as they had by the force of circumstances been drawn together in the Continental Congress, and how their solution in the Constitution was substantially in accord with the resolution of Mr. Madison, introduced into the Virginia house of delegates, to which we have referred.

The draft of a Federal Constitution, submitted to the convention by Mr. Pinckney, provided in the first and second paragraphs as follows (5 Elliot, Debates, p. 130):

"Art. VI. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

*"To regulate commerce with all nations [102] and among the several states;

"The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within — years after the first meeting of the legislature, and within the term of every — year after, be taken in the manner to be prescribed by the legislature.

"No tax shall be laid on articles exported from the states; nor capitation tax, but in proportion to the census before directed."

No other provision was made respecting taxation.

The plan of Mr. Paterson, of New Jersey, provided, in addition to the powers vested in Congress by the Articles of Confederation (p. 191), that Congress should be authorized—

"to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandise of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum, or parchment, and by a postage on all letters and packages passing through the general postoffice—to be applied to such Federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time to alter and amend, in such manner as they shall think proper; to pass acts for the regulation

of trade and commerce, as well with foreign nations as with each other."

By another section of the Paterson plan, it was provided that whenever requisitions upon the states should be necessary, they should be made by the rule of numbers and not by value of land, as under the confederation; and the Congress was to be authorized "to devise and pass acts" directing and authorizing the collection of requisitions when not complied with. It is thus seen that both of the plans referred to made no provision for uniformity of taxation in the sense contended for by the opponents of the tax now under consideration. The committee of detail, in the first section of article VII. of their draft of a proposed Constitution, reported the two clauses of the plan of Mr. Pinckney first quoted, substituting the word "foreign"

[103] *for the word "all" before the word "nations." (5 Elliott, Debates, 378.)

On August 25, 1787, the following occurred (5 Elliot, Debates, 478):

"Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that, under the power of regulating trade, the general legislature might favor the ports of particular states, by requiring vessels destined to or from other states to enter and clear thereat, as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. They moved the following proposition:

"The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other state than in that to which they may be bound, or to clear out in any other than the state in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one state in preference to another."

On the same day Mr. McHenry and General Pinckney submitted a proposition (which was referred *nem. con.* to a committee) relating to the establishment of new ports in the states for the collection of duties or imposts, which concluded as follows (p. 479):

"All duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States."

The fourth section of the seventh article of the proposed Constitution reported by the committee on detail on August 6, 1787, read as follows (p. 379):

"Sec. 4. No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited."

The committee to whom these propositions were referred made a report on August 28, in effect embodying both propositions in one paragraph, as follows (5 Elliott, Debates, 483):

[104] "That there be inserted, after the fourth clause of the seventh *section, 'nor shall any

regulation of commerce or revenue give preference to the ports of one state over those of another, or oblige vessels bound to or from any state to enter, clear, or pay duties, in another; and all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States.'"

It will be noticed that the committee recommended, not merely that preferences between ports should be forbidden by "any regulation of commerce," but also that such preferences should not be made by "any regulation of revenue." This, obviously, rendered it unnecessary to include, in the latter part of the clause, "prohibitions or restraints," as proposed by Mr. McHenry and General Pinckney. The substantial effect of the first clause of the paragraph was to require that all regulations of commerce or of revenue affecting commerce through the ports of the states should be the same in all ports.

It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts, and excises, though couched in different language, had absolutely the same significance. The sense in which the word "uniform" was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, "that all duties, imposts, excises, prohibitions, or restraints . . . shall be uniform and equal throughout the United States," struck out the words "and equal." Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each state. As we have seen, the pith of the controversy during the confederation was that even although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective states.

On August 31, 1797, the report of the committee was acted upon as follows (5 Elliot, Debates, 507): The provision, "Nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another," was adopted *nem. con.* After discussion the clause, "or oblige vessels bound to or from any state to enter, clear, [105] or pay duties in another," was agreed to. Quoting from the Debates at page 503:

"The word 'tonnage' was struck out *nem. con.*, as comprehended in 'duties.'

"On the question on the clause of the report—'and all duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States'—it was agreed to *nem. con.*"

In a footnote it is said:

"In the printed journal, New Hampshire and South Carolina entered in the negative."

On September 4, 1787, the committee to whom sundry resolutions, etc., had been referred on August 31, recommended, among others, the following addition and alteration

to the report before the convention (pp. 506 to 507) :

"1. The first clause of article 7, section 1, to read as follows: 'The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.'

"2. At the end of the second clause of article 7, section 1, add, 'and with the Indian tribes.'

The committee of style, on September 12, 1787, reported a plan of the Constitution (p. 535), the foregoing provision conferring authority to lay taxes, etc., being designated as section 8 of article 1.

On September 14, 1783, the words "but all such duties, imposts, and excises shall be uniform throughout the United States," which, in their adoption, had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one state over the port of another state—in other words, had been a part of another clause—were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

[106] Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the *other is a part of the first clause of section 8 of article 1. By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money Cases*, holding that the word "uniform" must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception.

We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. Thus, in the report made to the legislature of Maryland by Luther Martin, attorney general of the state, detailing and commenting upon the proceedings of the convention of 1787, of which convention Mr. Martin was a delegate, in the course of comments upon the tax clause of the Constitution Mr. Martin said (1 Elliot, Debates, p. 369) :

"Though there is a provision that all duties, imposts, and excises shall be uniform—that is, to be laid to the same amount on

the same articles in each state—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some states than on others, because these duties may be laid on articles but little or not at all used in some other states, and of absolute necessity for the use and consumption of others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, to wit, the states which use and consume the articles on which imposts and excises are laid."

Having disposed of the question of uniformity, we are next brought to consider certain contentions which relate to that subject. It is argued that even although it be conceded that *the uniformity required by the Constitution is only a geographical one, the particular law in question does not fulfil the requirements of even geographical uniformity, since it does not apply to the District of Columbia. We think this contention is without merit.

The proposition is predicated upon the fact that the statute purports to lay the tax upon legacies and distributive shares "passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory;" and provides that the receipt for the tax will entitle an administrator, etc., to credit to the amount of the payment made to the collector "by any tribunal which, by the laws of any state or territory, is, or may be, empowered to decide and settle the accounts of executors and administrators."

This, it is asserted, does not embrace the District of Columbia. Without attempting to determine whether the necessary construction of the statute would require the inclusion of the District of Columbia within its terms, aside from any special provision bearing upon the question, we think the provisions of section 31 of the act makes the objection untenable. That section provides as follows (30 Stat. at L. 466, chap. 448) :

"Sec. 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

The result of this provision is to carry into the law under review the provisions of section 3140 of the Revised Statutes, relating to internal revenue laws generally. It is as follows:

"3140. The word 'state,' when used in this title, shall be construed to include the territories and the District of Columbia, where such construction is necessary to carry out its provisions."

It is yet further asserted that the tax does not fulfil the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every *state. It is certain

that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the states may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts, and excises must be found in uniform quantities and conditions in the respective states, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states. Indeed, the contention was substantially disposed of in the *License Tax Cases*, 5 Wall. 472, 18 L. ed. 497, previously referred to. It was there urged that, as the several states had the right to forbid the carrying on of the liquor traffic, therefore Congress had no power to license such traffic, because it would interfere with the authority of the state. It was held that the license was validly imposed, that it did not interfere with the power of the states to prevent the liquor traffic, because in a state where such traffic was forbidden the license would be inoperative; but in the states where such traffic was allowed, the license would be effective. The argument, however, is additionally fully answered by the review which we have made of the origin and meaning of the expression "uniform throughout the United States." From that review it appears that the very objection upon which the proposition now advanced must rest was urged in the Continental Congress as the reason why the levy of uniform duties, imposts, and excises throughout the United States should not be authorized. This is shown by the objection of Mr. Rutledge and the suggestion of Mr. Lee. It is further shown by the protest of Rhode Island, and the reasons advanced why a duty on salt should not be levied. But it was seen that if it were required, not only that the duties, imposts, and excises should be uniform throughout the United States, but that in imposing them objects should be selected existing in equal quantity in the [109] several states, the *grant of power to levy duties, imposts, and excises would be a failure. In the convention which framed the Constitution the same argument was used without success, and, as we have seen, the only ground upon which the striking out of the words "and equal" after the word "uniform," in the adoption of the clause as now found in the Constitution, can be reasonably explained, is that it was done to prevent the implication that the duties, imposts, and excises which were to be uniform throughout the United States were to be placed upon rights equally existing in the several states. To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the confederation.

Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider *whether the [110] judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing legacies not exceeding \$10,000, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons the *judgment below must be reversed*, and the case be remanded, with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.

Mr. Justice **Brewer** dissents from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurs.

Mr. Justice **Peckham** took no part in the decision.

Mr. Justice **Harlan** dissenting:

While I concur in the construction placed by the court upon the clause of the Constitution declaring that all duties, imposts, and

excises shall be "uniform throughout the United States," I dissent from that part of the opinion construing the 29th and 30th sections of the revenue act. In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor, or trustee exceeds \$10,000, then every part of it constituting a legacy or distributive share, except the share of *a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.

Construed as I have indicated, the act is not liable to any constitutional objection.

Mr. Justice **McKenna** concurs in this dissent.

SHIRLEY T. HIGH and Jessie M. High,
Appts.,
v.

F. E. COYNE, as Collector of the United States Internal Revenue, and Ellen T. High, as Executrix of James L. High, Deceased.

(See S. C. Reporter's ed. 111, 112.)

War revenue act—legacy tax—erroneous construction of statute.

The affirmance of a decree sustaining the constitutionality of the provisions of the war revenue act of 1898, relating to legacy taxes, is made without prejudice to the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute, although the only questions raised by the assignments of error related to the constitutionality of the act, where the officers charged with the administration of the law have adopted and enforced an erroneous interpretation of it, by which an excessive tax is imposed.

[No. 225.]

Argued December 5, 6, 7, 1899. Decided May 14, 1900.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decision sustaining the constitutionality of the war revenue act. *Affirmed.*

See same case below, 93 Fed. Rep. 450.

Statement by Mr. Justice **White**:

[111] *The complainants, who are appellants here, filed their bill to enjoin the executrix of their father's estate from paying the legacy taxes levied by §§ 29 and 30 of the war revenue act of 1898. The collector of internal revenue was also made a defendant, and an injunction was asked against him to prevent his collecting or attempting to collect
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the taxes in question, which, it was asserted, he was about to enforce against the executrix, who, it was averred, would pay unless by the writ of injunction she was forbidden to do so. As heirs of their father and as beneficiaries of his estate, the complainants asserted they were entitled to prevent the executrix from making payment of taxes which were unconstitutional and hence void. The reasons relied on to show that the taxing law was repugnant to the Constitution of the United States were that the taxes were direct, and not apportioned, were not uniform, and were levied on objects *beyond the scope [112] of the authority of Congress. The bill was demurred to as not stating ground for relief. The demurrers were sustained, and from a decree dismissing the suit this appeal is prosecuted.

Mr. **Abram M. Pence** argued the cause and, with Messrs. *George A. Carpenter* and *Shirley T. High*, filed a brief for appellants.

Mr. **John G. Carlisle** also argued the cause and, with Messrs. *Peter B. Olney*, *William Edmond Curtis*, *Henry M. Ward*, *Ward B. Chamberlin*, *George F. Chamberlin*, *Julien T. Davies*, *Frederic R. Coudert, Jr.*, *E. S. Mansfield* and *W. S. B. Hopkins*, filed a brief for appellants.

Mr. *Henry M. Ward* filed a separate brief for appellants.

Messrs. *Richard C. Dalc*, *Samuel Dickson*, and *John C. Bullitt* filed a brief in behalf of the Fidelity Trust and Safe Deposit Company.

Messrs. *Thomas B. Reed* and *Thomas Thacher* also filed a brief for appellants.

Solicitor General **Richards** argued the cause and filed a brief for appellees.

*Mr. Justice **White** delivered the opinion [112] of the court:

As the court below did not grant an injunction, but dismissed the bill, it is unnecessary to consider whether the right would have existed to enjoin the collector of internal revenue, even had the court concluded that the averments of the bill disclosed a cause of action. Rev. Stat. 3226.

Every ground relied on to maintain that the taxes levied by §§ 29 and 30 of the war revenue act are repugnant to the Constitution has been decided adversely in the opinion this day announced in *Knowlton v. Moore*, 178 U. S. 41, ante, 969, 20 Sup. Ct. Rep. 747.

This disposes of this case, as the assignments of error raised only the constitutionality of the taxes, and there is nothing in the record to enable us to see that the statute was, by the collector, mistakenly construed.

As, however, the interpretation of the statute, which was held to be unsound in No. 387 (*Knowlton v. Moore*, 178 U. S. 41, ante, 969, 20 Sup. Ct. Rep. 747) was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction must have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to resist so much of the tax as may have arisen

from the wrong interpretation of the statute above referred to be not foreclosed by our decree.

Decree affirmed, without prejudice to any such right.

[113] *FIDELITY INSURANCE, TRUST, & SAFE DEPOSIT COMPANY, Executor under the Will of Daniel Craig, Deceased, *Plff. in Err.*,

v.

PENROSE A. McCLAIN.

(See S. C. Reporter's ed. 113, 114.)

War revenue act—taxing legacy or inheritance—affirmance without prejudice.

An affirmance of a judgment sustaining the constitutionality of the war revenue act of June 13, 1898, when no other question was raised by the plaintiff in error, may be made without prejudice to his right to relief as to so much of the tax, if any, as may have arisen from the wrong interpretation of the statute, where the officers charged with its administration have adopted and enforced an unsound interpretation of the statute, by which an excessive amount of tax has been imposed.

[No. 451.]

Argued December 5, 6, 7, 1899. Decided May 14, 1900.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of the defendant in an action against a collector of internal revenue. *Affirmed.*

The facts are stated in the opinion.

Mr. Richard C. Dale argued the cause and, with *Messrs. Samuel Dickson* and *John C. Bullitt*, filed a brief for plaintiff in error.

Solicitor General Richards argued the cause and filed a brief for defendant in error.

[113] **Mr. Justice White* delivered the opinion of the court:

This action was begun in a court of common pleas for the county of Philadelphia, state of Pennsylvania, to recover from the defendant, a collector of internal revenue, the sum of \$168.75, with interest, being the amount of an assessment made by the defendant under the authority of §§ 29 and 30 of the war revenue act of June 13, 1898, which we have just considered. The statement of claim filed on behalf of the plaintiff contained an averment of the amount of the tax paid without any particular description of the mode in which it had been levied. It was averred that the payment of the tax had been made under protest, and because of threats to distrain, etc. It was also further stated that an application for refunding had been refused, and judgment was prayed for the amount of the tax. The demand was based solely on the ground of the unconstitutionality of the statute, which was asserted to ex-

[114] ist because the tax was direct *and had not

been apportioned, and, if not direct, was wanting in uniformity.

The cause was removed into the circuit court of the United States for the eastern district of Pennsylvania. The defendant demurred on the ground that no cause of action was stated, and the demurrer was sustained. A judgment having been entered in favor of the defendant, the present writ of error was prosecuted.

The record contains the protest made at the time of the payment of the tax, and the petition for refunding. Both of these documents disclose that the sole ground urged against the assessment and collection of the tax was the unconstitutionality of the statute in the particulars above mentioned. This constitutional objection, as we have already said, was the only ground alleged in the statement of the case. The assignment of errors here made also confines the issue solely to the constitutional questions already referred to. There is nothing in the record to show the amount of the estate, the legacies or distributive shares therein, or upon what basis the collector proceeded in assessing the tax. It contains, therefore, nothing from which it can be said that, if the law under which the tax was laid be constitutional, an excessive tax was imposed. In *Knowlton v. Moore*, No. 387 of this term, just decided (178 U. S. 41, ante, 969, 20 Sup. Ct. Rep. 747), it was held that the law in question was constitutional. As, however, the interpretation of the statute which was held to be unsound in No. 387 was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction may have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to relief as to so much of the tax, if any, as may have arisen from the wrong interpretation of the statute above referred to, be not foreclosed by our judgment.

Judgment affirmed, without prejudice to the right to any such relief.

*HARRY PLUMBER, as Executor of the [115] Last Will and Testament of Joseph Plumber, *Plff. in Err.*,

v.

BIRD S. COLER, Comptroller of the City of New York.

(See S. C. Reporter's ed. 115-139.)

Inheritance tax law—exemption of United States bonds—state power to regulate succession to property of decedent—impairment by state of power of government to borrow money.

1. A legacy of United States bonds is not ex-

NOTE.—As to taxes on successions and collateral inheritances—see *Re Howe* (N. Y.) 2 L. R. A. 825, and note; *Wallace v. Myers* (C. C. S. D. N. Y.) 4 L. R. A. 171, and note; *Com. v. Ferguson* (Pa.) 10 L. R. A. 240, and note; *Re Romaine* (N. Y.) 12 L. R. A. 401, and note. And see note to *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

empted from the inheritance tax laws of a state by the provisions of the act of Congress of July 14, 1870, and the declaration on the face of the bonds issued thereunder, exempting them from taxation in any form by or under state authority, since the inheritance tax is not imposed on the bonds, but on the privilege of acquiring property by will or inheritance, which is a right and privilege created and regulated by the state.

2. The right of an individual citizen and resident of the state to direct the descent of his property by will or permit its descent to be regulated by the statute, as well as the right to receive the property of his testator or ancestor as legatee, devisee, or heir, is derived from and regulated by the state.
3. The impairment of the borrowing power of the government as the remote effect of a state statute imposing a tax upon the transfer of a decedent's property, when the statute is applied to property consisting of United States bonds, is not sufficient to render such statute unconstitutional.

[No. 489.]

Argued February 27, 28, 1900. Decided May 14, 1900.

IN ERROR to the Surrogate's Court of the County of New York, State of New York, to review a decision sustaining an inheritance tax law. *Affirmed.*

For report of case in Surrogate's Court, see 30 Misc. 19, 62 N. Y. Supp. 1024.

Statement by Mr. Justice **Shiras**:

- [115] *Joseph Plummer, a citizen and resident of New York, died October 28, 1898, leaving a last will whereby he bequeathed to Harry Plummer, his executor, \$40,000 in United States bonds, issued under the funding act of 1870, in trust, to hold the same during the lifetime of Ella Plummer Brown, daughter of the testator, and to pay the income thereof to her during her life, and at her death to divide the same between and amongst her issue then living.

The value of this life interest was computed by the appraisers at the sum of \$16,120, and a tax of \$161.20 was imposed thereon by the surrogate of the county of New York. From this appraisal and the order imposing the tax an appeal was taken to the surrogate's court of the county and state of New York, where the following stipulation was filed:

- "It is stipulated and agreed by and between the attorneys for the respective parties to the above-entitled proceedings that [116] *the \$40,000 in amount at par of bonds of the United States of America, of which the said Joseph Plummer died possessed, and upon the interest in which of Ella Plummer Brown a tax of \$161.20 was fixed, assessed, and determined by the order appealed from consist of 4 per cent bonds issued in the year 1877 and due in the year 1907, under and by virtue of and pursuant to the statute of the United States, passed July 14, 1870, entitled 'An Act to Authorize the Refunding of the National Debt,' which authorized the Secretary of the Treasury, among other things, to issue various classes of bonds in the sums therein mentioned, including 'a sum or sums not exceeding in the aggregate 178 U. S.

one thousand million dollars of like bonds, . . . payable at the pleasure of the United States after thirty years from the date of their issue, and bearing interest at the rate of four per cent per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal, or local authority; and the said bonds shall have set forth and expressed upon their face the above-specified conditions;' and that pursuant to said statute there is set forth on the face of each of said bonds the following clause, that is to say: 'The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal, or local authority.'"

On December 22, 1899, the surrogate's court affirmed the appraisal and the order imposing a tax. Thereupon Harry Plummer, executor, appealed to the appellate division of the supreme court of the state of New York, which court on January 5, 1900, affirmed the order of the surrogate and the decree of the surrogate's court. From this decree of the appellate division of the supreme court an appeal was taken to the court of appeals of the state of New York, where, on January 8, 1900, the proceedings and order of the surrogate and the decree of the appellate division were affirmed.

In the notice of appeal to the surrogate's court and in that of the appeal to the court of appeals the grounds of appeal were stated to be the invalidity of the statute of New York purporting *to impose a tax upon a [117] transfer by legacy of bonds of the United States, and the invalidity of the statute of the state of New York and of the authority exercised thereunder by the appraiser and the surrogate, in so far as United States bonds were concerned. And the appellant specially set up and claimed a title, right, privilege, and immunity under the Constitution of the United States, and under the statute of the United States in respect to the exemption of said bonds from state taxation in any form.

On January 9, 1900, a writ of error was sued out from this court.

Messrs. William V. Rowe and Treadwell Cleveland argued the cause and, with **Messrs. Evarts, Choate, & Beaman**, filed a brief for plaintiff in error:

Congress, in providing that the full amount of principal and interest on the bonds shall be paid without diminution by state taxation, has, as in the case of the exercise of other Federal powers,—as, for instance, in the establishment of salaries of all Federal officers, or in enactments under the power to regulate commerce,—created a supreme law of the land, absolutely binding as a prohibition upon the states.

Dobbins v. Erie County Comrs. 16 Pet. 435, 10 L. ed. 1022; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 102, 39 L. ed. 911, 15 Sup. Ct. Rep. 802.

common law of England, were part of the exemption of these bonds by statute from state taxation, cannot be burdened by the states.

Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

The tax in question is unconstitutional because impairing and burdening the borrowing power of the United States.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *People ex rel. Leonard v. Tax & A. Comrs.* 90 N. Y. 63.

It makes no difference however inconsiderable may be the amount of the tax burden imposed by the state tax.

Weston v. Charleston, 2 Pet. 468, 7 L. ed. 488.

It makes no difference in respect of the unconstitutionality of the imposition of a tax by a state upon, or in respect of, the bonds or the loans of the United States, that the tax is not at all discriminating, but is merely the inclusion of United States bonds in a general tax upon taxpayers at precisely the same rate imposed upon other property.

New York ex rel. Bank of Commerce v. New York City & County Tax Comrs. 2 Black, 629, 17 L. ed. 451.

The provision for payment to assigns has always been held to include devisees, legatees, and executors or administrators, and every species of assignee, whether voluntary or by act of law.

Spencer's Case, 5 Coke, 16; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 10 Best & S. 1; *Titley v. Wolstenholme*, 7 Beav. 425; *Hamilton v. Kingsbury*, 15 Blatchf. 64, Fed. Cas. No. 5,984; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Thurber v. Carpenter*, 18 R. I. 782, 31 Atl. 5; *Douglas v. Hennessy*, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583; *Cumberland v. Graves*, 7 N. Y. 305.

The right to dispose of personal property by will was a right existing at common law.

1 Chitty's Bl. pt. 2, pp. 490 *et seq.*

A legacy is a bequest or gift of goods and chattels by testament; and the person to whom it is given is styled the legatee; which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others.

1 Chitty's Bl. pt. 2, p. 512.

The rights and privileges of testators and legatees in respect of disposing of personal property by will, and receiving the benefit of such disposition as that existing in the common law of England, were part of the common law of the colony of New York so long as it remained a colony.

1 Kent, Com. 472, 473.

Up to the 1st day of January, 1830, the right to dispose of personal property by will in the state of New York rested upon the common law, and upon nothing else.

Watts v. Public Administrator, 4 Wend. 168.

The only provisions of the Revised Statutes applicable to this subject constitute an

affirmance of the common-law right to dispose of personal property by will, with the addition of some new restrictions imposed upon its exercise in respect of matters of form only, and not in respect of the power to make such a will.

2 N. Y. Rev. Stat. '60, chap. 6, art. 2, § 21; chap. 6, art. 3, § 40.

A correlative of the right to acquire and use property during life is the right to dispose of it at death.

The franchise-tax cases are inapplicable in respect to exactions by the state upon natural persons, whose creator it is not, and who are subject to no such despotic or absolute authority as are corporations created by it.

So far as respects the question at issue, the opinion in *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, is merely a *dictum* which, when uttered, had no reference or intended reference to any question of taxation of the borrowing power of the United States under the Constitution.

The only question involved in *Magor v. Grima*, 8 How. 493, 12 L. ed. 1170, related to the validity of the Louisiana act imposing a succession tax on aliens.

We confidently submit to the court that it is entirely plain that the legislative act of the state of New York, under which this tax is claimed, is a taxing act, and nothing else. That is all it pretends or purports to be, and it, and similar statutes, have been repeatedly so treated and construed.

Re McPherson, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245; *Cope's Estate*, 191 Pa. 1, 45 L. R. A. 316, 43 Atl. 79.

A state cannot impose a tax upon a privilege granted by itself, where such tax is an interference with a constitutional right or power of the Federal government.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *McCall v. California*, 130 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

Messrs. Jabish Holmes, Jr., and Edgar J. Levey argued the cause and filed a brief for defendant in error:

The right to take property by devise or descent is the creature of the law of the state, and not a natural right; a privilege, and therefore the authority which confers it may impose conditions upon it.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, Affirming 141 N. Y. 479, 36 N. E. 505; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The courts of New York have uniformly construed its transfer law as not imposing a tax on property, but on the value of the privilege of succession created by the state.

Re Sherman, 153 N. Y. 5, 46 N. E. 1032; *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *Re Hoffman*, 143 N. Y. 329, 38 N. E. 311; *Re Bronson*, 150 N. Y. 6, 34 L. R. A. 238, 44 N. E. 707; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Davis*, 149 N. Y. 546, 44 N. E. 185.

The same construction has uniformly been given by other states to similar inheritance laws.

Re Wilmerding, 117 Cal. 281, 49 Pac. 181; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *Kochersperger v. Drake*, 167 Ill. 125, 41 L. R. A. 446, 47 N. E. 321.

That the right of a person to take by inheritance or will is a favor conferred by a state, and is subject to its power of regulation, is conceded in the following additional cases:

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Cooley*, Const. Lim. 5th ed. p. 440; *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493; 2 Bl. Com. 211; *Lavery v. Egan*, 143 Mass. 392, 9 N. E. 747; *Brettun v. Fox*, 100 Mass. 234, 97 Am. Dec. 95; *Gillis v. Weller*, 10 Ohio, 464; *Sturgis v. Ewing*, 18 Ill. 176; *Edwards v. Pope*, 4 Ill. 465.

Every case that can be found, where this question is raised, has decided that United States bonds can be appraised to determine the value of the privilege of succession, in order to fix the tax or bonus to be paid the state for the privilege it confers.

Strode v. Com. 52 Pa. 181; *Clymer v. Com.* 52 Pa. 185; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032; *Re Whiting*, 150 N. Y. 31, 34 L. R. A. 232, 44 N. E. 715; *Re Whiting*, 2 App. Div. 590, 38 N. Y. Supp. 131; *Carver's Estate*, 4 Misc. 592, 25 N. Y. Supp. 991; *Re Tuigg*, 2 Connoly, 633, 15 N. Y. Supp. 548; *United States v. Perkins*, 163 U. S. 629, 41 L. ed. 288, 16 Sup. Ct. Rep. 1073; *Re Howard*, 5 Dem. 483.

The amount of capital of a foreign corporation, invested in imported articles in their original packages, can be included in assessing the tax upon a foreign corporation doing business in the state of New York, where the tax is based upon the amount of capital stock employed in this state, although the Supreme Court has repeatedly held that no state can impose a tax, directly or indirectly.

upon imported articles in their original packages.

New York v. Roberts, 171 U. S. 658, *sub nom. New York ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, Affirming 149 N. Y. 608, 44 N. E. 1127, 91 Hun, 158, 36 N. Y. Supp. 368.

The privilege of succession granted by a state is more like the grant of a franchise to a corporation than anything else. The principle of cases where United States bonds have been appraised in determining the value of franchises or privileges conferred by the state cannot be distinguished from that of the case at bar.

Monroe County Sav. Bank v. Rochester, 37 N. Y. 365; *People v. Home Ins. Co.* 92 N. Y. 328, Affirmed in 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 631, 18 L. ed. 913.

The same principle is illustrated by the cases in the United States Supreme Court upholding a tax upon the value of bank shares.

Van Allen v. The Assessors, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229; *New York v. The Commissioners*, 4 Wall. 244, *sub nom. New York ex rel. Duer v. New York City & County Tax & A. Comrs.* 18 L. ed. 344.

The possibility that the borrowing power of the government may be affected by subjecting government bonds to the transfer tax laws is too remote to be considered.

Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

*Mr. Justice Shiras delivered the opinion [117] of the court:

In this case we are called upon to consider the question whether, under the inheritance tax laws of a state, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.

It is not open to question that a state cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce v. Commissioners of Taxes*, 2 Black, 620, 17 L. ed. 451; *Home Ins. Co. v. New York*, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.

So, likewise, it is settled law that bonds issued by a state, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 583, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673.

The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice Nelson, in *The Collector v. Day*, 11 Wall. 113, 124, *sub nom. Buffington v. Day*, 20 L. ed. 122, 126: "The general government and the states, although both exist within the same territorial limits,

are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states;" and, as was said by Mr. Chief Justice Fuller, in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 537, 39 L. ed. 763, 15 Sup. Ct. Rep. 673: "As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state."

As, then, for the reasons advanced and applied in the previous cases, it is not within the power of a state to tax Federal securities, it was not necessary for Congress, in order to secure such immunity, to declare in terms, in the act of July 14, 1870, and on the face of the bonds issued thereunder, that the principal and interest were exempt from taxation in any form by or under state, municipal, or local authority. Such a declaration did not operate to withdraw from the states any power or right previously possessed, nor to create, as between the states and the holders of the bonds, any contractual relation. It doubtless may be regarded as a legitimate mode of advising purchasers of such bonds of their immunity from state taxation, and of manifesting that Congress did not intend to waive this immunity, as it had done in the case of national banks, which are admittedly governmental instrumentalities.

With these concessions made, we are brought to the pivotal question in the case, and that question is thus presented in the second point discussed in the brief filed for the plaintiff in error. "If the question of the right of the state to impose the tax now in question be considered merely with reference to the inherent lack of power of the state to impose such a tax, because of the provisions of the Constitution of the United States bearing upon *that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States." Or, as stated elsewhere in the brief: "The states have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the state."

It will be observed that these propositions concede that the tax law of the state of New York in question does not expressly, or by

necessary implication, propose to tax Federal securities. It is only when and if, in applying that law to the estates of decedents, such estates are found to consist wholly or partly of United States bonds, that the reasoning of the plaintiff in error, assailing the validity of the statute, can have any application. And the contention is that individuals, in forming or creating their estates, will or may be deterred from offering terms, in the purchasing of such bonds, as favorable as they otherwise might do, if they are bound to know that such portion of their estates as consists of such bonds is to be included, equally with other property, in the assessment of an inheritance tax.

Before addressing ourselves directly to the discussion of these propositions we shall briefly review the decisions in whose light they must be determined.

And, first, what is the voice of the state courts?

A detailed examination of the state decisions is unnecessary, because it is admitted in the brief of the plaintiff in error that in many, if not in most, of the states of the Union inheritance or succession tax laws, similar to the New York statute in question, are and have been long in operation, and that the question of their validity, in cases like the present, has always heretofore been determined by the state courts against the United States. We cannot, however, accede to the suggestion in the brief that *the state decisions are entitled to but little consideration, for the reason that "they are the determinations of a distinct sovereignty, adjudicating upon the rights of the nation, and naturally jealous of their own." Undoubtedly, in a case like the present, the national law is paramount, and its final exposition is for this court. Still, for reasons too obvious to require statement, the decisions of the state courts, particularly if they are uniform and concur in their reasoning, are worthy of respectful consideration, even if the question be, at last, a Federal one.

Without attempting a rehearsal of the state decisions, we may profitably examine the reasons and conclusions of several of the leading state courts.

A statute of Massachusetts of 1802 provided that every institution for savings, incorporated under the laws of that state, should pay a tax on account of its depositors, on the average amount of its deposits. The Provident Institution of Savings, a corporation having no property except its deposits and the property in which they were invested, and authorized by the general statute of Massachusetts to receive money on deposit and to invest its deposits in securities of the United States, had on deposit on the 1st day of May, 1865, \$8,047,652—of which \$1,327,000 stood invested in public funds of the United States, exempt by law of the United States from taxation under state authority. The company declined to pay that portion of the tax on its property invested in United States bonds. On suit brought by the commonwealth to recover the same, the supreme judicial court of Massachusetts, regarding the

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[119] States bearing upon *that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States." Or, as stated elsewhere in the brief: "The states have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the state."

tax as one on franchise, and not on property, held the tax to be lawful. *Com. v. Provident Inst. for Savings*, 12 Allen, 312.

[121] By a subsequent statute of 1864, chap. 208, corporations having capital stock divided into shares were required to pay a tax of a certain percentage upon "the excess of the market value" of all such stock over the value of its real estate and machinery. The Hamilton Manufacturing Company refused to pay the tax upon that portion of its property which was invested in United States securities, because, by the act of Congress authorizing their issue, they were exempt from taxation by state authority. *It was held by the supreme judicial court of Massachusetts that the tax was to be regarded as a tax on the franchise and privileges of the corporation, and was lawful so far as related to Federal securities. *Com. v. Hamilton Mfg. Co.* 12 Allen, 300.

The legislature of Connecticut in 1863 enacted that the savings banks in the state should annually pay to the treasurer of the state a sum equal to $\frac{3}{4}$ of 1 per cent on the total amount of deposits. The "Society for Savings," a corporation of Connecticut, refused to pay the tax upon that portion of its deposits which was invested in United States bonds declared by act of Congress to be exempt from taxation by state authority.

On a suit brought by Coite, treasurer of the state, to recover the tax thus withheld, the supreme court of Connecticut decided that the tax in question was not a tax on property, but on the corporation as such, and rendered judgment accordingly for the plaintiff. *Coite v. Society for Savings*, 32 Conn. 173.

In Pennsylvania it has been repeatedly held that the collateral inheritance law of that state, imposing a tax upon the total amount of the estates of decedents, is valid, although the estate may consist in whole or in part of United States bonds; and this upon the principle that what is called a collateral inheritance tax is a bonus, exacted from the collateral kindred and others, as the conditions on which they may be admitted to take the estate left by a deceased relative or testator; that the estate does not belong to them, except as a right to it is conferred by the state; that the right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the state sees fit to impose. *Strode v. Com.* 52 Pa. 181; *Clymer v. Com.* 52 Pa. 186.

In Virginia the highest court of the state has construed a similar statute as imposing the tax, not upon the property, but upon the privilege of acquiring it by will or under the intestate laws. *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Miller v. Com.* 27 Gratt. 110.

[122] *The supreme court of Illinois has held valid a statute of that state, entitled "An Act to Tax Gifts, Legacies, and Inheritances in Certain Cases, and to Provide for the Collection of the Same." Ill. Rev. Stat. 1895, chap. 120. The constitutionality of the act 178 U. S.

was denied, because of the alleged want of reasonableness in its classification of those subject to the tax and the want of equality in the amounts imposed. But the supreme court held that an inheritance tax is a tax, not upon property, but on the succession, and that the right to take property by devise or descent is the creature of the law, a privilege, and that the authority which confers the privilege may impose conditions upon it. *Kochersperger v. Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321.

By an act of the legislature of New York (Laws 1881, chap. 361, § 3), it was enacted that "every corporation, joint-stock company, or association whatever, now or hereafter incorporated or organized under any law of this state, . . . shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state, annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company, or association during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per centum of dividends so made or declared," etc.

The Home Insurance Company, a corporation of the state of New York, having a capital stock of \$3,000,000, declared a dividend of 10 per cent for the year 1881. During the year 1881 the company had part of its capital invested in United States bonds, exempt from state taxation. The amount so invested changed from \$3,000,000 to \$1,940,000 in such bonds during the year 1881. The company, in tendering payment of its tax, claimed that so much of the laws of New York as required a tax to be paid upon the capital stock of the company, without deducting from the amount so to be paid that part invested in bonds of the United States, was unconstitutional and void. In an action brought to recover such unpaid portion of the tax, the supreme court of New York, at general term, adjudged *that [123] the company was liable to pay such tax; and this judgment was affirmed by the court of appeals. The view of those courts was that, the tax being upon the franchise of the company, it mattered not how its capital stock or property may be invested, whether in United States securities or otherwise. *People v. Home Ins. Co.* 92 N. Y. 328.

In *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365, it was said:

"It is true that where a tax is laid upon the property of an individual or a corporation, so much of their property as is vested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed. It is, however, argued with great ingenuity and skill that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their money in United States bonds.

their franchises and privileges cannot be taxed by the state. The power thus to invest their moneys, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be pretended that the state would violate any obligation resulting from the power of the United States to borrow money, if the law conferring the power upon the plaintiffs to invest their moneys in United States stocks and bonds were repealed. The state is under no obligation, express or implied, to legislate to enhance the credit of the general government, and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position that a franchise granted by the bounty of the state is not taxable, because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue that, because such a franchise enhances the credit of the United States, therefore the legislature could not repeal the law granting the franchise without violating its constitutional obligation. Suppose the legislature had limited the amount in which the plaintiffs

[124]*could invest its moneys in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money. It must therefore be regarded as sound doctrine to hold that the state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the state. If the grantee accepts the boon it must bear the burden."

In *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032, it was said by the court of appeals of New York, per Chief Judge Andrews, that—

"This court has not been called upon to consider the question of the power of the state to prescribe that in ascertaining the value of the property of a decedent for the purpose of fixing the tax, under the collateral inheritance or transfer tax laws, the value of Federal securities owned by the decedent shall be included. But we apprehend that the existence of the power cannot be denied upon reason or authority. The tax imposed is not, in a proper sense, a tax upon the property passing by will, or under the statutes of descents or distribution. It is a tax upon the right of transfer by will, or under the intestate law of the state. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will, or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to a property of an intestate, is not material. The so-called tax is an exaction made by the state in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law, and if the property con-

sists of government securities, the transferee derives his right to take them as he does his right to take any other property of the decedent, under the laws of the state, and the state by these statutes makes the right subject to the burden imposed."

And in the case in hand, the very matter of complaint is that the courts of the state of New York held that, under the laws of that state, an inheritance tax can be validly assessed *against the entire estate of a decedent, although composed in greater part of United States bonds; and the language of the surrogate, affirmed by the court of appeals, was as follows:

"It is almost unnecessary to state that the theory on which the courts have held this kind of security taxable is that the tax is not upon the bonds themselves, but upon the transfer thereof. This distinction is firmly established in this state. See, besides the *Sherman Case*, *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *Re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707; and it seems to have been recognized in the Supreme Court of the United States, *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, in which *Re Merriam* was affirmed."

The decisions of the state courts may be summarized by the statement that it is competent for the legislature of a state to impose a tax upon the franchises of the corporations of the state, and upon the estates of decedents resident therein, and in assessing such taxes and as a basis to establish the amount of such assessments, to include the entire property of such corporations and decedents, although composed, in whole or in part, of United States bonds; and that the theory upon which this can be done consistently with the Constitution and laws of the United States is that such taxes are to be regarded as imposed, not upon the property, the amount of which is referred to as regulating the amount of the taxes, but upon franchises and privileges derived from the state.

Let us now proceed to a similar survey of the Federal authorities on this subject.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168, was a case where, by the law of Louisiana, a tax of 10 per cent was imposed on legacies, when the legatee is neither a citizen of the United States nor domiciled in that state, and the executor of the deceased or other person charged with the administration of the estate was directed to pay the tax to the state treasurer. Felix Grima was the executor of John Mager, and retained the amount of the tax in order to pay it over as the law directed. Suit was brought by a legatee to recover it, upon the ground that the act of Louisiana was repugnant to the Constitution of the United States. The validity of the act was sustained by *the state courts, and the

[126] cause was brought to this court. The judgment of the state courts was here affirmed, and it was said, in the opinion delivered by Chief Justice Taney:

"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property,

real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of 10 per cent for the use of the state."

In *Van Allen v. The Assessors*, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229, it was held that it was competent for Congress to authorize the states to tax the shares of banking associations organized under the act of June 3, 1864, without regard to the fact that a part or the whole of the capital of such association was invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under state authority." This decision has ever since been acted upon, and its authority has never been questioned by any court, and from it we learn that there is no undeviating policy that, at all times and in all circumstances, the tax system of the states shall not extend to Federal securities.

The next cases to be noted are: *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; and *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904.

[127] In these cases this court affirmed the supreme courts of Connecticut and Massachusetts in holding that state taxes may be imposed, the amount of which may be determined by the aggregate *amount of the property or capital stock of banking and manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority.

As we have already seen, when referring to the state decisions, the reasoning upon which the state courts proceeded in the case of corporations was that such taxes were to be deemed as laid, not upon the bonds as property, but upon the franchise to do business as a corporation or association derived from the state. This reasoning was approved by this court; and it may be observed in passing that, as appears in the reports of the arguments of counsel, the contention so strongly pressed in the present case, namely, that under no form can Federal securities be practically rendered by state legislation less valuable, was fully argued. See also the case of *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99.

Next worthy of notice is the case of *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593. It came here on 178 U. S.

error to the supreme court of the state of New York, whose judgment had been affirmed by the court of appeals, and was twice argued. The question considered was whether a statute of the state of New York was valid in respect to imposing a tax upon a New York corporation, measured and regulated by the amount of its annual dividends, where those dividends were partly composed of interest of United States bonds owned by the corporation.

As we have heretofore stated, the state courts answered this question in the affirmative, basing their decision upon the proposition that the tax was imposed as a tax upon corporate franchises or privileges, and that such a tax was not invalidated by the circumstance that the measure of its amount was fixed by the amount of the annual dividends of the company partly derived from the interest of United States bonds. 92 N. Y. 328.

In this court the question was elaborately argued, as may be seen in the first report of the case in 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385; and it was again contended that the case fell within the principle of public policy that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations *of the instrumentalities of the [128] national government, and also that the tax in question was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The reasoning of the state court was substantially approved and their judgment sustaining the validity of the state statute was affirmed. Some of the observations of the opinion of the court, delivered by Mr. Justice Field, may be appropriately quoted:

"Looking now at the tax in this case, . . . we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statutes designate it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension

of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be *ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property, as sources of revenue, which is not exempt from taxation. . . . The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of other states. From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the state over the corporate franchise and the conditions upon which it shall be exercised is as ample and plenary in the one case as in the other."

And, after citing and commenting upon the previous cases from Connecticut and Massachusetts, the court said: "In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

In *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax under the law of the state of New York.

The facts of the case were that one William W. Merriam, a resident of the state of New York, left a last will and testament, by which he devised and bequeathed all his estate, real and personal, to the United States. [130] The surrogate assessed an *inheritance tax of \$3,964.23 upon the personal property included in said bequest. Upon appeal to the general term of the supreme court the order of the surrogate's court was affirmed, and

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upon a further appeal to the court of appeals the judgment of the supreme court was affirmed, and the cause was brought to this court.

It was contended that, upon principle, property of the United States was not subject to state taxation; but it was held by this court, affirming the judgment of the courts below, that the tax was not open to the objection that it was an attempt to tax the property of the United States, since the tax was imposed upon the legacy before it reached the hands of the legatee; that the legacy became the property of the United States after it had suffered a diminution to the amount of the tax, and that it was only upon such a condition that the legislature assented to a bequest of it.

The reasoning of the court may be manifested by the following excerpts from the opinion delivered by Mr. Justice Brown:

"Though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good. In this view the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases: a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus, the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. This was the view taken of a similar *tax by [131] the court of appeals of Maryland in *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82, in which the court observed:

"Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property . . . to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitations named, are, consequently, wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our law should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that

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there shall be paid out of such property a tax of 2½ per cent into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'

"That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other states (*Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096), in which it said . . . that 'the effect of this special tax is to take from the property a portion, or percentage of it, for the use of the state, and I think it quite immaterial whether the tax can be precisely classified with the taxation of property or not. It is not a tax upon persons.' *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Schoolfield v. Lynchburg*, 78 Va. 366; *Strode v. Com.* 52 Pa. 181; *Re Cullum*, 145 N. Y. 593, 40 N. E. 165. In this last case, as well as in *Wallace v. Myers*, 38 Fed. Rep. 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the estate of the decedent, or the privilege of acquiring property by inheritance. [132] **Eyre v. Jacob*, 14 Gratt. 422; *Dos Passos*, Inheritance Tax Law, chap. 2, § 8, and cases cited.

"Such a tax was also held by this court to be free from any constitutional objection in *Mager v. Grima*, 8 How. 490, 493, 12 L. ed. 1168, 1170, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than the exercise of the power which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will or testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. . . . If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.' To the same effect is *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

"We think it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

One of the propositions recognized in that case applicable to the present one is that a state tax that would be invalid if imposed directly on a legacy to the United States may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the government—the theory of such a view apparently being that the property rights of the government do not attach until 178 U. S.

after the tax has been paid, or until the condition imposed by the tax law of the state has been complied with. Such is also the case in respect to the legacy to Ella Plummer Brown, as the statute in question distinctly makes it the duty of the executor to pay the amount of the tax before the legacy passes to the legatee.

In *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, an effort was made to have a tax imposed against corporations based upon "capital employed within the state" declared invalid, in that particular case, because a portion of such capital [133] consisted of imported goods in original packages; and this court said:

"Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the state under the doctrine of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, the validity of the inheritance tax law of Illinois was assailed because of inequalities and discriminations so great as to amount to a deprivation of property and to a denial of the equal protection of the laws. The law in question had been upheld by the supreme court of the state in the case of *Kochersperger v. Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321, hereinbefore referred to.

This court held that the law was one within the competency of the legislature of the state to make, and that it did not conflict in any wise with the provisions of the Constitution of the United States. In the course of the discussion, Mr. Justice McKenna, who delivered the opinion of the court, said:

"The constitutionality of the [inheritance] taxes has been declared, and the principles upon which they are based explained, in *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Strode v. Com.* 52 Pa. 181; . . . *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; . . . *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; . . . and in *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99.

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural *right—a privilege; and therefore [134]

the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

In closing our review of the Federal decisions the case of *Wallace v. Myers*, 38 Fed. Rep. 184, may be properly referred to,—especially as it has been cited with approval by this court in *United States v. Perkins*, 163 U. S. 625, 629, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073.

The question involved was the very one we are now considering, namely, the validity of the inheritance tax law of the state of New York when applied to a legacy consisting of United States bonds. In his opinion Circuit Judge Wallace reviewed many of the state and Federal decisions heretofore referred to, and reached the conclusion that the tax was to be regarded as imposed, not on the bonds, but upon the privilege of acquiring property by will or inheritance, and that where the property of the decedent included United States bonds, the tax may be assessed upon the basis of their value.

We think the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

Passing from the authorities, let us briefly consider some of the arguments advanced in the able and interesting brief filed in behalf of the plaintiff in error.

The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds "shall be exempt from taxation in *any form* [135] by or under state, municipal, or local "authority;" and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation, even when composed in whole or in part of United States bonds, must be overruled. Plainly in those cases, as in this, there was taxation *in a form*, and in them, as in this, the amount of the tax was reached by including in the assessment United States bonds.

So that we return to the authorities, by which it has been established that a tax up-
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on a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax, not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the state.

The second proposition relied on, namely, that to permit taxation of the character we are considering would operate as a burden upon the borrowing power of the United States, cannot be so readily disposed of. Still, we think some observations can be made which will show that the mischief which it is claimed will follow if such statutes be sustained as valid is by no means so great or important as supposed.

And here, again, it is obvious that to affirm the second proposition will require an overruling of our previous cases. For, on principle, if a tax on inheritances, composed in whole or in part of Federal securities, would, by deterring individuals from investing therein, and, by thus lessening the demand for such securities, be regarded as therefore unlawful, it must likewise follow that, for the same reasons, a tax upon corporate franchises measured by the value of the corporation's property, composed in whole or in part of United States bonds, would also be unlawful.

To escape from this conclusion, it is contended, in the argument of the plaintiff in error, that, conceding that such taxes "may be [136] valid as imposed on corporate franchises, and permitting our decisions in such cases to stand, yet that the case of the estates of decedents is different; that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States on terms as favorable as if we were to hold otherwise.

This is only to state the proposition over again. For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might injuriously affect the demand for such securities, it would equally be our duty to condemn all state laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds.

In fact, the mischief, if it exists at all and is not merely fanciful, might be supposed to be much greater in the case of state laws taxing franchises than the case of taxing the estates of decedents. So small now is the income derivable from Federal securities that few individuals, and those only of great wealth, can afford to invest in them; and the demand for them is mostly confined to banking associations and to large trading and manufacturing companies which invest their surplus in securities that can be readily and quickly converted into cash. Moreover, no inconsiderable portion of the United States loans is taken and held, as everyone knows,

in foreign countries, where doubtless it is subjected to municipal taxation.

While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations, and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by state taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the state of New York.

[137] It is further contended that there is a vital difference between the individual and the corporation; that the individual exists *and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the state and dependent upon the state for the continuance of its existence, and subject to regulations and to the imposition of burdens upon it by the state, not at all applicable to natural persons.

Without undertaking to go beyond what has already been decided by this court in *Mauger v. Grima*, 8 How. 490, 12 L. ed. 1168; in *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99, and in *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee, or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the state, and we are unable to perceive any sound distinction that can be drawn between the power of the state in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by state taxation, is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance.

Again, it is urged that the pecuniary amount of the state tax which is to be set aside is of no legal consequence; that any amount, however inconsiderable, is an interference with the constitutional rights of the United States, and must therefore be annulled by the judgment of this court. Of course, nobody would attempt to affirm that an unconstitutional tax could be sustained by claiming that, in a particular case, the tax was insignificant in amount.

[138] But when the effort is made, as is the case here, to establish the unconstitutional character of a particular tax by claiming *that its remote effect will be to impair the borrowing power of the government, courts, in overturning statutes long established and

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within the ordinary sphere of state legislation, ought to have something more substantial to act upon than mere conjecture. The injury ought to be obvious and appreciable. It may be opportune to mention that, even while we have been considering this case, the United States government has negotiated a public loan of large amount at a lower rate of interest than ever before known. From this it may be permissible to infer that the existence of legislation, whether state or Federal, including Federal securities as part of the mass of private property subject to inheritance taxes, has not practically injured or impaired the borrowing power of the government.

The contention of the plaintiff in error that taxation of the estates of decedents, in any form, and however slight, is invalid, if United States bonds are included in the appraisement, seems to be unreasonable. Suppose a decedent's estate consisted wholly of United States securities, could it reasonably be claimed that the charges and expenses of administration, imposed under the laws of the state, would not be payable out of the funds of the estate? If the estate were a small one, such expenses might require the application of all the Federal securities. If the estate were a large one, the expenses attendant upon administration would be proportionately large, to be raised out of the Federal securities. It is not sufficient to say that such expenses are in the nature of statutory debts, and that the question of the exemption of United States bonds cannot arise until after the debts of the estate shall have been paid. For, after all, what is an inheritance tax but a debt exacted by the state for protection afforded during the lifetime of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the state, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the state. Nor can it be readily supposed that such obligations can be evaded or defeated by the particular form in which the property of the decedent was invested.

*Upon the whole, we think that the decision of the courts below was correct, and the judgment is therefore affirmed. [139]

Mr. Justice **White** dissents.

Mr. Justice **Peckham** took no part in the decision.

GEORGE T. MURDOCK, as Executor of
Jane H. Sherman, Deceased, *Plff. in Err.*,
v.

JOHN G. WARD, United States Collector of
Internal Revenue.

(See S. C. Reporter's ed. 139-149.)

War revenue act—tax on legacy or inheritance—exemption of United States bonds.

1. United States bonds included in a legacy or distributive share of a decedent's estate

are not exempted from the tax on the transmission of such property, imposed by the war revenue act of 1898, §§ 29, 30, by reason of the declaration in the Federal statutes and on the face of the bonds to the effect that they are exempt from taxation, since the tax is not upon the bonds, but on the right of transfer by will or under the intestate law.

2. A judgment dismissing a complaint against an internal revenue collector to recover the amount of a tax alleged to have been unlawfully exacted may be reversed at the cost of the plaintiff in error, although the only contention on his part was that the statute under which the tax was collected was unconstitutional, while the court holds that it was constitutional, where it appears that the tax was computed at an excessive amount by reason of an erroneous construction of the law.

[No. 458.]

Argued December 5, 6, 7, 1899. Decided May 14, 1900.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a decision dismissing a complaint against an internal revenue collector in a suit to recover an amount paid as internal revenue taxes. *Reversed.*

Statement by Mr. Justice Shiras:

- [139] *In October, 1899, George T. Murdock, as executor of the last will and testament of Jane H. Sherman, brought an action in the supreme court of the state of New York against John G. Ward, collector of internal revenue for the fourteenth district of the state of New York, wherein the plaintiff sought to recover the sum of \$36,827.53, which the plaintiff alleged had been unlawfully exacted from him as executor of said estate.

On petition of the defendant the cause was removed into the circuit court of the United States for the southern district of New York.

The complaint contained the following allegations:

"I. Jane H. Sherman, late of the village of Port Henry, in the county of Essex and state of New York, died on or about the 30th day of September, 1898, leaving certain property, and also leaving a last will and testament, in and by which said will this *plaintiff, George T. Murdock, was appointed to be, and by due order of the surrogate of the county of Essex, in the state of New York, to whom jurisdiction in that behalf pertained, he has become and is, the sole executor of the said last will and testament of said Jane H. Sherman.

"II. The plaintiff further alleges and states that the said Jane H. Sherman, deceased, upon her death left a very considerable amount of personal property, amounting to upwards of one million of dollars.

"III. That the defendant, John G. Ward, at all the times mentioned in this complaint, was and he is collector of internal revenue for the fourteenth district of the state of New York, having his office and official place of residence at the city of Albany, in the state of New York.

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"IV. That said John G. Ward, assuming to act as such collector, and assuming and pretending to act under and by virtue of the laws of the United States, which he assumed conferred authority upon him therefor, and particularly under and in pursuance of the provisions of an act of the Congress of the United States commonly known as the 'war revenue law' of June 13, 1898, and being an act to provide ways and means to meet war expenditures, and for other purposes, passed by the Congress of the United States, and becoming a law on the 13th day of June, 1898, did, on or about the 4th day of April, 1899, by force and duress, exact, demand, and collect from this plaintiff and from the estate represented by him as such executor the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents (\$36,827.53) and upon the claim and under the pretext that the same was a lawful assessment as an internal revenue tax upon the estate of said deceased and against this plaintiff, as executor of said deceased, on account of the legacies or distributive shares arising from personal property, being in charge or trust of this plaintiff, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman.

"V. That on or about the 8th day of April, 1899, this plaintiff, under protest, and protesting that he was not, nor was the estate represented by him, liable to pay said tax, involuntarily *and under duress, because of the illegal demand made upon by said defendant, did pay to the said defendant as such collector, as aforesaid, the said sum of \$36,827.53. [141]

"VI. That thereafter, believing the imposition of said tax and its collection to be unlawful, this plaintiff did appeal to the Commissioner of Internal Revenue and to the Treasury Department of the United States of America from the action and decision of said defendant in holding this plaintiff to be liable for the payment of said tax and in collecting the said tax in manner aforesaid, and did state and represent to said Commissioner that the collection of said tax was unlawful, and that the amount thereof should be refunded for the following reasons:

"First. The imposition of said tax was unconstitutional, unlawful, and void.

"Second. The imposition and collection of said tax deprived this deponent of his property and the estate represented by him of its property without due process of law.

"Third. That the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

"Fourth. That the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

"Fifth. That the law under which said tax was imposed denies to this deponent the equal protection of the laws.

"Sixth. The tax so imposed is a direct tax, and is void because not apportioned among the states in proportion to their pop-

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ulation and in accordance with the provisions of the Constitution of the United States.

"Seventh. If said tax is an impost, excise, or duty, the law imposing the same is unconstitutional and void because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States; and

"Eighth. It is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York."

[142] *And this plaintiff did, in and by such appeal, claim that he was entitled to have the sum of money so paid and the amount thereof refunded, and he did then and there ask and demand the return of the same moneys to him, and did appeal from the act of said defendant, as such collector, in imposing said tax and exacting from plaintiff payment of the amount thereof.

"VII. On the 21st day of October, 1899, the said Commissioner of Internal Revenue, and the Treasury Department of the United States, represented by the said Commissioner of Internal Revenue, did disallow the appeal of this plaintiff in the behalf above stated, and did reject the claim of the plaintiff to have refunded the amount of the tax paid as aforesaid.

"VII. A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation; nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding, as executor, as aforesaid, or otherwise, of such bonds and certificates of indebtedness.

"IX. This plaintiff claims and charges that by reason of the premises the amount of said tax has been unlawfully exacted from him as executor of said estate; that each and every of the grounds stated by him in the above-mentioned appeal to the said Commissioner of Internal Revenue states and represents a true and lawful reason why the imposition of said tax is unlawful, and why the said tax should be refunded.

"Wherefore this plaintiff demands judgment against the said defendant for the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents (\$36,827.53) with interest from the 8th day of April, 1899, with the costs of this action."

The defendant, appearing by Henry L. Burnett, United States attorney for the southern district of New York, demurred to the complaint upon the ground that the complaint did not state facts to constitute a cause of action.

[143] *On November 14, 1899, after hearing, the circuit court sustained the demurrer and ordered the complaint to be dismissed, with costs to the defendant. Thereupon a writ of 178 U. S.

error was allowed to the judgment, and the cause was brought to this court.

Mr. Charles E. Patterson argued the cause and, with Mr. Alpheus T. Bulkeley, filed a brief for plaintiff in error.

Messrs. Evarts, Choate, & Beaman, with Messrs. Charles F. Southmayd and William V. Rowe, submitted a brief by leave of court on behalf of the holders of United States bonds.

Mr. John G. Milburn filed a brief for various legatees.

Solicitor General Richards argued the cause and filed a brief for defendant in error.

*Mr. Justice Shiras delivered the opinion [143] of the court:

That the tax imposed under the provisions of the revenue act of June 13, 1898, is a direct tax, and therefore void because not apportioned among the states in proportion to their population; that if not a direct tax, but an impost, excise, or duty, it is void because the tax levied is not uniform throughout the United States; and that it is not within the province of the constitutional power of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York,—are contentions of the plaintiff in error which have been determined against him in the case of *Knowlton v. Moore*, 178 U. S. 41, ante, 969, 20 Sup. Ct. Rep. 747, just decided by this court. The opinion in that case so fully discusses the arguments urged in support of those propositions that their further consideration is unnecessary.

The remaining question is that presented by the following assignment of error:

"The court erred in refusing to find that, in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint, and which was assessed against the plaintiff in error because of his ownership as executor, as aforesaid, of such bonds of the government of the United States."

*The only allegation in the complaint respecting bonds of the United States is contained in the eighth paragraph, which is as follows: [144]

"A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation; nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding as executor, as aforesaid, or otherwise, of such bonds and certificates of indebtedness."

The complaint does not set forth the terms of the will, nor attach a copy of it as an exhibit. And it is suggested in the brief of the solicitor general, filed on behalf of the United States, that, as presented by the record, this is not a case where United States bonds have passed from the testatrix to legatees, but where a personal estate of a certain value in money has passed to the executor, to be charged against him as money to be distributed among the beneficiaries under the will; and that, therefore, for aught that appears, the executor may have sold every bond and distributed the proceeds in money; and that, even if legatees entitled to certain sums of money shall have accepted United States bonds in lieu of money, they would take the bonds, not under the will, but as purchasers.

However, the complaint does allege that the money which is sought to be recovered was assessed against the plaintiff as executor of the deceased "on account of legacies or distributive shares arising from personal property being in his charge or trust, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman," and was paid by him under duress. Such allegations, taken in connection with that contained in the eighth paragraph, above quoted, to the effect that, of the property taxed, at least one-third part consisted of United States bonds, makes it to sufficiently appear that United States bonds in the hands of the plaintiff as executor or trustee under a will [145] were *included as a portion of the estate passing to the executor, and were assessed and taxed as such portion. It may also be observed that it is the executor or trustee who has in charge the legacies or distributive shares arising from personal property, passing after the passage of the act, from any person possessed of such property, who is the person taxed in respect to such property. Accordingly, we think there is room in this record for the contention of the plaintiff in error that, as matter of fact, bonds of the United States formed a portion of the property actually assessed; and that, consequently, the court is called upon to determine whether it was obligatory on the executor of Jane H. Sherman to include in his statement to the collector bonds of the United States in his possession and charge as such executor, and whether it was the right and duty of the collector to demand and receive from the executor a sum of money measured by the value of the property in his hands, although composed in part of United States bonds.

Putting aside, as already disposed of in the case of *Knowlton v. Moore*, the claims that inheritance and legacy taxes imposed by the United States in the act of June 13, 1898, are invalid because, as direct taxes, not apportioned, or, as duties, for want of uniformity, or because the taxing power of the United States does not reach such property transmissible under the laws of the states, it is conceded, as we understand the argument of the plaintiff in error, that United States bonds would be properly included in estimating the amount of an inheritance or

legacy tax, were it not for the clauses contained in the United States statutes exempting such bonds from state and Federal taxation. On the other hand, it is not denied by the counsel for the government that it was the intention of those clauses to exempt the bonds and interest thereon from any Federal tax, direct or indirect. What is denied is that there was any intention on the part of Congress, by the clauses mentioned, to exempt the portion of an estate invested in United States bonds from either a state or Federal inheritance tax.

It is claimed by the plaintiff in error, and conceded by the government, that the exemption clause was incorporated into the bonds and became a subsisting contract between the government *and the bondholders. It is further [146] contended on the one side and conceded on the other, that this contract extends to the assigns of the holders. But a legal issue is joined when it is affirmed by the plaintiff in error and denied by the government, that assigns must be interpreted to include those whose title is derived under the inheritance and legacy laws of the states.

It has recently been decided by this court, in the case of *Plummer v. Coler*, 178 U. S. 115, ante, 998, 20 Sup. Ct. Rep. 829, where the question involved was the validity of the inheritance tax law of the state of New York when applied to a legacy consisting of United States bonds containing a clause of exemption from state and Federal taxation, that the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

It may be said that in that case we were dealing with the sovereign power of a state to tax property within her own limits; but still the contention had to be met that Federal bonds were not within the taxing power of the state, not only because they were declared to be exempt from state taxation in any form, but because they were means devised by the government to raise money, and that such a purpose might be defeated if the states were permitted to tax the bonds in the hands of their holders. The conclusion, however, was reached, following state and Federal cases cited, that the inheritance or legacy tax law of the state of New York did not expressly, or by necessary implication, propose to tax Federal securities; that the tax was not imposed on the property passing under the state laws, but on the right of transfer by will or under the intestate law of the state; that, whatever the form of the property, the right to succeed to it is created by law, and if it consists of United States bonds the transferee derives his right to take them, as *he does his right to take any other prop- [147]

erty of the decedent, under the laws of the

state, and the state by its statutes makes the right subject to the burden imposed.

A similar distinction has been recognized by several of the state courts, which have held that, while a tax imposed on United States bonds by a state statute would be invalid because beyond the reach of the state's power to tax, yet that a tax upon the franchises or capital stock of a state corporation, measured by the value of its entire property, would be valid, even if the property was composed in whole or in part of Federal securities, because the tax can be regarded as imposed, not on specific property, but on the rights and privileges bestowed by the state. *Com. v. Provident Inst. for Savings*, 12 Allen, 312; *Com. v. Hamilton Mfg. Co.* 12 Allen, 300; *Coite v. Society for Savings*, 32 Conn. 173.

The judgments in those cases, holding that state taxes may be lawfully imposed, the amount of which may be determined by the aggregate amount of the property or capital stock of banking or manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority, were affirmed by this court. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings Co. v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904.

Without repeating the discussion in the opinion in *Plummer v. Coler*, and following the conclusion there reached, we are unable to distinguish that case from the present one.

If a state inheritance law can validly impose a tax measured by the amount or value of the legacy, even if that amount includes United States bonds, the reasoning that justifies such a conclusion must, when applied to the case of a Federal inheritance law taxing the very same legacy, bring us to the same conclusion. We must therefore hold that if, as held in *Knowlton v. Moore*, the tax imposed under the act of June 13, 1898, is not invalid as a direct, unapportioned tax, nor for want of uniformity, nor as an infringement upon the laws of the states regulating wills and descents, then the tax upon [148] legacies or bequests *descendible under and regulated by state laws is valid, even if such legacies incidentally are composed of Federal bonds.

It cannot be denied that the government of the United States has, and has heretofore exercised, the power to tax its own bonds. By the act of July 1, 1862 (12 Stat. at L. 474, chap. 119), there was imposed a tax upon the interest on United States bonds at one half the rate of the tax imposed upon the income of other property; and by the act of June 30, 1864 (13 Stat. at L. 281, chap. 173, and 479, chap. 78), the discrimination in favor of the holders of United States bonds was abandoned, and the interest on them was taxed at the like rates as other income.

The argument in this case turns, at last, upon the proposition that, by the exempting clauses in the statutes and on the face of the 178 U. S.

bonds, the United States entered into a contract with those who should buy and hold the bonds that neither principal nor interest should be taxed.

Whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised, we need not consider, because the contract in this case does not, as we view it, mean that a state may not, or the United States may not, tax inheritances and legacies, regardless of the character of the property of which they are composed. That some of the holders of United States bonds may have paid franchise taxes to the states, and others may have paid state or Federal inheritance and legacy taxes, has nothing to do with the contract between the United States and the bondholders. The United States will have complied with their contract when they pay to the original holders of their bonds, or to their assigns, the interest, when due, in full, and the principal, when due, in full.

These views demand an affirmance of the judgment of the circuit court sustaining the defendant's demurrer to the complaint.

We observe that it appears in the schedule of legacies prepared by the executor in this case, on a form apparently furnished by the collector of internal revenue, that several of the legacies under Mrs. Sherman's will were for sums under \$10,000, and which were therefore, under the construction *put by this [149] court on the statute in *Knowlton v. Moore*, not taxable. It also appears that the theory on which the taxes were computed in respect to legacies over \$10,000 was by measuring the tax by the amount of the entire estate, instead of by the amount of each legacy. This method of construing and applying the statute we have held, in *Knowlton v. Moore*, to be erroneous. Therefore the executor, representing the respective legatees, is entitled to recover back the amount of taxes paid on legacies under \$10,000 and likewise such excess of taxes as was paid by reason of the erroneous interpretation of the statute.

We here meet the formal difficulty that neither the complaint in the circuit court nor the assignments in error in this court apparently questioned the correctness of the construction put upon the statute by the collector. The questions raised and considered only involved the validity of the act, and not its construction if valid.

As, however, the parties proceeded on a mutual mistake of law, we think the practical injustice that might result from an affirmance of the judgment may be avoided by reversing the judgment at the cost of the plaintiff in error, and sending the cause back to the circuit court, with directions to proceed therein according to law. And accordingly it so ordered.

Mr. Justice **White** dissents in respect to the taxability of the bonds.

Mr. Justice **Peckham** took no part in the decision of the case.

[150] *GEORGE D. SHERMAN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 150-152.)

War revenue act—excessive tax—reversal of judgment.

A judgment dismissing an action by a legatee against the United States to recover an alleged illegal tax under the war revenue act, where the statute is held constitutional, but on a proper construction thereof is held not to justify the imposition of the whole amount of the tax that was collected, will be reversed, although in another action the executor has established his right to recover the illegal excess from the internal revenue collector, in order that judgment of dismissal in the present case may not embarrass the plaintiff's right to claim indemnity from the executor.

[No. 459.]

Argued December 5, 6, 7, 1899. Decided May 14, 1900.

IN ERROR to the Circuit Court of the United States for the Northern District of New York dismissing a complaint against the United States. *Reversed.*

Statement by Mr. Justice Shiras:

[150] *In the circuit court of the United States for the northern district of New York, on November 20, 1899, George D. Sherman filed a complaint against the United States, seeking to recover from said defendant the sum of \$8,969.02, which he claimed had been unjustly exacted by John G. Ward, collector of internal revenue for the fourteenth district of New York, from George T. Murdock, executor of the last will of Mrs. Jane H. Sherman, the mother of complainant, as a duty or tax imposed by virtue of the provision of the act of June 13, 1898; that said sum of \$8,969.02 was deducted by the said executor from the income due and payable under the provisions of said will to the complainant; that the income, of which the complainant was entitled to receive an annual portion during his life, was composed in part of United States bonds, which the complainant avers to be, by virtue of the acts of Congress under which they were issued, nontaxable and non-assessable for the purposes of taxation.

The complaint further alleged, among other things, that the tax so imposed was void because a direct tax not apportioned among the states in proportion to their population; that if said tax was not direct, but an impost, excise, or duty, the same was void because not uniform throughout the United States; and that it is not within the constitutional power of Congress to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York, or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is a gift of a testator of smaller means.

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*The United States, appearing by Charles H. Brown, United States attorney for the northern district of New York, demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action. On hearing, the circuit court sustained the demurrer, and ordered that the complaint be dismissed. A writ of error was allowed to this judgment, and the cause was brought to this court.

Mr. Charles E. Patterson argued the cause and, with Mr. Alpheus T. Bulkeley, filed a brief for plaintiff in error.

Messrs. Evarts, Choate, & Beaman, with Messrs. Charles F. Southmayd and William V. Rowe, submitted a brief by leave of court on behalf of the holders of United States bonds.

Solicitor General Richards argued the cause and filed a brief for defendant in error.

*Mr. Justice Shiras delivered the opinion of the court: [151]

In so far as the contentions urged in this action are based on the allegation that the tax imposed on the legacies left in the will of Mrs. Jane H. Sherman is void because it is an unapportioned direct tax, or, if not a direct tax, but a duty or excise, the same is void because not uniform throughout the United States, or void because it is not competent to levy an inheritance or legacy tax upon property passing to legatees under the laws of the state of New York, they have been disposed of adversely to the plaintiff, in the case of *Knowlton v. Moore*, recently decided by this court (178 U. S. 41, ante, 969, 20 Sup. Ct. Rep. 747).

So, too, the proposition that bonds of the United States and the income therefrom are not lawfully taxable under an inheritance-tax law of the United States, because exempted by contract from such tax, has just been decided not to be well founded, in the case of *Murdock v. Ward*, 178 U. S. 139, ante, 1009, 20 Sup. Ct. Rep. 775.

The allegation in the complaint, that "it is not within the constitutional power of Congress to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is the gift of a testator of smaller means," need not be considered, because this court has held in the case of *Knowlton v. Moore* that upon a proper construction of the act of June 13, 1898, the amount of the inheritance or legacy tax levied thereunder is measured by the amount of the legacy or distributive share passing under the laws of the state, and not by the amount of the estate of the testator or of the deceased owner.

As, however, it appears in this record that the taxes actually levied and paid on the legacies left by the will of Mrs. Sherman were computed upon the mistaken assumption that the amount of the estate of the testatrix was the measure of the tax, and not the amount of the respective legacies, the complainant is entitled to be repaid the excess thus imposed

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upon his legacy. As we have reversed the judgment in the case of *Murdock v. Ward*, and have remanded that case to the circuit court of the southern district of New York, in order that the erroneous computation may be corrected, and as thus what is coming to the plaintiff in error, upon such correction being made, will be recovered by Murdock as executor and trustee under the will of Mrs. Sherman, and thereby and in that case the plaintiff in error will be indemnified, he needs no further proceeding in his suit in the circuit court for the northern district of New York. Lest, however, the judgment dismissing his complaint may embarrass his right to claim indemnity from the executor, we shall reverse this judgment, and it is so ordered.

Mr. Justice **White** dissents in respect to the taxability of the bonds.

Mr. Justice **Peckham** took no part in the decision of the case.

[153]*CHESAPEAKE & OHIO RAILWAY COMPANY, *Plff. in Err.*,
v.

WILLIAM HOWARD and Others.

(See S. C. Reporter's ed. 153-167.)

Carriers—liability for injury to passenger on leased railroad—illegality of arrangement under which train runs.

1. The existence of a lease by a railroad company of its road for an annual rental will not relieve a company which is running a train over the road from liability for injury to a passenger caused by the negligence of its own agents or servants in charge of the train.
2. The illegality of an agreement or arrangement under which a train is run by a railroad company over the track of another company will not relieve the owner of the train from liability for damages to a passenger caused by the negligence of its agents or servants.

[No. 247.]

Argued April 17, 18, 1900. Decided May, 21, 1900.

IN ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment against a railroad company in an action for damages. *Affirmed.*

NOTE.—As to liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract—see *Caruthers v. Kansas City, Ft. S. & M. R. Co.* (Kan.) 44 L. R. A. 737, and note.

As to lease as affecting liability of railroads—see *Chollette v. Omaha & R. Valley R. Co.* (Neb.) 4 L. R. A. 135, and note; *Virginia Midland R. Co. v. Washington (Va.)* 7 L. R. A. 344, and note; *Hart v. Charlotte, C. & A. R. Co.* (S. C.) 10 L. R. A. 794, and note.

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See same case below, 14 App. D. C. 262.

Statement by Mr. Justice **Peckham**:

*The railroad company seeks by this writ [153] of error to reverse a judgment obtained against it at a trial term of the supreme court of the District of Columbia in favor of defendants in error, which judgment has been affirmed by the court of appeals of the District.

The defendants in error are husband and wife, and the action was brought by them to recover damages alleged to have been sustained by the wife because the car in which she was riding ran off the track while forming part of a train in transit from Louisville, Kentucky, to the city of Washington, D. C. The accident occurred during the night of November 16, 1886, at a place called Soldier, in the state of Kentucky, and about 60 miles west of the east line of the state, and while the train was running on the rails of the Elizabethtown, Lexington, & Big Sandy Railroad Company, which was a Kentucky corporation.

The amended declaration of the plaintiffs below alleged that the train on which the wife was a passenger was operated and conducted by the agents of the plaintiff in error, and that the plaintiff in error was managing and operating a line of railway *between [154] the cities of Louisville, in the state of Kentucky, and Washington city, in the District of Columbia, and upon said line of railway it was a common carrier of passengers for hire; that on the 18th of November, 1886, the plaintiff, Laura P. Howard, purchased from the agents of the defendant, at the city of Louisville, a ticket entitling her to a passage upon the railway from the city of Louisville to the city of Washington, and the defendant, it was alleged, thereupon became bound to safely carry and transport her from the city of Louisville to the city of Washington, but the defendant did not carry or transport her safely, and that near the town of Soldier, in the state of Kentucky, by the unskilfulness, carelessness, and wrongful neglect and mismanagement of defendant's agents in charge of said train, the sleeping car in which she was riding left the track, and went down an embankment and was demolished, and she was badly wounded and injured, and that by reason of these injuries she suffered great pain, and has been rendered permanently unable to do any business.

The defendant took issue upon these allegations, and the case went to trial. It has been twice tried, and upon the first trial, when all the evidence was in, the court directed a verdict for the defendant on the ground that no liability on its part had been shown for the accident in question. Upon appeal to the court of appeals of the District that court reversed the judgment (11 App. D. C. 300), and granted a new trial. A retrial was had, and the jury found a verdict in favor of the plaintiffs, upon which judgment was entered, and on appeal it has been affirmed by the court of appeals. (14 App. D. C. 262.)

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Mr. Leigh Robinson argued the cause and filed a brief for plaintiff in error.

Mr. R. Ross Perry argued the cause and, with *Messrs. James Francis Smith and R. Ross Perry, Jr.*, filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

[154] ***Mr. Justice Peckham**, after stating the above facts, delivered the opinion of the court:

The injuries sustained by Mrs. Howard, as [155] shown by the evidence, *are very serious, and undoubtedly permanent. The accident happened at night, the car in which she was sleeping left the rail and went over an embankment about 30 feet high, and was broken to pieces. She was released from the car and taken to a cottage by the wayside, and subsequently was given a berth in a sleeping car and brought to Washington.

On the trial she was sworn as a witness, and testified that the disease was evidently progressing, because she could not sit up as long; that she could not walk any distance; could not ride in the street cars without great suffering; that she suffered in various ways a great deal, in her head and in her spine, and was never free from pain. The suffering in her head was at the base of the brain, and if she wanted to see anything back of her she had to turn her entire body; she could not turn her head either way. She said she had been under the doctor's care most of the time during the past eleven years up to the time of the trial.

Dr. Chrystie, a specialist in spinal diseases, testified on the trial that Mrs. Howard placed herself under his treatment early in 1887, and had been under his treatment ever since. He said that she was suffering from an incurable spinal affection, which was progressive, occasioning great suffering and almost total disability. The witness had contrived, and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front, which steadies the back as a broken bone would be steadied, and this gives her partial relief, but the disease is located so low down, so much superincumbence of weight above, that it does not give her complete relief. The apparatus is made of steel, and, the doctor said, should be worn constantly, and she should sleep in it at night. It is necessary for her to wear it every hour for comfort, as well as for protection of her backbone. The disease is progressing slowly, and if it had not been for this spinal assistance, he thought she would have had complete paralysis.

At the time of the accident she was a clerk in the Agricultural Department at Washington, but since that time has been compelled to give up her position, and has been unable to do any work.

[156] *The probable cause of the accident, as shown by the evidence given by the plaintiffs, was an imperfect flange on one of the wheels of the sleeping car in which Mrs. Howard was riding. It did not appear that

a careful inspection could not have discovered the defect. There was evidence also given as to the train being driven at a reckless rate of speed at the time. We think there was sufficient evidence of negligence to carry the case to the jury.

The most important question, that of the liability of the defendant company for the consequences of an accident on the road of another company, arises upon the evidence now to be considered.

In order to sustain their claim the plaintiffs gave evidence showing the following facts: The Elizabethtown, Lexington, & Big Sandy Railroad Company, hereinafter called the Kentucky company, was incorporated by an act of the legislature of Kentucky, approved January 29, 1869, for the purpose of building a railroad from Elizabethtown to a point on the Big Sandy river at or within 20 miles of its mouth, all within the state of Kentucky. By a subsequent act the company was authorized to sell the railroad or lease the same whenever it might be to the interest of the company to do so. The Big Sandy river is the boundary line between the states of West Virginia and Kentucky.

At this time the Chesapeake & Ohio Railway Company, the plaintiff in error (hereinafter called the Virginia company), or its predecessor, had been incorporated by an act of the legislature of Virginia, and was operating its railroad from Phœbus, a station about a mile east of Fortress Monroe, in Virginia, to Huntington, in the state of West Virginia, and about 8 miles east of the Big Sandy river.

In 1877 the legislature of West Virginia passed an act providing for a terminus for the Chesapeake & Ohio Railway on that river, and for the building of a bridge over it so as to connect with the road of the Kentucky corporation. That corporation had not then built its road east of Mount Sterling, a place some distance west of the river, and on November 12, 1879, the Virginia and Kentucky corporations entered into an [157] agreement, by which the Kentucky corporation was to complete its railroad from Mount Sterling east to the river, and thereby form a connection with the road of the Virginia company, and in consideration thereof the latter company was to complete its road from the station at Huntington to and across the river, and allow the Kentucky corporation the free and undisputed use of its railroad from the westerly bank, and across the river to the depot of the Virginia corporation in the city of Huntington, for the term of five years from the date of the completion of the road as stated.

Pursuant to the agreement this extension from Huntington west to the river was completed early in 1882, and at that time the Kentucky corporation had also completed its road from Mount Sterling east to the river, and had also a running arrangement over the Louisville & Nashville Railroad into the city of Louisville.

During these times Mr. C. P. Huntington was very largely interested, and was the con-

trolling spirit, in a number of railroads situated both east and west of the Mississippi. He had built many new lines and extended many old ones, and had a plan for bringing into practically one management a line of railroad extending from the Atlantic to the Pacific. He was also desirous of organizing into one line his lines east of the Mississippi river, consisting of the Virginia company, the Kentucky company, and the Chesapeake & Ohio and Southwestern Railroad Company.

After the completion of the road of the Virginia company from Huntington to the west side of the river and its connection with the Kentucky corporation at that point, an arrangement was made between the two corporations by which they were operated substantially as a continuous system. They were operated together by one general manager, under verbal directions from Mr. Huntington, who was president of the Virginia company, and owned a controlling amount of the stock of the Kentucky company. Under that arrangement the Virginia company "operated and maintained the line of railroad for and on account of the Elizabethtown, Lexington, & Big Sandy Railroad Company, mostly west of the Big [158] Sandy river, *to Lexington, and included in that also the 8 miles of track between the west bank of the river and Huntington. They operated it for and on account of the Elizabethtown, Lexington, & Big Sandy Railroad Company, keeping an account on the books of the Chesapeake & Ohio Railway Company of all receipts of every character between Lexington and Huntington, including also the Louisville connection." This was in the early part of 1882. The arrangement continued, as testified to by one of the witnesses, who was an officer of the defendant, until the organization of the Newport News & Mississippi Valley Railroad Company (hereinafter spoken of), after which it is said that its officers operated the properties under the leases hereinafter mentioned. (This statement appears to be merely the conclusion of the witness from the other facts in the case.) The duration of the contract or arrangement under which the Virginia and Kentucky roads were operated as a continuous system was to be five years from the date of the completion of the road, which was in the early part of 1882, and that would have made the arrangement continue until 1887, a period subsequent to the happening of the accident. The witness supposed that the organization of the Newport News & Mississippi Valley Railroad Company terminated the contract by force of the lease above referred to. He stated that it was terminated in the same manner in which it was made, by the direction of Mr. Huntington; that Mr. Huntington directed Mr. Smith, the general manager, to operate the properties in accordance with the leases after they had been made. Mr. Huntington desired to extend, complete, and bring his different railroads under one management, that of himself.

For the purpose of being able the more
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easily to accomplish this object, Mr. Huntington procured from the legislature of the state of Connecticut an act, approved March 27, 1884, incorporating the Southern Pacific Railroad Company, which was therein authorized and empowered to contract for and acquire, by purchase or otherwise, and buy, hold, own, lease, etc., railroads, railroad bridges, engines, cars, rolling stock, and other railway equipment, etc., in any state or territory; "Provided, however, that said corporation shall not have power to *make [159] joint stock with, lease, hold, own, or operate any railroad within the state of Connecticut."

On March 10, 1885, the legislature of Connecticut changed the name of the Southern Pacific Company to that of the Newport News & Mississippi Valley Company, with all the powers and privileges and subject to all the liabilities existing under the former name.

On January 29, 1886, the Kentucky corporation and the Newport News & Mississippi Valley Company (the Connecticut corporation), entered into an agreement of lease, by which the Kentucky corporation leased its road to the Connecticut corporation for 250 years from the 1st day of February, 1886, at a rental of \$5,000 per annum, and on June 15, 1886, the Virginia corporation and the Connecticut corporation also entered into an agreement, by which the railroad of the former was leased to the latter corporation from July 1, 1886, for 250 years, at a yearly rental of \$5,000.

As Mrs. Howard's injuries were sustained in November, 1886, on the railroad in Kentucky which had been leased to the Connecticut corporation the January previous, the plaintiff in error herein makes the claim that it is not liable for the results of that accident, because it did not occur on its road nor on the road of any company for the negligent acts of whose agents it was responsible.

Assuming that the Kentucky railroad had been leased to the Connecticut corporation, and that the latter was, at the time the accident occurred, actually engaged in the management of the former, and that the train to which the accident happened was conducted and managed by the agents of the Connecticut company, it might then be assumed that this plaintiff in error could not be held responsible for the result of such accident; but the simple fact that at the time when it occurred the lease spoken of was in existence would not conclusively bar a recovery in this case. If, notwithstanding the execution of the lease, the plaintiff in error in fact, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for that accident, notwithstanding the existence of the lease. The evidence was *sufficient to show that prior to [160] the execution of the lease the Kentucky corporation was controlled and managed by the plaintiff in error, and it was so controlled and managed by the direction of Mr. Huntington, the president of plaintiff in error. It is claimed that this arrangement was wholly

illegal, as beyond the powers of the Virginia corporation. But if, while the Kentucky corporation was managed under such agreement, an accident had occurred by reason of the negligence of the agents and servants of the Virginia company, it would have been liable for the damages arising therefrom, notwithstanding the agreement or arrangement under which such control was maintained was illegal. If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is *ultra vires*, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement. *First Nat. Bank v. Graham*, 100 U. S. 699, 702, 25 L. ed. 750, 751; *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. ed. 176, 177, 6 Sup. Ct. Rep. 1055; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Buffett v. Troy & B. R. Co.* 40 N. Y. 168; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 22 L. R. A. 364, 35 N. E. 776; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123.

We are therefore brought to a consideration of the evidence in the record, tending to show that this train was a train of the plaintiff in error, controlled and managed by its agents and servants, for whose negligence it is liable.

The circumstances attending and leading up to the arrangement made between the Virginia and Kentucky companies in 1882, by which arrangement the former took upon itself the management of the Kentucky company, have been set forth somewhat in detail in order that such facts might be viewed in connection with the evidence as to the leases and the manner in which the affairs of the roads were thereafter conducted, so that the whole case could be examined to determine whether it was proper to submit to the jury the main question of fact: Who had the management and control of the train to which the accident happened?

[161] Evidence was given that many years prior to the execution of the lease above referred to the Virginia company had established *offices and an agency in the city of Washington for the purpose of obtaining business for that company and its connections, and it had entered into some kind of running arrangements with the Virginia Midland Railway Company, whose road extended from the city of Washington through the city of Charlottesville, in the state of Virginia, a station on the line of the Chesapeake & Ohio Company. After the arrangement between the Virginia and Kentucky companies above mentioned, if not before, the Virginia company sold tickets at Washington through to Louisville, and *vice versa*, and advertised the route in various newspapers throughout the country, especially in Washington and Louisville, in which the route was designated as the Chesapeake & Ohio Railroad, or Route, and it also advertised that it ran through or "solid" trains over this route. Such advertisements were continued after the execution of the lease up to and after the happening of this

accident. There is room in the evidence for the inference, which a jury might draw, that the Chesapeake & Ohio Company, by these various facts, and by such advertisements, and by the tickets which it sold, held itself out to the public as a carrier of passengers between the two cities. There was no substantial change in the character either of the advertisements or of the tickets after the execution of the leases.

If the Virginia company did in fact thus hold itself out as a carrier of passengers between the two cities without change of cars and by a solid train, the inference that such train was its own, and that the servants in charge thereof were its servants, might be based upon that fact together with the other evidence in the case, and such inference would be for the jury.

For the sole purpose of organization, and the more readily to enable Mr. Huntington to work out his scheme for one continuous line from the Atlantic to the Pacific, he procured the acts of the Connecticut legislature incorporating the Newport News & Mississippi Valley Railroad Company. The capital stock of the corporation was fixed at \$1,000,000 divided into shares of \$100 each, and the act provided that whenever \$500,000 should be subscribed and 10 per centum of the subscription paid in cash, the stockholders *might [162] organize the corporation, which might then proceed to do the business authorized by the act. An affidavit of the secretary of the company attached to the copy of the articles of association, filed in the office of the secretary of state of West Virginia, showed the acceptance of this charter by the vote of a majority of the corporation and the subscription of \$500,000 to the capital stock on May 10, 1884, and the payment in cash of 10 per centum at the time of such subscriptions. There was no proof of a dollar's worth of the capital stock ever having been issued, although officers of the company seem to have been elected. Mr. Huntington was the president of the corporation, and the officers of the Virginia corporation appear to have been also elected or to have acted as officers of the Connecticut corporation. After the execution of the leases already mentioned there seems to have been no actual change in the *personnel* of the officers of the leased road, nor in the actual management or control thereof. The same hands continued apparently in the same employment. There is no proof of the payment of a single dollar on account of these leases, but nevertheless a formal transfer was alleged to have been made to the lessee of the rolling stock and equipment of the Virginia and Kentucky corporations. The evidence is sufficient to admit the inference that it was a merely formal, although possibly valid, lease for the purpose of organization, which would render it easier to accomplish the formation of a continuous line, which Mr. Huntington had at heart. The same offices in the city of Washington were retained after the lease as before. The same individuals remained in the same relative positions therein, and substantially

the same advertisements and the same kind of tickets were inserted in the newspapers and sold at the offices after as before the execution of the leases. The sign at the Washington office was "Chesapeake & Ohio Railway Ticket Office," at the windows where the tickets were sold and over the doors, and no change was made after the execution of the leases, and after that time, as well as prior thereto, they continued to use the name of the Chesapeake & Ohio Railway and Chesapeake & Ohio Route, and the general passenger agent said that from the time he commenced in 1882 he *did not think the sign was ever changed. He was under the impression that the tickets had been changed after the execution of the leases, and that they were then issued in the name of the Newport News & Mississippi Valley Company, but that was a mere impression. The ticket of the plaintiff was issued by the Virginia company, and provided for a passage from Louisville to Washington. She had taken this route to and from Washington several times before, and her ticket, of the same description, had always been honored over the whole length of road between the two cities.

From all these facts it does not necessarily follow as a legal conclusion that the execution of a lease from the Kentucky to the Connecticut corporation changed the status of the former company, and effected in and of itself a change in the operation and management of that company, so that the Virginia company no longer managed or controlled the Kentucky company. The lease might exist, and the Virginia company might still manage the Kentucky company or some particular through train over that road.

Evidence was also given showing that some time after the execution of these leases, and after the happening of the accident, the Virginia company went into the hands of a receiver at the instance of Mr. Huntington, and after it came out the Connecticut corporation went out of existence, and transferred all the property which had come to it from the Virginia company back to that corporation; and during all that period there was actually no change in the manner of conducting the business of the roads other than as a matter of bookkeeping, nor in the persons who filled the offices and did the work of the companies. The Connecticut corporation simply disappeared from view. During the whole period it was the Chesapeake & Ohio Route or the Chesapeake & Ohio Road that was advertised as forming a continuous line from Washington to Louisville and carrying passengers thereon without change of cars and in a solid train.

Coming to the particular case of the defendants in error, the evidence showed that the wife purchased the ticket upon which she entered the car at Louisville; that it [164] was a ticket headed "Chesapeake & Ohio Railway," and that it stated that it was good for one continuous, first-class passage from Louisville, Kentucky, to Washington, 178 U. S.

D. C., and was signed by the same person who had theretofore been the general passenger and ticket agent of the Chesapeake & Ohio Railway. The ticket contained a notice that the company acted only as agent in selling for passage over other roads; but we think it plain that a passage over a road or on a train which was controlled or managed by it would not be included in such exception. The ticket was not purchased at the regular ticket office of the company, but from what is termed in the evidence a "scalper," and was the half of a round trip or excursion ticket from Washington to Louisville and return. When Mrs. Howard came to the station at Louisville for the purpose of commencing her journey she entered the train which was lettered or had a card attached to it signifying that it was the Chesapeake & Ohio train for Washington, and she supposed she was on a train of that company, and after entering the sleeping car she surrendered her ticket to the conductor, and the same was received as a good and sufficient ticket entitling her to transportation from Louisville to Washington. After the accident happened, and while she was on her way to Washington in the train which had been procured for the passengers, she was attended by a doctor, who stated that he was the chief of the corps of surgeons of the Chesapeake & Ohio Railway, and when she told the doctor she was afraid she would lose her position on account of the injury, she testified that the doctor said to her, "The company will see you through," and although he did not say the Chesapeake & Ohio Railway Company, yet from the conversation she had with him she understood that it was that company for which he spoke.

Other evidence was given on this subject which it is not necessary to refer to, and when the judge came to charge the jury he stated upon this point as follows:

"It is not enough, to render the defendant liable or to justify you in finding that it was operating the road, to find that it sold tickets over it. If the defendant simply sold a through ticket from Louisville to Washington or sold a round-trip ticket from *Wash-[165] ington to Louisville and return to Washington, and the plaintiff, Mrs. Howard, had the return part of that ticket, that alone would not be sufficient evidence to establish the fact that the Chesapeake & Ohio Railroad Company was operating this Elizabethtown, Lexington, & Big Sandy road. We all know that railroad companies habitually sell tickets over their own roads and, in connection with them, over other roads; so that the mere sale of such a ticket, and that in itself, would not be sufficient. It must appear from all the evidence, to your satisfaction, not only that this defendant sold a ticket over that road, upon the faith of which this lady was riding at the time, but in order to hold the defendant liable you should find that the Chesapeake & Ohio Railroad Company, as a corporation, by its officers and agents, was operating this road; that that corporation,

the Chesapeake & Ohio Railroad Company, controlled this road, operated it, ran it, and that the trains which ran over it were the trains of the Chesapeake & Ohio Railroad Company; that they were manned by their employees and controlled by their officers and agents; and, unless you find that the evidence establishes that state of facts, you would find for the defendant upon that point, because, in order to render the defendant liable for this accident, if it was caused by negligence, it must appear to your satisfaction by a preponderance of evidence that the Chesapeake & Ohio Railroad Company controlled and was running its trains over this road.

[166] "Perhaps I may aid you a little further upon that question without touching upon your province, for the fact is all for you. There is evidence here tending to show that state of facts. The plaintiffs claim that the evidence is sufficient to establish it; that is, the Chesapeake & Ohio Railroad Company controlled this particular road, and was running trains over it at the time of this accident. The defendant denies that the evidence is sufficient to establish those facts, and it is for you to determine which one of them is right in relation to it. The defendant also says that even if the evidence is sufficient to establish that state of facts at any time, that state of facts did not exist at the time of this accident; that it was ended in January, 1886, some months prior to this accident, by the lease which the Elizabethtown, *Lexington & Big Sandy Railroad Company made to the Newport News & Mississippi Valley Railroad Company. That lease is in evidence. I suggest that you divide that subject into two heads. First, determine whether the evidence is sufficient, when you take it all together, to establish to your satisfaction the fact that the defendant here, the Chesapeake & Ohio Railroad Company, was controlling and running the Elizabethtown, Lexington, & Big Sandy road prior to the execution of this lease to which I have just referred. If you find the evidence insufficient to establish that, you might dismiss that subject, I should say, without looking any further, and find for the defendant. But if you find from the evidence that the Chesapeake & Ohio Railroad Company, immediately before the execution of this lease just mentioned, was operating and controlling this Elizabethtown road, then you would naturally pass to the next step, which is, whether the execution of this lease and the facts and circumstances attendant upon it ended that arrangement, so that the Chesapeake & Ohio Railroad Company ceased at the time of the execution of that lease to control and run the trains upon that road."

We think this charge was in substance correct, although we do not suppose it was necessary, in order to hold the Virginia company liable, that it should have had the complete control and management of the road of the Kentucky corporation. If it had the control and management of that train it would have been sufficient, even though the Ken-

tucky or the Connecticut company managed and controlled other and local trains over the road of the Kentucky company.

The point would be whether there was evidence enough to submit the question to the jury as to the management and control of the train by the plaintiff in error. Upon a careful consideration of the whole case and all the various circumstances prior to and connected with the making of these leases, we think there was evidence sufficient to allow the jury to pass upon that question as one of fact, and the decision of the jury in favor of the plaintiff ought not to be disturbed.

The circumstances of the case are quite unusual. The evidence shows that in each of the three corporations there was *but one [167] controlling and guiding hand; that all the steps taken were steps in the direction of establishing, organizing, and maintaining a continuous line of road from one ocean to the other, and that the various contracts, arrangements, and leases were but means to accomplish this one purpose; that the Virginia company, under the guidance and direction of Mr. Huntington, held itself out to the world as a carrier or transporter, and not a mere forwarder, of passengers from Washington to Louisville or the reverse, and that it issued tickets as evidence or tokens of its contract to so carry. The mere formal existence of these leases does not change the actual facts in the case. Assuming their validity, they are not conclusive against the defendants in error. They could exist, and the train in question in this case might still have been under the general control of or managed by the Virginia corporation. If so, it was responsible for the neglect of the agents employed by it. The fact that the Kentucky road had immediately prior to the lease been in the actual control and management of the Virginia company, when taken in connection with the other evidence in the case, is an important one in determining the main question as to the continuation of such management of the road or of the train after the execution of the lease to the Connecticut corporation. In our judgment a submission of the question as one of fact for the jury was not error.

Another question was argued relating to the alleged release of the cause of action by Mrs. Howard upon the payment of \$200. The evidence adduced by the plaintiffs in regard to the release was sufficient, if believed, to render it unavailable as a defense. The question was submitted to the jury under instructions quite as favorable to the defendant as it was entitled to, and the finding in favor of the invalidity of the paper ought not to be disturbed.

We have carefully examined the other questions made by the plaintiff in error, including that in regard to the want of jurisdiction because of an alleged insufficient service of process, but we are satisfied that no error has been committed, and the judgment must therefore be affirmed.

[168]*SAMUEL CASTNER *et al.*, Petitioners,
v.

W. H. COFFMAN, etc.

(See S. C. Reporter's ed. 168-186.)

Trademark—in name of coal—geographical name—name adopted by selling agents who inspect and grade the coal.

1. The use of the name "Pocahontas Coal" by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right in such agents to the use of the name for all the coal from that field, or deprive the mine owners of the right to use the same name.
2. A final decree dismissing a bill for an injunction may be directed by a circuit court of appeals in reversing a decree for a temporary injunction, where the bill is devoid of equity upon its face and no supplementary evidence can be offered which will change the result.
3. The enhancement of the reputation of coal from a certain field by the careful inspection and grading thereof by the selling agents, who sell it under the name of the place where it is mined, gives them no exclusive right to such name as a trademark.

[No. 113.]

Argued January 23, 24, 1900. Decided May 21, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree reversing that of the Circuit Court allowing a temporary injunction against the use of an alleged trademark for coal. *Affirmed.*

See same case below, 59 U. S. App. 35, 87 Fed. Rep. 457, 31 C. C. A. 55; 59 U. S. App. 67, 87 Fed. Rep. 468, 31 C. C. A. 65.

Statement by Mr. Justice **White**:

[168] *This suit was commenced on March 12, 1897, in the United States circuit court for the district of West Virginia, sitting in equity. On the date mentioned a bill of complaint was filed on behalf of Samuel Castner, junior, and Henry B. Curran, copartners, trading under the firm name of Castner & Curran. The defendant named in the bill was W. H. Coffman, doing business under the name of Pocahontas Coke & Coal Company and W. H. Coffman Coke Company. The relief prayed was substantially that the defendant might be perpetually restrained from using or imitating the name "Pocahontas" in connection with the selling, advertising, or offering for sale, of coal. The relief thus asked

NOTE.—As to use of geographical name as trademark—see *Gato v. El Modelo Cigar Mfg. Co.* (Fla.) 6 L. R. A. 823, and note; *New York & R. Cement Co. v. Coplay Cement Co.* (C. C. E. D. Pa.) 10 L. R. A. 833, and note; *Hoyt v. J. T. Lovett Co.* 17 C. C. A. 652, and note; *Illinois Watch Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, and note. See also note to *Alff v. Radam* (Tex.) 9 L. R. A. 145.

As to jurisdiction of circuit court of appeals on appeals from interlocutory decrees—see note to *United States Freeland & Emigration Co. v. Gallegos*, 32 C. C. A. 481.

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for was based upon the averment that the word "Pocahontas" was a trademark for coal, which trademark was owned by the complainant firm, and, besides, that the word in question had come in the course of business to designate the coal offered for sale by the complainants, and that the use of the name by the defendant was calculated to deceive the public into believing that the coal dealt in by him was coal which had been inspected and graded by the complainants, would thus operate to defraud the complainants, and constitute undue and unlawful competition in trade.

Affidavits and exhibits were filed with the bill in support of a motion for an injunction. A demurrer to the bill having been overruled, the defendant filed an answer accompanied by affidavits and exhibits in opposition to the motion for an injunction. Several affidavits in rebuttal were thereupon filed on behalf of the complainants. Upon the record thus made the motion for *an injunction was [169] heard, and, after consideration by the court, it was decreed as follows:

"That the defendant in his own name, and in the name of the Pocahontas Coke & Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents, and workmen, and each and every of them, be and the same are restrained and inhibited from using the name 'Pocahontas' or 'Pocahontas Flat Top' in connection with his business, the court being of the opinion that the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agents from advertising, offering for sale, or selling coal from what is known in Virginia, or West Virginia, as the Pocahontas coal field, or advertising the coal as so mined and produced from that field, and this injunction shall not apply to transactions of the defendant already concluded by actual shipments of coal."

The defendant appealed to the circuit court of appeals for the fourth circuit. Among the assignments of error filed was the following:

"II. The court erred in rendering any decree at all until the merits of the said cause, as put in issue by the pleadings, were fully developed by proofs adduced in the proper order of chancery proceeding and practice."

The circuit court of appeals reversed the decree of the circuit court and remanded the cause, with directions to dismiss the bill. It was held that the complainants had no trademark in the word "Pocahontas;" that they were not entitled to the exclusive use of that word to designate the coal sold by them, or its character or quality, but, on the contrary, that the word "Pocahontas" indicated coal mined in the Pocahontas coal field, and that all the producers of that region had the right to use it in common with the complainants. The court held that the proof did not show

[170] that the defendant had practised any deception on the public, or that he had perpetrated any fraud upon the appellees. *Before the mandate issued, however, a rehearing was applied for, and the reviewing court was asked to provide in the mandate, after reversing the order granting a preliminary injunction, that the parties should "proceed to take their proofs in order that the cause may thereafter be heard upon pleadings and proofs, to the end that a final decree may be entered." This petition for a rehearing was denied, the court stating:

"We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that therefore it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing."

The cause was then brought to this court by writ of certiorari.

Messrs. Arthur V. Briesen and Frederick P. Fish argued the cause and, with **Mr. Henry E. Everding**, filed a brief for petitioners:

The English equity practice adopted in the better-considered equity decisions in this country is adverse to dismissing a bill upon motion for preliminary injunction.

Brooke v. Clarke, 1 Swanst. 550; *Blow v. Taylor*, 4 Hen. & M. 159; *Cole v. Sands*, 1 Overt. 183; *Porter v. Moffett*, 1 Morris (Iowa) 108; *Brown v. Wilson*, 56 Ga. 534; *Strong v. Harrison*, 62 Miss. 61. See also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 6 Pick. 376; *Basche v. Pringle*, 21 Or. 24, 26 Pac. 863; *Lynn v. Mount Savage Iron Co.* 34 Md. 603; *Cheney v. Jones*, 14 Fla. 587.

Where the court of appeals has dismissed the complainant's bill upon an appeal from an interlocutory decree, it is strongly intimated that the *ex parte* affidavits and imperfect record in the case of an appeal from a preliminary injunction would preclude the court from dismissing the bill or finally disposing of the suit.

Richmond v. Atwood, 5 U. S. App. 151, 52 Fed. Rep. 10, 2 C. C. A. 596, 17 L. R. A. 615; *Marden v. Campbell Printing Press & Mfg. Co.* 33 U. S. App. 123, 67 Fed. Rep. 809, 15 C. C. A. 26; *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.* 43 U. S. App. 47, 72 Fed. Rep. 545, 19 C. C. A. 25.

It has been decided in some cases that upon a motion for preliminary injunction, if there is nothing to be decided but a question of law the court will decide that question, and so finally dispose of the suit.

Knoxville v. Africa, 47 U. S. App. 74, 246, 77 Fed. Rep. 501, 23 C. C. A. 252; *Ohio Brass Co. v. Thomson-Houston Electric Co.* 54 U. S. App. 1, 80 Fed. Rep. 712, 26 C. C. A. 107; *Green v. Mills*, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90.

However clear the facts may seem to be, nevertheless if there is a question of fact involved, the court may not dismiss the bill or finally dispose of the suit upon an appeal from a preliminary injunction.

Curtis v. Overman Wheel Co. 20 U. S. App. 146, 58 Fed. Rep. 784, 7 C. C. A. 493; *Andrews v. National Foundry & Pipe Works*, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. Rep. 782, 10 C. C. A. 60; *Knoxville v. Africa*, 47 U. S. App. 74, 77 Fed. Rep. 501, 23 C. C. A. 252.

Mr. E. B. Stocking argued the cause and filed a brief for respondent.

Mr. A. G. Safford filed a brief for respondent, with the answer to the petition for writ of certiorari.

***Mr. Justice White**, after making the [170] foregoing statement, delivered the opinion of the court:

The complainants in their bill predicate their asserted right to the sole and exclusive use of the name "Pocahontas," as applying to coal, upon two grounds: First, the ownership of the alleged trademark, which it is averred the complainants acquired from the Southwest Virginia Improvement Company in April, 1895; and, second, upon a use by the complainants and their predecessors in right of the word "Pocahontas" as a trademark or name to designate the character and the quality of the coal dealt in by them. In other words, the complainants contend that for many years prior to the period when they assert they were vested by the Southwest Virginia Improvement Company with the ownership of the alleged trademark they, as licensees of said company, used the word "Pocahontas" to designate the coal sold by them, to such an extent that that word, as applied to coal, came to represent in the public mind the coal of the complainants; that this continued up to the time the trademark was acquired, and from that time down to the filing of the bill.

*Whilst the propositions above stated por-[171] tray the rights asserted by the complainants in their bill, in their proof, and in the argument at bar, a wider contention is advanced, that is, that the complainants have a right to the name "Pocahontas," not only because they acquired it whilst acting under a license from the Southwest Virginia Improvement Company and as the assignees of a trademark owned by that company, but that they have a right to the name "Pocahontas" independently of the existence of any such right in the Southwest Virginia Improvement Company, or of the ownership by that company of a trademark embracing that name. Without stopping to consider the conflict which is engendered by this latter view, we shall at once proceed to an analysis of the evidence in the record, for the purpose of ascertaining whether the complainants have the exclusive right claimed by them, derived either as licensees or assignees of the Southwest Virginia Improvement Company, or in any other way.

The coal which was the subject of the dealings had by the complainants, as averred in their bill, was the product of what is known as the Great Flat Top coal region of Virginia and West Virginia. It is referred to in the bill of complaint as "a tract or field of smokeless bituminous or semi-bituminous coal." The initial operations in the devel-

opment of the region were begun in 1881 by a Virginia corporation styled the Southwest Virginia Improvement Company. Some surface work was done in the fall of that year. In March, 1882, the first blast was put in what was termed the east mine; a contract was closed to run that mine one mile; also the air course and the No. 1 west mine. These mines were situated respectively east and west of a stream called Coal Branch. As early as March, 1882, a contract was made to supply coal from these mines to the Norfolk & Western Railway Company. The branch of that road to the mines, however, was not completed until March, 1883, and the first shipment of coal was made in that month. As a result of the operations referred to, a mining town was located near to the mines, and was called Pocahontas. It was made a postoffice in 1882. It had a population in January, 1883, of 1,000 souls, and was incorporated by the legislature *of Virginia in 1884 under the name of "Pocahontas." The Improvement Company also named its mines the Pocahontas mines, and from the beginning appears to have sold the product of its mines as Pocahontas coal.

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Without minutely tracing the development of the coal field in question, it may suffice to say that either by acquiring coal lands from the Southwest Virginia Improvement Company, or from other sources, a land company known as the Flat Top Association became interested in lands within the coal field in question and by 1885 several mines additional to those owned by the Southwest Virginia Improvement Company were being worked by other operators. The connection of the complainants or their predecessors with the mines or coal field in question arose as follows:

While it is alleged in the bill that "some time prior to January, 1884," Castner & Company, Limited, a corporation, "dealt in, inspected, and sold coal from such region or field aforesaid," there is no proof in the record even tending to show that Castner & Company had any connection with Pocahontas coal prior to January 1, 1885. Indeed, as it will hereafter develop, the fact that they did not represent that article is clearly inferable from a statement made by them in an application for the registry of an alleged trademark.

It is established that in July, 1883, one William Lamb was the agent of the Southwest Virginia Improvement Company, at Norfolk, Virginia, and that the general sales agent of the company was one Edward S. Hutchinson, who was located in Philadelphia, at which place the general offices of the company were established. Castner & Company, Limited, became the general tidewater coal agent on January 1, 1885, for the product of all the mines then in operation in the Great Flat Top coal region, including the product of the original Pocahontas mines. This appointment was the outgrowth of an agreement entered into between the Norfolk & Western Railroad, the Southwest Virginia Improvement Company, the Flat Top Coal Company, and three les-

sees of the latter company operating coal mines in the region referred to. This agreement was made on the 29th of December, 1884. It provided for the handling of the entire *coal output of all the then producers,[173] and of any subsequent operators in said region, by a general coal agent, to be appointed by the railroad company. The contract, moreover, provided for the appointment by the railroad company of another person, to be known as the general tidewater coal agent, and who was to be subject to the general direction and management of the general coal agent. It was also stipulated in the contract that the general coal agent should perform outstanding contracts of the Southwest Virginia Improvement Company for the delivery of coal. Castner & Company, Limited, were appointed the general tidewater coal agent under the agreement.

In passing, it is proper to notice the fact that the coal mined in the various collieries in operation at the date of this agreement, as is the case with the mines now being operated, was from the same seam as that mined at the original Pocahontas mines, which seam was then known as the "Nelson or Pocahontas bed, No. 3." It clearly appears from the record that prior to the date of the contract above mentioned, at a time when the predecessors of the complainants appear to have had nothing to do with the product at the Pocahontas mines, the coal mined from the Pocahontas vein had become well and favorably known as a coal of high grade. Thus, in a letter from sales agent Hutchinson, dated July 5, 1883, he states: "We are all especially pleased with the testimonial from Mr. McCarrick, and it confirms the view we have all along entertained, that the Pocahontas coal is the best steam coal in the market." So, also, in the eighth article of the contract between Castner & Company, Limited, and the railroad company, by which the former was appointed the general tidewater coal agent, it was recited that "the coal from the Great Flat Top coal region has proved to be of superior quality, and suitable for steam purposes, and especially for the use of ocean steamships, as well as for sale in the West Indian and South American markets." That the coal supplied by the producers might, however, in some instances, be of inferior quality, was recognized in a stipulation contained in the coal producers' contract, providing for an allowance to be made to purchasers of coal because of inferiority of quality, such allowance to be deducted from any amount found due or that might become due to the producer.

*While the contract between the coal pro-[174]ducers and the agreement appointing the general tidewater coal agent are contained in the record, the agreement appointing the general coal agent was not put in evidence. One of the complainants, in an affidavit dated March 18, 1897, attached as an exhibit a monthly statement rendered by the coal agent, which is headed "Office of the General Coal Agent, Roanoke, Virginia, February 15,

1885." Nowhere in the statement, however, is there an intimation as to who was such coal agent. It is plainly inferable, however, from the excerpt which we now make, who was the appointee to that responsible position. The extract we make is from the issue of October, 1891, of a publication styled *The Iron Belt*. It reads as follows:

"Pocahontas Company.

"The Pocahontas Coal Company, organized January 1, 1895 (1885?). Officers: William C. Bullitt, president; D. H. Matson, secretary and treasurer; H. N. Claxton, general agent; John Twohy, superintendent piers, Norfolk; general office, Roanoke, Va.; branch office, Norfolk, Va.; shipping office, Bluefield, W. Va. This company, who makes all sales for the entire output of the region, assuming all liabilities, shipped during the year 1890, 1,807,716 tons, and has shipped during the present year to date (October 10th), 1,628,927 tons. 'From present indications,' says Mr. Matson, secretary of the company, 'we estimate that for the year 1891 we will ship 2,300,000 tons.'

"The Pocahontas Coal Company makes a uniform price for all coal mined, furnishes inspectors for each tippie where the coal is loaded, thus guaranteeing to purchasers coal free from bone, slate, and other impurities. This company pays the operators by check the fifteenth day of each month, thus securing them against losses by reason of bad debts, storage and freight rates. The company employs twenty-six subinspectors, who are under the supervision of Mr. W. D. Milne, chief inspector. Mr. Milne's headquarters are at Bramwell, and he makes a tour of inspection of each tippie at least once a week."

[175] So, also, there is contained in the record a letter, headed with the names of the then officers of what is termed "Pocahontas *Coal Company, shippers of celebrated Pocahontas coal." On this letter head was a vignette, presumably the figure of Pocahontas. This letter was addressed to the proprietors of the Indian Ridge Colliery, and referred to the handling by the Pocahontas Coal Company of the product of that colliery. The Indian Ridge Colliery, referred to in this letter, is one of the mines represented by the defendant in this cause. The operation of this mine was commenced about the date of the letter, and its product, in accordance with the general agreement already stated, was shipped through the general coal agent, the Pocahontas Coal Company.

In the article in *The Iron Belt*, above referred to, there is also a statement of the production from 1883 to 1891 of the various mines controlled in October, 1891, by the Pocahontas Company, as the general coal agent of all the mine owners or operators. This statement showed that from one colliery operating in 1883 the number of collieries had increased to nineteen in October, 1891.

Under the coal producers' agreement, as we have seen, the entire product of the mines in the Great Flat Top coal region, intended for rail transportation other than that used for coke, was to be consigned to the general

coal agent, and only a portion of such product was to be handled by the general tide-water coal agent, whose operations were to be "subject to the exclusive control, supervision, and direction of the general coal agent."

We have already referred to the fact that when the combination referred to was formed, the coal mined from the Pocahontas or No. 3 bed had, under that name, an established reputation. Further confirmatory evidence of this fact will now be referred to. Andrew S. McCreath, chemist to the State Geological Survey, of Pennsylvania, embodied the results of much research and personal investigation during part of 1882, and the fall of 1883, and the spring of 1884, in a work entitled "*Mineral Wealth of Virginia*," extracts from which are contained in the record. At page 110 he mentions the existence of numerous openings on the "Nelson or Pocahontas coal bed (No. 3 of the section)," and also of some few openings "on the upper [176] beds, No. 5 and No. 6. He further says (p. 110):

"On Coal Branch, the Pocahontas bed (No. 3) has been extensively mined at the Pocahontas mines of the Southwest Virginia Improvement Company."

At page 150 he says:

"The section at Pocahontas shows the presence of at least three workable beds above water level, although almost the entire output of the region at present comes from the No. 3 Nelson or Pocahontas bed.

"This handsome coal bed is everywhere present, so far as explored, with a workable thickness, being 11' 3" in the vicinity of Pocahontas, and holding its workable dimensions through the field for 5 miles eastward to the waters of Flipping creek, where it becomes split into two beds, about 4½ and 5½ feet thick.

"To the west of Pocahontas, along Laurel creek, for a distance of 8 miles, the bed carries its full thickness fairly well, and shows nearly the same section for a long distance north of the dividing ridge on the waters of the Elkhorn and the Tug Fork of Sandy.

"The good quality of this coal has been well established by numerous tests, both in the laboratory and in actual practice."

The Pocahontas Coal Company appears to have continued to act as general coal agent of the producers' combination until the spring of 1895, about the time of the appointment of a receiver for the Norfolk & Western Railroad, which company, as will be remembered, was a party to the original agreement of the combination. By this time the development of the coal field in question had largely progressed, and a number of additional mines were being operated. A new company, called the Pocahontas Company, was chartered on March 12, 1895, and in 1896 this company was handling the coal produced from numerous mines in the Pocahontas field. Agreements were made, however, by the complainants in March, 1895, directly with some of the mine owners

[177] formerly represented by the Pocahontas Coal Company (among them the Southwest Virginia Improvement Company), by which agreements complainants *were constituted the general factors and selling agents for the product of the mines of such owners.

The product of the Indian Ridge mine, now represented, as we have said, by the defendant, and which was opened in the spring of 1894, when it ceased to be shipped through the Pocahontas Coal Company as general agent, was marketed through the agency of the complainants until January 1, 1896. From this last-mentioned date until November 1, 1896, the product of the mine was shipped through the Pocahontas Company, the complainants having become the sole agents of the latter company for tidewater and lins trade.

It is plainly inferable from the averments of the bill, as it is unquestionably established by the evidence in the record, that from January 1, 1885, the date of the coal producers' combination referred to, the product of the various collieries controlled by the combination was uniformly termed Pocahontas coal, and the evidence shows that this appellation was made use of as well upon bill heads and advertising matter of the general coal agent, and of some, at least, of the producers, as upon the stationary and advertising matter of Castner & Company, Limited, the general tidewater coal agent.

It is by the light of the facts just stated that we come to consider the claim made in the bill that the complainants are the exclusive owners of the trademark or the tradename "Pocahontas," as applied to all coal coming from the Pocahontas coal field, because prior to April 1, 1895, they had used the same by the license and permission of the Southwest Virginia Improvement Company, and subsequent to that date had used it as owner under an assignment of said trademark or tradename to them from the Improvement Company. There is no evidence whatever in the record tending to show any express license to complainants or their predecessors from the Southwest Virginia Improvement Company, authorizing them to use the name "Pocahontas" as an exclusive tradename or trademark for coal; and the facts which we have above stated render it absolutely impossible that there should have been any such valid license. It is patent that the word "Pocahontas," prior to the formation of the coal producers' combination on January 1, 1885, [178] indicated *all the coal coming from a particular seam of coal known as the Pocahontas vein. When the combination was entered into, creating a general coal agent to dispose of all the coal to be marketed from all the collieries which were then being worked or might thereafter be worked in the Pocahontas region, it is undoubted that the name "Pocahontas" was applied by everybody concerned, including the Southwest Virginia Company, as indicating coal coming from the region, without reference to the particular mine from which it was taken, for all the coal was advertised by the owners and general coal agent under the name of Pocahontas coal, and was contracted for and shipped under the same name. Indeed, during the existence of the original combination the complainants, or their predecessors, who now assert that they have an exclusive right to the name "Pocahontas" as designating the coal sold by them, were acting as tidewater agents, under the supervision and control of the general coal agent, for all the mine owners and were themselves selling the coal under the name referred to as agents of the owners, and dealing in such coal, on behalf of the owners of all the mines, as Pocahontas coal. When the Pocahontas Coal Company ceased to act as the general coal agent, on the appointment of a receiver of the Norfolk & Western Railroad, the complainants, who now assert the exclusive right in themselves to the name "Pocahontas," became the principal agent for the sale of the coal from some of the mines, among the number one of the mines controlled by the defendant, putting the product of that mine upon the market, as agent of the owner, as Pocahontas coal.

Destructive as is this state of the proof of the assertion that there was a license to the complainants prior to 1895 by the Southwest Virginia Improvement Company, the existence of such a license is further rebutted by the fact that there is no evidence of any want of knowledge by the Southwest Virginia Improvement Company of the use by the Pocahontas Coal Company, or by the producers generally of the designation Pocahontas as the name of the coal mined in any and all of the collieries in operation in the region. Indeed, the exaggerated character of the assertion of the complainants, that prior to 1895 they *used the trademark as [179] the licensees of the Improvement Company, is shown by the record. In August, 1885, Castner & Company, Limited, was under the contract the general tidewater coal agent, that is, such agent for all the mine owners in the Pocahontas region. Although thus representing the owners, this corporation, on the 25th of August, 1885, filed an application for the registry of a trademark, in which it was recited that Castner & Company, Limited, had adopted for its use as a trademark for coal the word "Pocahontas," and that the same had been continuously used by said corporation "since about January 1, 1885." This date, it will be remembered, was when the corporation referred to became the general tidewater coal agent for the producers of Pocahontas coal. In an affidavit deposing to the truth of the statements contained in the application, it was stated: "That said corporation (Castner & Co., Limited), has a right to the use of the trademark therein described; that no other person, firm, or corporation, has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive."

The conflict between the claim of license made in the bill and these sworn assertions in the application to register a trademark requires no comment. The record, however, shows a further contradiction. Turning to

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Exhibit B, attached to the bill, which is the alleged assignment of trademark made in 1895 by the Southwest Virginia Improvement Company to Castner & Company, Limited, and under which complainants claim to be the owners of the trademark "Pocahontas," as applied to all coal, we find it recites that Castner & Company, Limited, had been appointed on March 26, 1895, the agents to sell all the output of coal of the mines of the Improvement Company, which coal "has become known under the trade name or mark, 'Pocahontas,' by adoption and continuous use thereof by the said corporation, the Southwest Virginia Improvement Company." Besides this, the document states that the assignor, the Southwest Virginia Improvement Company, "did adopt, on or about the 1st day of July, 1882, as a trade name, or mark, the word 'Pocahontas' for [180] coal mined in a region or *field opened up and operated in Tazewell county, Virginia, in the year 1882, by the said corporation, the Southwest Virginia Improvement Company, and which trade name, or mark, it continued to use thereafter in its coal-mining operations in said region, or field, from the date aforesaid, as the trade name or mark, for all coal mined and sold by it up to the present time."

Thus we have Castner & Company, Limited, becoming by contract an agent of the mine owners to sell their coal, putting it upon the market as Pocahontas coal, and dealing with it as such, yet filing a claim for a trademark by which it was sought to deprive the owners of the designation which appropriately belonged to their product. We find the bill verified by both complainants, one of whom made oath to the application for a trademark. In such bill it is asserted that at the time the trademark was applied for Castner & Company, Limited, were not the owners of the trademark, but were mere licensees of the Southwest Virginia Improvement Company.

And also it appears that, when in 1895 the complainants became the principal agents of certain of the mine owners, a monopoly of the name of "Pocahontas" as against all the mine owners was again sought to be obtained by taking a transfer of an alleged trade mark or name from the Southwest Virginia Improvement Company. The statements in the paper reciting such transfer being in irreconcilable conflict with the affidavit to the application for a trademark.

But putting out of mind these contradictions, it is manifest that, long prior to the purported assignment by the Southwest Virginia Improvement Company of the alleged trademark or tradename, by the acts of all the parties concerned in the production and marketing of the coal (including the Southwest Virginia Improvement Company, Castner & Company, Limited, and the complainants), the name "Pocahontas" indicated the region from which the coal in question came and the natural quality thereof, and applied indiscriminately to the product of all the mines in that region, producing that character of coal.

Although the facts which we have referred to make inevitable the foregoing deductions, nevertheless we state a few additional facts which make the situation, if possible, yet clearer.

*In the issue of October, 1891, of The Iron [181] Belt, already referred to, the region in question was termed the Pocahontas Flat Top coal region, and the product thereof was frequently referred to as Pocahontas coal or Pocahontas Flat Top coal. So, also, in the agreements made by complainants in March, 1895 (after the producers' combination had ceased to be operative), to act as sales agent for the product of certain of the mines, there is contained express recognition of the fact that the products of all the mines in that region, whether those products were inspected and controlled by the complainants or not, were usually designated and generally known as Pocahontas coal. Thus, in a stipulation numbered 3 in an agreement made by complainants with the Pulaski Iron Company on March 26, 1895, it is recited:

"It is agreed by the parties hereto that the parties of the second part may act as selling agents for other producers of Pocahontas coal, provided they shall become and continue to be the exclusive agents of such producers, and provided, further, that the aggregate amount of coal sold during any year for the party of the first part shall be less than 2.615 per cent of the total amount of Pocahontas coal sold by the parties of the second part during that year."

And in a supplementary agreement with the same company, dated December 28, 1895, it is said:

"That, until the expiration of the said contract of 26th March, 1895, according to the terms thereof, the party of the first part will sell or dispose of no Pocahontas coal whatever save through the agency of the parties of the second part.

"The parties of the second part hereby promise and agree that in the event of the sale or disposition of any Pocahontas coal by any producer for whom they may at any time be acting as sales agent, except through the agency of the said parties of the second part, that they will at once, on receipt of written notice of the particulars of such sale or disposition from the party of the first part, and upon its written request, forthwith terminate its agency for such producer," etc.

Again, in a supplement to The Daily Telegraph, a publication *at Bluefield, West Vir- [182] ginia, such supplement being entitled "Pocahontas Flat Top Coal Field Industrial Edition," the product of the region referred to is frequently spoken of as Pocahontas coal or Pocahontas coke, etc. And, as bearing upon the claim made in the bill, that the coal from this field had acquired a great reputation in the markets of the world by reason of the expenditures of time and money made by complainants "in inspecting, selecting, grading, and otherwise maintaining the superior quality and purity of the said coal," we call attention to a lengthy ad-

vertisement of the complainants contained in the publication just referred to, in which appeared no allusion to an inspection of the product, but wherein it was clearly recognized that the wide reputation of Pocahontas coal was the result of making known the inherent excellent quality of the article itself. The product of the mines represented by the complainants, among which mines was the Indian Ridge mine, now represented by the defendant, is frequently referred to in the card as Pocahontas coal. We excerpt portions of the card in the margin.†

{183} *Now, this advertisement of the complainants makes it clear that they were offering for sale, not the particular product of any one mine, but that the Pocahontas coal which they advertised was derived from numerous collieries within the Pocahontas region. Indeed, when it is considered that coal from the Indian Ridge mine, which the defendant now represents, was for a time represented by the complainants, and the coal therefrom sold by them as Pocahontas coal, the contention now advanced amounts but to this, that an agent can deprive the principal of his property by appropriating it to himself, and that complainants, because they were intrusted, first, in a subordinate capacity as tidewater agents by many of the mine owners, and then in a more enlarged capacity as general agent, with power to represent and act for the producers, have come into the position where they can virtually exercise a monopoly of sale as to the product of all

†CASTNER & CURRAN.

Are the General Agents for the sale of Pocahontas Flat Top Smokeless Semi-Bituminous Coal.

Having satisfied themselves by exhaustive analyses and tests that Pocahontas coal was unequaled as a steam fuel, they determined to leave nothing undone to demonstrate this fact and establish its reputation as second to no other coal, and, owing to their energetic efforts and judicious advertising, Pocahontas coal to-day enjoys the unique distinction of being the only coal in the world that has been officially indorsed by the governments of Great Britain and the United States. It is always used in testing the speed of government cruisers built on the Atlantic seaboard, the Secretary of the Navy having issued an order to this effect several years ago. The Cunard and White Star Steamship Companies use it exclusively on their eastern voyages, and with it have made all their great speed records of recent years. It is conceded to be the best fuel for locomotives and stationary engines, and its supremacy as a steam fuel is now established beyond dispute.

THE RECORD OF POCAHONTAS COAL IS THE MOST REMARKABLE IN THE HISTORY OF THE TRADE.

The first mine was opened in 1883, the shipments for that year amounting to only 75,000 tons.

In 1895 there were thirty-eight collieries in operation, whose output (including tonnage converted into coke) aggregated 3,500,000 tons.

Not only is this coal famous for the immense growth of its tonnage, but its reputation has also increased, until to-day it enjoys the distinction of having been officially indorsed as the *best American steam coal by the United States Navy Department, the United States War Department, the British Minister at Washington, all the leading steamship, railroad, and manufacturing companies,*" etc.

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the mines in the Pocahontas region by compelling every mine owner in the Pocahontas field to offer no coal on the market unless the description be qualified, or unless the coal be confided for sale to the complainants.

It is insisted, however, that the appellate court should have complied with the request contained in the petition for a rehearing, and remanded the cause to permit further proofs in support of the material allegations of the bill. In *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, ante, 856, 20 Sup. Ct. Rep. 706, we considered the question as to the power of a circuit court of appeals, in reviewing the action of a circuit court in allowing a temporary injunction *pendente lite*, upon affidavits; to consider the case upon the merits and direct a final decree dismissing the bill. It was held that the propriety of the exercise of such a power must be determined from the circumstances of the particular case. And it was added:

*"If the showing made by the plaintiff be [184] incomplete; if the order for the injunction be reversed because injunction was not the proper remedy, or because under the particular circumstances of the case it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused,—then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. *But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention,—we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed.*"

As respects the case at bar, we are satisfied from the averments of the bill and the proof that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right to the trademark or tradename "Pocahontas" exists in the complainants. Further, we concur in the conclusion of the circuit court of appeals that the bill, upon its face, is devoid of equity. It is fairly to be inferred from the averments of the bill that it charges that, while acting as agents of the owner of one of the mines represented by the defendant, and of the owners of many other mines in the same region or field, there was applied by the complainants to the product of all the mines the appropriate designation Pocahontas coal, a description which applied to all the coal produced by the operators in that region, and which was correctly descriptive of such product. Whether, as claimed, the reputation of the coal was enhanced by careful inspection and grading by the complainants or their predecessors, is left conjectural by the record. But if it be conceded that the proof on this branch of the case was certain, it could operate no change of result. In inspecting and grading the coal, complainants and their predecessors were but agents of the mine owners. Certainly, the agent cannot be heard to say that he may appropriate to

himself the name belonging to the product of his principal, or that he may affix the name to coal for his own purposes, and not for the benefit and advantage of his principal.

[185] Keeping in mind the circumstances under which the complainants *made whatever use they did make of the appellation "Pocahontas," as applied to coal produced from the Pocahontas coal region, we can perceive no just ground for the claim that there was unfair competition in trade, by reason of the acts averred to have been committed by the defendant. In substance, the alleged wrongful acts were averred to consist in the advertising in various forms by the defendant of the coal handled by him, as "Pocahontas" coal, when in fact such coal is a "very inferior and very impure coal." It was also averred, *in the alternative*, that such acts were done with the intent to cause the purchasers of said coal to believe "that the same was sold by your orators, or is of the quality of that sold by your orators." The effect of the advertising of the coal handled by the defendant, as "Pocahontas" coal, it is also asserted, is that purchasers of the coal dealt in by the defendant are liable to and will be deceived by such representations into purchasing such coal "as your orators' superior and specially selected coal." It is further averred that purchasers have in fact been so deceived, and that the "reputation of your orators' 'Pocahontas' coal has thereby been tainted." Leaving out of view the emphatic denial of the defendant, that the coal handled by him is in any wise inferior to that handled by the complainants, it is plain from the averments in the bill that the alleged inferiority in the coal is grounded upon the supposition of a want of careful inspection and grading. We do not think, however, that if it were a fact that it had become generally known and recognized by the public that the complainants, while in the employ of the coal producers of the Pocahontas coal field, inspected and graded the product of the mines in such manner as that thereby the reputation of the coal was enhanced, that the owners of mines producing Pocahontas coal thereby lost their right to designate their coal by its appropriate name, because of the possibility that some person, by reason of the coal being termed what it really was, might be induced to believe that it was still inspected by complainants.

As we have already said, in its final analysis, the right which the complainants assert amounts but to the contention that because at one time they were the agents of the owners of coal *mined from the Pocahontas field, and had sold the same as agents for the owners under its correct name, they thereby divested the owners of their property, and have acquired a monopoly of selling all the coal from the Pocahontas field under its appropriate name. We think there was no error in the decree of the Circuit Court of Appeals, and it is therefore affirmed.

HENRY P. CLARKE, *Plff. in Err.*,
v.

NANCY B. CLARKE, John H. Perry, Guardian *ad Litem* of Nancy B. Clarke, and Henry P. Clarke, as Administrator of the Personal Estate of Julia Clarke, Deceased.

(See S. C. Reporter's ed. 186-195.)

Conversion of real property by will—effect of probate in other state—determination by court where land lies.

1. The equitable conversion of real property into personalty by will is a matter within the exclusive province of the courts of the state in which the land lies to determine, although the will was made and has been probated at the domicile of the testator in another state, where it is construed to work such conversion of the real property wherever situated, and it is immaterial that the executor has not assumed to make any conveyance of the property.
2. The local law of a state is taken by the Supreme Court of the United States as announced by the state court of last resort.
3. The interest of a minor devisee in land situated in another state cannot be determined in a suit to construe the will, in which a guardian *ad litem* is appointed for the infant, as neither the executor nor trustee under the will nor the guardian *ad litem*, nor any other person assuming to represent the minor in that state, has authority to act for the minor in respect to real estate beyond the jurisdiction of the court and situated in another state.
4. A decision by the courts of the domicile of a testatrix, that her will worked a conversion into personalty of all her real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in that state.

[No. 216.]

Argued April 9, 10, 1900. Decided May 21, 1900.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a decision affirming a decree which refused to accept a probate decision in another state as conclusive upon the title to real property in that state. *Affirmed.*

See same case below, 70 Conn. 195, 39 Atl. 155, and 70 Conn. 483, 40 Atl. 111.

Statement by Mr. Justice **White**:

*This writ of error was procured for the purpose of obtaining the reversal of a judgment of the supreme court of errors of the state of Connecticut, which, as respected real estate situated in the state of Connecticut, refused to follow and apply a judgment of the supreme court of South Carolina interpreting and construing the will of Julia H. Clarke. [186]

NOTE.—As to effect of probate of will in another state—see *Martin v. Stovall* (Tenn.) 48 L. R. A. 130, and note.

As to equitable conversion of real property into personalty—see *Cottman v. Grace* (N. Y.) 3 L. R. A. 145, and note. See also note to *Bullard v. Chandler* (Mass.) 5 L. R. A. 104.

The facts from which the legal questions presented arise are as follows:

Henry P. Clarke and Julia Hurd intermarried in New York in 1886, and immediately thereafter went to South Carolina, where they afterwards continuously resided. Mrs. Clarke died on February 10, 1894, owning real and personal property in South Carolina, and also real estate situated in Connecticut. Two daughters survived, one Nancy B., aged five years, the other, Julia, aged about two months.

[187] *A will and codicil executed by Mrs. Clarke were duly established in the court of probate for Richland county, in the state of South Carolina. The will contained the following provisions:

"Fifth. The rest, residue, and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise, and bequeath as follows: One half thereof to my husband, Henry P. Clarke, and one half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

"In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue, and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

"And I give, devise, and bequeath the said rest, residue, and remainder as aforesaid, to each and to their heirs and each of them forever."

The infant daughter Julia died shortly after her mother, in the month of May, 1894, owning no property in Connecticut except such as had devolved on her under the will of her mother.

Henry P. Clarke, as executor of the last will and testament of his wife, Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, his infant daughter, brought suit in June, 1895, against said Nancy B. Clarke, in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

[188] *A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing, the court decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of

whatsoever description and wheresoever situated; that the plaintiff as executor should receive, administer, and account for the same as personalty; that he was, by the said will, authorized and empowered to sell and convey the same for the purpose of executing the will, and leave was given to apply for further orders and directions upon the foot of the decree. This judgment was, upon appeal, affirmed by the supreme court of South Carolina. 46 S. C. 230, 24 S. E. 202.

The controversy in the courts of Connecticut was commenced by the filing, in the probate court for the district of Bridgeport, of a petition on behalf of Henry P. Clarke as administrator of the estate of his deceased daughter Julia Clarke, he having been appointed such administrator by the proper court in Connecticut. In the petition it was recited that Julia had died intestate, leaving *real estate* in the district, and that divers persons claimed to be entitled to have the said real estate set apart and distributed to them, and the court was asked to hear the claims of said parties and ascertain to whom the estate should be apportioned. A guardian *ad litem* having been appointed by the court for Nancy B. Clarke, the application was heard, and a decree was entered finding that she was the sole heir and distributee of her deceased sister Julia. The Connecticut law, which devolved on Nancy the whole of the real estate of Julia, differed from the law of South Carolina, by which the estate of Julia, both real and personal, passed equally to the father and to Nancy the surviving sister.

Henry P. Clarke, individually, appealed from the decision of the probate court to the superior court of the county of Fairfield. That court filed its findings stating the facts concerning the controversy, and reserved the resulting questions of law to the supreme court of errors of the state, which court recommended that the decree of the probate court be affirmed. 70 Conn. 195, 39 Atl. 155. Thereupon the superior court of Fairfield county entered a decree in conformity to the mandate to it directed. *In the body of the [189] decree the court referred to the contention between the parties, and stated the one pertinent to the issue now before us, as follows:

"Upon the facts aforesaid the appellant claimed and contended that the decision and decree of the circuit court for the fifth judicial circuit of the state of South Carolina, being the court of common pleas and general sessions for Richland county, affirmed by the supreme court of said state (46 S. C. 230, 24 S. E. 202), in the case of Henry P. Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix, wherever situated, was binding and conclusive on the courts of this state in his favor in this proceeding, and that to hold otherwise would be to deny full faith and credit to the judicial proceedings and judgment of the state of South Carolina, and would be in

contravention of section 1, article 4, of the Constitution of the United States."

An appeal was taken from the decree of the superior court. The supreme court of errors of Connecticut, although it remarked that the appeal was unnecessary, as its prior judgment had settled the controversy between the parties, yet entertained the appeal, and affirmed the decree below. 70 Conn. 483, 40 Atl. 111.

Mr. Le Roy F. Youmans argued the cause and, with **Mr. John S. Verner**, filed a brief for plaintiff in error:

Where a person occupies a representative capacity, and has a personal interest under the instrument giving him the representative character, he is bound by a judgment to which he was a party in either capacity.

Manigault v. Holmes, Bail. Eq. 283; *Small v. Small*, 16 S. C. 64; *Verner v. Bookman*, 53 S. C. 398, 31 S. E. 283; *Morton v. Packwood*, 3 La. Ann. 173; *Denegre v. Denegre*, 33 La. Ann. 689; *Pouché v. Harison*, 78 Ga. 410, 3 S. E. 330; *Donifelser v. Heyl*, 7 Kan. App. 606, 52 Pac. 468; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Stewart v. Montgomery*, 23 Pa. 410; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 741, 24 L. ed. 190.

In South Carolina a bill for the distribution of an infant's estate may proceed without making an administrator of the infant a party.

Markley v. Singletary, 11 Rich. Eq. 393.

Where the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other state and court in the United States.

Christinas v. Russell, 5 Wall. 290, 18 L. ed. 475.

The will being the will of a South Carolinian, and all the beneficiaries under the residuary clause being domiciled in that state, we submit that the courts of that state, which assumed jurisdiction, had jurisdiction of the parties and the question as to meaning of that will, although it indirectly affected lands outside of that state.

Massie v. Watts, 6 Cranch, 160, 3 L. ed. 185; *Kildare v. Eustace*, 1 Vern. 419; *Toller v. Carteret*, 2 Vern. 494; *Penn v. Baltimore*, 1 Ves. Sr. 444.

It has been held that a suit for specific performance of a contract for the conveyance of lands proceeds *in personam*, and may be maintained in any court of equity which has jurisdiction of the parties, even if the land lies in another state or foreign country.

Brown v. Desmond, 100 Mass. 269.

The law of the domicile governs in the interpretation of wills.

Story, Conf. Laws, §§ 479a, 479c; *Van Stenwyck v. Washburn*, 59 Wis. 510, 17 N. W. 289; *Harrison v. Nixon*, 9 Pet. 484, 9 L. ed. 202; *Trotter v. Trotter*, 4 Bligh N. R. 502; *Chamberlain v. Napier*, L. R. 15 Ch. Div. 614; *Caruthers v. Corbin*, 38 Ga. 86; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 648; *Black*, Judg. § 922.

Actions or proceedings to set aside wills or test their validity are generally proceedings *in rem*, while suits for their construction are *in personam*.

Freeman, Judg. § 608; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; *Freeman v. Alderson*, 119 U. S. 187, 30 L. ed. 373, 7 Sup. Ct. Rep. 165.

Mr. S. F. Phillips also argued the cause and, with **Mr. F. D. McKenney**, filed a further brief for plaintiff in error.

Mr. Le Roy F. Youmans also filed a separate brief for plaintiff in error.

Mr. John H. Perry argued the cause and, with **Mr. Winthrop H. Perry**, filed a brief for defendants in error:

The courts of one state will not recognize the rights of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize as valid title so acquired.

Farmers' Loan & T. Co. v. Postal Teleg. Co. 55 Conn. 334, 11 Atl. 184.

The law of the domicile has no efficacy when the subject is real estate.

Lamar v. Scott, 3 Strobb. L. 562; *Beall v. Lowndes*, 4 S. C. N. S. 258; *Abrams v. Moseley*, 7 S. C. N. S. 150; *Cureton v. Mills*, 13 S. C. 409, 36 Am. Rep. 700.

The judgment of the South Carolina court, so far as it was intended to affect Connecticut land by determining that the will lawfully directed and empowered the executor to sell and convert that land, was beyond the power of the South Carolina court to render, because it was confessedly beyond its power to enforce.

Johnson v. Mallory, 74 Cal. 430, 16 Pac. 228; *Dacey*, Conf. Laws (1896) pp. 215, 365.

The element of consent would have been necessary to bind the parties as to the Connecticut land, and the infant could not give any such consent.

Whitesides v. Barber, 24 S. C. 373.

And even if Nancy Clarke could have lawfully consented to the action taken, the Connecticut court might properly refuse to be bound thereby because of the considerations of public policy involved.

Springer v. Shavender, 118 N. C. 33, 23 S. E. 976; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

***Mr. Justice White**, after making the foregoing statement, delivered the opinion of the court:

The supreme court of errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into personalty *of the real estate situated in the state of Connecticut, and, consequently, that though personal property might be governed by the law of the domicile, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited, under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the

real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property, it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really the only question which the assignment of errors presents for our decision.

The argument at bar has taken a wide range, and the various legal principles by which it was deemed that a solution of the controversy might be facilitated have been supported by a very elaborate reference to authority. We do not deem it necessary, however, to critically review the cases cited and the observations of text writers which were relied on in argument, nor to analyze all the contentions which it is asserted those authorities sustain. We say this, because, in our opinion, the matter at issue may be disposed of by the application of two well-defined and elementary legal principles.

It is a doctrine firmly established that the law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461, where the court said (p. 570, L. ed. p. 829, Sup. Ct. Rep. p. 462):

[191] **"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. United States v. Crosby, 7 Cranch, 115, 3 L. ed. 287; Clark v. Graham, 6 Wheat. 577, 5 L. ed. 334; McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858.*

Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that state, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that state) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South

Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governed in such a case. It is conceded that had the will been presented to the courts of Connecticut in the first instance and rights been asserted under it, that the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will, but the decree of the South Carolina court construing the will, is the measure of the rights of the parties as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective states controlling the transmission of real property by will, or in case of intestacy, are operative only so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be *done directly can be accomplished by indi- [192] rection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the nonexistence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that state as announced by the court of last resort of that state.

As correctly observed in the course of the opinion delivered by the supreme court of errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving the mode of passing title to lands in that state. This resulted from the fact that in the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate in Connecticut by a deed sufficient, under the laws of that state, to transfer title to real estate—a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of

the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed.

[193] As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty, or estate with respect to lands situated in Connecticut, depended upon the laws of that state. The courts of *the domicile of Mrs. Clarke could properly be called upon to construe her will so far as it affected property which was within or might properly come under the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another state, however much those courts might indirectly affect and operate upon it in controversies where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument encumbering such land.

And the cogency of the reasons just given is further demonstrated by considering the case from another, though somewhat similar, aspect. The decree of the South Carolina court, which, it is contended, had the effect of converting real estate situated in Connecticut into personal property, was not one rendered between persons who were *sui juris*. Nancy B. Clarke, one of the parties to the suit in South Carolina, and whom the Connecticut court has held inherited, to the exclusion of the father, under the laws of Connecticut, the whole of the real estate belonging to her sister, was a minor. She was therefore incompetent, in the proceedings in South Carolina, to stand in judgment for the purpose of depriving herself of the rights which belonged to her under the law of Connecticut as to the real estate within that state. Neither the executor nor trustee under the will, nor the guardian *ad litem*, nor any other person assuming to represent the minor in South Carolina, had authority to act for her *quoad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut.

It cannot be doubted that the courts of a state where real estate is situated have the exclusive right to appoint a guardian of a nonresident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the state. This court had occasion to consider and pass upon this doctrine in the case of *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585, and, in the course of the opinion, it was said (p. 631, L. ed. p. 592):

[194] *"One of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and

others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed, and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: 'It has certainly not received any sanction in America, in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property or their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.' Story, *Conf. L.* §§ 499, 504, 504a. And see Whart. *Conf. L.* 2d ed. §§ 259-268; 3 Burge, *Colonial & Foreign Laws*, 1011. And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. Whart. *Conf. L.* 2d ed. §§ 267, 268."

Of what efficacy, however, would be the power of one state to control the administration, through its own courts, of real estate within the state, belonging to minors, without regard to the domicile of the minor, if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another state. Here, again, the argument relied on must rest upon the false assumption that an exclusive power which confessedly exists in the courts of one jurisdiction may be wholly destroyed or rendered nugatory by the action of the courts of another jurisdiction in whom is vested no authority whatever on the subject. It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which *was not with-[195] in the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court.

When, therefore, Henry P. Clarke, as administrator, appointed in Connecticut, of the estate of his deceased daughter, Julia Clarke, applied to the Connecticut probate court to determine who was entitled to the "real estate" owned by the intestate, it was the province of the Connecticut court to decide such question solely with reference to the law of Connecticut. Its power in this regard was not limited by the fact that in order to determine who owned the real estate, it was necessary for the court to construe the will of the mother of the intestate, and to determine what effect it had upon the status of the real estate under the law of Connecticut. Having a right to decide these questions, it was not constrained to adopt the construction of the will which had been announced

by the court of South Carolina. From these conclusions, it follows that because the court of Connecticut applied the law of that state in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one state to the judgments and decrees of the courts of another state was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

Judgment affirmed.

[196]*WILLIAM C. BROWNING, *et al.*, *Plffs. in Err. & Appts.*,
v.

CHARLES H. DEFORD.

(See S. C. Reporter's ed. 196-205.)

Chattel mortgage—mortgagee's knowledge of mortgagor's fraud as to creditors—validity of mortgage as against attachment by defrauded vendor.

1. Proof that the agent of the mortgagees of chattels was a lawyer of long standing and considerable practice, and that a debt to him-

NOTE.—Effect of election of remedies in case of fraudulent purchase.

An action to enforce a contract procured by fraud is not a bar to a subsequent action for the alleged fraud, as the remedies are consistent and concurrent, both proceeding upon the theory of an affirmation of the contract. *Bowen v. Mandeville*, 95 N. Y. 237; *Wanzer v. DeBaun*, 1 E. D. Smith, 261; *Whittier v. Collins*, 15 R. I. 90, 23 Atl. 47; *Morgan v. Skidmore*, 55 Barb. 263.

It is otherwise as to any subsequent action which attacks the conclusiveness of the contract. *Lehman v. Van Winkle*, 92 Ala. 443, 8 So. 870; *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 83; *Acer v. Hotchkiss*, 97 N. Y. 395; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073; *Bulkley v. Morgan*, 46 Conn. 393; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019; *Sanger v. Wood*, 3 Johns. Ch. 416; *Horner v. Boyden*, 27 Ill. App. 573; *Seavey v. Potter*, 121 Mass. 297.

But an action on a contract, brought without knowledge of fraud, will not prevent a subsequent action to disaffirm the contract for fraud. *Hays v. Midas*, 104 N. Y. 602, 10 N. E. 141; *Equitable Co-Operative Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487.

On the same principle, an action to recover property on the ground that it was obtained

self which had been already partially paid was secured by the mortgage, and that he was the son-in-law of the head of the firm which gave the mortgage, and who had previously given deeds to members of his family, one of them being to the lawyer's wife, which deeds had been long withheld from record, and that the mortgagors were merchants, constantly buying and replenishing their stock, and standing in need of credit, is sufficient to go to the jury on the question of his connection with the scheme of the mortgagors to execute the mortgage for the purpose of defrauding their unsecured creditors.

2. A chattel mortgage taken by an antecedent creditor who knows that the debtor has procured the goods fraudulently cannot be sustained against defrauded vendors of the property, whether they elect to rescind the sale and replevin the goods or to sue for the purchase price and attach the goods.

[No. 245.]

Argued April 16, 17, 1900. Decided May 21, 1900.

IN ERROR to and APPEAL from the Supreme Court of the Territory of Oklahoma to review a decision affirming a judgment for defendant in an action of trover by chattel mortgagees. *Affirmed.*

See same case below (Okla.) 60 Pac. 534.

Statement by Mr. Justice Brown:

*This was an action in the nature of trover [196] by the surviving partners of the firm of Henry W. King & Company, and four other creditors, as chattel mortgagees, against Charles H. DeFord, sheriff of Oklahoma county, to recover the value of a stock of goods seized by the defendant and sold under writs of attachment issued against the property of the firm of W. F. Wolfe & Son, in suits instituted by general creditors of that firm. Defendant justified under these writs of

by fraud will prevent a subsequent action on the contract of sale. *Moller v. Tuska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552; *Thompson v. Fuller*, 28 N. Y. S. R. 4, 8 N. Y. Supp. 62.

An attachment to enforce a claim on contract, made with full knowledge of fraud therein, is a conclusive election to affirm the contract. *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Benedict v. National Bank of the Commonwealth*, 4 Daly, 171; *Wright v. Pierce*, 4 Hun, 351; *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 83; *Sickman v. Abernathy*, 13 Colo. 174, 23 Pac. 447; *Butler v. Hildreth*, 5 Met. 49; *Bulkley v. Morgan*, 46 Conn. 393.

For a full review of the cases above cited and others bearing on this question, see note to *Union Cent. L. Ins. Co. v. Scheldler (Ind.)* 15 L. R. A. 89.

A vendor by electing to sue for the contract price, with knowledge of the fraud in the sale, waives his right to rescind the contract and recover the property sold. *First Nat. Bank v. McKinney*, 47 Neb. 149, 66 N. W. 280.

The commencement of a suit for the purchase price is a binding election to affirm the sale, notwithstanding a voluntary nonsuit is taken. *Lowenstein v. Glass*, 48 La. Ann. 1422, 20 So. 890.

And the original petition in an action to recover the purchase price cannot be amended

attachment, and alleged that the indebtedness of each of the attaching plaintiffs was procured by W. F. Wolfe & Son by means of false and fraudulent representations as to their financial standing and credit; that the mortgage was executed by such firm in pursuance of a conspiracy between the firm and the mortgage creditors, who had knowledge of the fraudulent acts of the firm, and knew that the mortgage was given with intent to hinder, delay, and defraud their general creditors; that the mortgage was neither given nor accepted in good faith for the purpose of securing a bona fide indebtedness; but that the indebtedness was in part, if not wholly, false, fictitious, and trumped up to suit the occasion, and that the real intent of Wolfe & Son in executing the mortgage was to place their property beyond the reach of their creditors.

[197] The case was tried before a jury, and resulted in a verdict and judgment for the defendant, which was affirmed by the *supreme court of the territory; whereupon plaintiffs brought the case to this court both by writ of error and appeal. Another suit in attachment brought by E. S. Jaffray & Co. against Wolfe & Son, in which the mortgage was set up as a defense and the facts were the same,

so as to set out an election to avoid the sale for fraud, and to recover the goods. *Wachsmuth v. Sims* (Tex. Civ. App.) 32 S. W. 821.

In order to bind himself by his election to sue for the contract price, the vendor must know at the time whether the goods can be found and identified, or be put upon notice or inquiry which, if prosecuted with reasonable diligence, will lead to such knowledge. *White v. Beal & F. Grocer Co.* 65 Ark. 278, 45 S. W. 1060.

An action for the purchase price, brought without knowledge of the fraud, does not interfere with the vendor's right to rescind immediately upon discovery of the fraud, and to bring an action in replevin to recover possession of the property. *Rochester Distilling Co. v. Devendorf*, 72 Hun, 428, 25 N. Y. Supp. 200.

And the prosecution of a suit for the purchase price by a vendor, without knowledge of the fraud, does not bar an action to recover damages for the fraud. *Albany Hardware & Iron Co. v. Day*, 11 App. Div. 230, 42 N. Y. Supp. 971.

Nor need the judgment recovered in the former suit be discharged before the second may be maintained. *Ibid.*

The pendency of an action in replevin instituted by the vendor against the assignee or transferee of the fraudulent purchaser forms a complete defense to an action against the purchaser himself to recover the purchase price. *Seeman v. Bandler*, 26 Misc. 372, 56 N. Y. Supp. 210.

But an action of replevin brought by a vendor against the chattel mortgagee of a portion of the property sold, which was settled, with the vendee's consent, for a stipulated sum, is not such an election of remedies as will bar a suit for the fraudulent representations inducing the sale, in which the amount unpaid on the original contract is claimed as damages. *Shaut v. Schauoth*, 46 App. Div. 450, 61 N. Y. Supp. 767.

An action for the recovery of damages for obtaining goods under false pretenses with the preconceived design not to pay for them is not inconsistent with a replevin action previously

also resulted in a judgment that the mortgage was fraudulent. *Jaffray v. Wolfe*, 4 Okla. 303, 47 Pac. 496.

Mr. John W. Shartel argued the cause and filed a brief for plaintiffs in error and appellants.

Mr. Arthur A. Birney argued the cause and filed a brief for defendant in error and appellee:

All papers executed in pursuance of an original design, contemplated and determined upon in the beginning, are in law deemed to constitute one transaction, and are construed together, whether made on the same day or on different days. Whether the instruments constitute one transaction is a question for the jury.

Bump, Fraud. Convey. § 339.

If the act or declaration is so connected with the main fact under consideration as to explain its character, further its object, or to form, in conjunction with it, one continuous transaction, the evidence is admissible without regard to the time when the act was done or the declaration was made.

Bump, Fraud. Convey. 590, 594, 595; *Cooke v. Cooke*, 43 Md. 522.

An antecedent creditor who knows that

brought. *Welch v. Seligman*, 72 Hun, 138, 25 N. Y. Supp. 363.

And the filing of a complaint for the rescission of a contract on the ground of fraud is not such a conclusive election of remedy as to preclude an abandonment of that cause of action by amending the complaint so as to demand damages on account of the same fraud. *Cohon v. Fisher*, 146 Ind. 583, 36 L. R. A. 193, 44 N. E. 664, 45 N. E. 787; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

See, however, *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274, in which an action to recover damages for fraudulent misrepresentations as to the value of property at the time of a trade was held to be in effect an action for part of the purchase price, and, while pending, to constitute an election to ratify the trade, so as to preclude the remedy by rescission.

An antecedent creditor who knows that his debtor procured goods and merchandise by fraudulent means cannot, by chattel mortgage, secure a lien on such fraudulently procured goods adverse to the innocent vendors who have attached the property, having elected to waive the tort and to bring an action to recover the value of the goods. *Wafer v. Harvey County Bank*, 46 Kan. 597, 26 Pac. 1032; *Browning v. Deford*.

To the contrary is *Stokes v. Burns*, 132 Mo. 214, 33 S. W. 460, in which a vendor by attaching the property is held to waive the fraud in the sale, and to have no standing to avoid a trust deed executed by the vendees to secure a bona fide indebtedness, notwithstanding the knowledge of the beneficiaries that the deed was executed with the intention to defraud the vendees' other creditors.

So, an attachment of goods in an action for the purchase price thereof is based on an affirmation of the contract, so as to waive any fraud in purchase as between the seller and a subsequent purchaser who obtained the goods in payment of an honest debt, although with knowledge of the fraud by the original purchaser. *Gray v. St. John*, 35 Ill. 222.

his debtor procured goods by fraudulent means cannot by a chattel mortgage secure a lien upon such goods adverse to the innocent vendor thereof.

Stearns v. Gage, 79 N. Y. 102; *Wafer v. Harvey County Bank*, 46 Kan. 597, 26 Pac. 1032.

Of the three things which must occur to protect the title of the purchaser, the first is: He must buy without notice of the bad intent on the part of the vendor.

14 Am. & Eng. Enc. Law, 287.

The decisions of this court are conclusive upon this point.

Blennersssett v. Sherman, 105 U. S. 100, 26 L. ed. 1080; *Kempner v. Churchill*, 8 Wall. 362, 19 L. ed. 461; *Clements v. Moore*, 6 Wall. 312, *sub nom. Clements v. Nicholson*, 18 L. ed. 788.

[197] *Mr. Justice **Brown** delivered the opinion of the court:

This was a contest between mortgage creditors suing as plaintiffs and attaching creditors representing the defendant sheriff.

The facts are that on December 15, 1890, the firm of W. F. Wolfe & Son, retail merchants, and conducting a store at Oklahoma city, executed a joint chattel mortgage to one Vance and several other creditors for whom he acted, and by whom he was authorized to take any security he could get, of their stock of goods at Oklahoma city, and another stock at the city of Guthrie, not involved in this case. The mortgagees immediately took possession of the mortgaged property by one Harvey, their agent, and a brother-in-law of Vance, who proceeded to take an inventory. Shortly after the execution of the mortgage, a number of other creditors brought suits in attachment against Wolfe & Son, and through the defendant De Ford, sheriff of Oklahoma county, levied upon the goods, and dispossessed the mortgagees, who brought suits for the conversion of the property. These suits were subsequently consolidated into two cases, in one of which all the mortgage creditors appear as plaintiffs, and the sheriff of Oklahoma county as defendant. The defense was that the goods were fraudulently obtained of the attaching creditors by false representations made by W. F. Wolfe & Son

[198] as to their assets, and that *Vance, one of the mortgage creditors, acting for himself and as agent and attorney for the others, not only had full knowledge that such goods were wrongfully and fraudulently obtained, but actively participated in obtaining the same, and that he had full knowledge that the mortgage was executed by Wolfe & Son for the purpose of hindering, delaying, and defrauding their creditors, and actively participated in such fraudulent device. In other words, in brief, that the goods were purchased in the pursuance of a conspiracy that when a large stock had been obtained by Wolfe & Son by means of fraudulent statements as to their assets, certain deeds of their real estate which had been previously made, but which had remained unrecorded, should be placed of record, and the goods and merchandise obtained upon such fraudulent

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statements should be mortgaged to the plaintiffs in satisfaction of their claims.

In this connection the court charged the jury that, "in order to invalidate the chattel mortgage, it is not enough for the defendant to show simply that the firm of W. F. Wolfe & Son fraudulently purchased goods of the attaching creditors, but it must also appear from the evidence that the plaintiffs in this case were parties to such fraud; that they were either active participants in such fraud, or that they aided or abetted in such fraud, or that said plaintiffs at the time they took said mortgage actually knew that Wolfe & Son had fraudulently incurred a liability and debt for the goods or a portion thereof described in the chattel mortgage."

Though there are many assignments of error, there are really but two which require our consideration: First, that there was no evidence of knowledge on the part of Vance, who acted for the mortgage creditors, of the fraudulent character of the purchases made by Wolfe & Son of the attaching creditors; second, that the court erred in holding the mortgagees liable simply upon proof that the mortgage was taken with knowledge of such fraudulent representations.

1. To make out their case the attaching creditors were bound to show, first, that the goods were fraudulently purchased, and, second, that the mortgagees, or Vance, their agent, was a party to or cognizant of such frauds. There was ample evidence that *the [199] goods were fraudulently purchased. The firm of W. F. Wolfe & Son was composed of William F. Wolfe, the father, and Louis H. Wolfe, the son. On January 5, 1887, Louis H. Wolfe dede to his wife Winifred, in consideration of love and affection, a certain lot of land, No. 15, in Topeka, Kansas, by deed, which was not recorded until December 17, 1890. On July 26, 1890, William F. Wolfe and his wife Georgia H. dede to Laura V. Vance, their daughter, and the wife of A. H. Vance, another lot in the city of Topeka, No. 20, in consideration of the sum of \$6,500, and subject to a mortgage of \$4,000. This deed was also filed for record December 17, 1890. On September 8, Georgia H. Wolfe, wife of William F. Wolfe, made application to the townsite trustees of Oklahoma city for a deed to four lots of land in that city, being the site of their business house, stating that she had purchased the same on May 17, 1890, of Louis H. Wolfe, her son, and William F. Wolfe, her husband, who had given her a quitclaim deed to the same. This deed was also recorded the same day (December 17). Notwithstanding these deeds, the Wolfes, in their statement of assets furnished the attaching creditors, included all this real estate, putting an estimate of \$20,000 upon that in Topeka and \$12,000 upon that in Oklahoma. This amount added to the value of the Oklahoma store stock \$17,000 and the Guthrie store stock \$35,000, made their total assets \$84,000, less \$27,000 liabilities, net assets \$57,000. Sundry letters were produced from the firm, written during the summer and fall of 1890 to several of the attaching creditors, in which this real estate was in-

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cluded as a part of their assets, notwithstanding that most of it had already been conveyed to different members of their families. These facts, which were not denied, and which were scarcely susceptible of denial, were fully established, and were clearly sufficient to lay before the jury as to the fraudulent character of the purchases of the attaching creditors.

The facts that Vance was a lawyer of long standing and considerable practice, and, as already stated, was the son-in-law of William F. Wolfe; that one of the deeds was to his wife, and was withheld from record for several months, and until a day or two after the chattel mortgage was made; that he could [200] *scarcely have failed to know that other deeds had been made to the wives of William F. and Louis H. Wolfe, which were also withheld from record; that these men were merchants who were constantly buying and replenishing their stock and stood in need of credit; and that he was himself one of the creditors secured by the mortgage—for a debt, too, which had been already partially paid—were, we think, sufficient evidence to open to the jury the question of his connection with the scheme of Wolfe & Son to execute this mortgage for the purpose of defrauding their unsecured creditors. The very fact that one of these deeds was withheld from record for three years and a half, another for eight months, and another for about six months was, unexplained, sufficient to indicate that they were withheld for no good purpose. While evidence was lacking of a direct participation by Vance in these plans to defraud the creditors of Wolfe & Son, his intimate connection with the family and the fact that the mortgage was given, partially at least, to secure him for his liability as surety for the firm, was not too remote to justify the court in laying the whole matter of his connection with the fraudulent scheme before the jury, and as he was acting as agent and attorney for the other secured creditors, they were equally chargeable with himself.

2. Upon the second point, the jury were instructed, in substance, that to defeat the mortgage it was necessary for the attaching creditors to show that Wolfe & Son were guilty of fraud in contracting the debts, to satisfy which the writs of attachment were levied; and also to show that the mortgagees were parties to such fraud; or that at the time they took the mortgage they knew that Wolfe & Son had fraudulently incurred a liability for the goods described in the mortgage. The objection of the plaintiffs to this instruction is stated in their fourth assignment of error, that the court “erred in holding, as a principle of law, that where goods have been fraudulently obtained by means of false representations as to the financial standing of a debtor, and where such creditors elect to sue for the purchase price of such goods, and proceed by the attachment of the property claimed to belong to the debtor, that a party previously taking a mortgage on [201] such goods to secure an *antecedent debt, with knowledge of such false representations,

must surrender such property to such attachment creditors.”

The theory of the plaintiff is that the attaching creditors had an election of remedies—either to rescind the sale and replevy the goods, in which case it would have been sufficient as against the mortgagees to prove that they took the mortgage with the knowledge that the goods had been fraudulently purchased, and that the mortgagors had no title to them; or to sue for the purchase money and thereby affirm the sale, and to attach the goods as the property of the mortgagors, in which case the mortgagees would stand only as preferred creditors, and their mortgage would be valid, notwithstanding their knowledge that the goods had been fraudulently purchased.

It is entirely true that, upon being satisfied that the goods had been purchased upon fraudulent representations, the attaching creditors had an election of remedies. They might rescind the sale and replevy the goods, or they might affirm the sale, sue for the purchase price, and attach the goods upon the ground that they had been fraudulently purchased. Had it not been for the mortgage, it would only have been necessary for the attaching creditors to show that the debts were fraudulently contracted, to sustain their attachment; but in order to attack the mortgage, and to show that they had a title superior to that of the mortgage creditors, it was necessary to go further, and prove that the mortgage was fraudulent. This might be done by evidence that the mortgage was taken in pursuance of a scheme to defraud the general creditors, or that the mortgagees took their security with the knowledge that it covered goods which had been purchased upon fraudulent representations, and that the purchases were made under such circumstances as would entitle the vendors to rescind the sale and reclaim the goods. They chose, it is true, to treat the sale as valid, sue for the purchase price, and thereby affirm the title of the vendees, but they did not thereby affirm the mortgage. Their approbation went no farther than the sale from themselves to Wolfe & Son. Their reprobation went to the mortgage, and to that alone. There was, indeed, an election of remedies, and having made an election the attaching creditors *were bound thereby. [202] But such election went no farther than to affirm the sale, under which they were at liberty to attach the goods as still belonging to the vendees. They were bound no farther by the fraudulent mortgage of such goods than they would have been by the fraudulent assignment of them, and no class of cases is more common than that of attachments sued out for goods which are claimed to have been fraudulently assigned.

The instruction complained of is fully supported by the recent case in the supreme court of Kansas of *Wafer v. Harvey County Bank*, 46 Kan. 597, 26 Pac. 1032, which holds directly that an antecedent creditor, who knows that his debtor procured goods and merchandise by fraudulent means, cannot by a chattel mortgage secure a lien upon

such fraudulently procured goods, adverse to the innocent vendors of such goods. This was also an action by a chattel mortgagee against the sheriff who had seized under attachments a stock of goods belonging to the attachment debtor. The distinction relied upon by the plaintiffs in this case was noticed in that, the court remarking that these goods having been obtained from the attaching creditors by fraudulent means, the debtor acquired no title to them, and the attaching creditors would be justified in retaking the goods, or they could waive the tort and bring an action for their value, in which case knowledge of the plaintiffs, that the goods had been fraudulently obtained, did not put them in a position of bona fide purchasers, or enable them to set up the mortgage against attaching creditors.

[203] In the cases relied upon by the plaintiff, but one (*Stokes v. Burns*, 132 Mo. 214, 33 S. W. 460) is in point. In that case it was held that where defendants procured goods by fraud, and transferred the same in trust for a bank, to secure a bona fide indebtedness, the mere knowledge of the bank that the goods were so procured, and that the defendants intended to defraud their other creditors, is not sufficient to avoid the trust deed at the suit of a creditor, who did not seek to disaffirm the sale of property by him to defendants. The suit was by attachment for the recovery of an amount for flour sold by plaintiff to the defendants, under which the sheriff seized certain property. The grantee *under the deed of trust filed an interplea, claiming the property so seized under his deed. The court held that the plaintiff, by suing upon his account, waived the fraud in the sale, and treated it thereby as the property of the defendants, with the same power of disposition in the defendants over it as of any other property owned by them. It was said: "If the debts secured by the deed of trust were honest debts, and the property conveyed was not excessive, and no collusive agreement shown between the defendants and the bank and Ayr Lawn Company or the trustee in the deed of trust . . . for the use of the defendants, the deed of trust must be maintained, and there was nothing to submit to the jury. No proof was offered or claim made at the trial that any part of the property conveyed by the deed of trust was, by agreement between defendants and the beneficiaries, to be held for the use of defendants. Then proof of fraud on the part of defendants in procuring the property would have no tendency to prove such a result. If the debt secured was honest, the dishonest methods of defendants in gathering to themselves the property, and the knowledge of that fact by the beneficiaries, together with a knowledge of defendants' intention to defraud their other creditors in making the deed, all would not invalidate the deed or make availing to plaintiff the property thus conveyed in this character of suit." It was admitted in the case that the plaintiff had an election of remedies, but it was said that "the action of plaintiff in that case was based upon a contract of sale, and was a confirmation of it
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and a waiver of all fraud involved in it, so far as the rights of the intervening interpleader are concerned in the contest for the property. The sole inquiry, then, was as to the alleged fraudulent disposition of the property by the deed of trust to the interpleader, with the burden of its establishment upon the plaintiff."

We are unable to accept this view of the law. We think it makes no difference as to the rights of the mortgagee whether the action be in replevin or assumpsit. In either case the mortgagee can hold them if he be a bona fide purchaser, without notice, but not otherwise. If the attaching creditors rescind the sale and sue in replevin, the mortgagees, having knowledge of *the fraudulent [204] purchase, are in the position of taking a mortgage upon property to which they knew the mortgagor had no title. If, upon the other hand, the creditors proceed by attachment, the mortgagees, knowing that the goods were fraudulently purchased, stand in the position of taking advantage themselves of the debtor's fraud, and obtaining a preference to which they are not justly entitled. If, as the evidence had some tendency to show, they actively participated in the fraud, their position is even worse.

It is consonant neither with good morals nor sound sense to hold that one may take a mortgage upon the property of another, which he knows to have been fraudulently acquired, and to which the purchaser has no valid title, whether the vendor elect to pursue the purchaser by a retaking of the property, or by an action for the price and an attachment of the property to secure the debt. Whichever remedy be pursued, the fact remains that, at the time the mortgage was taken, the mortgagor had a voidable title to the property mortgaged; and while an election to sue in assumpsit recognizes this title as between him and the vendor, such recognition does not redound to the validity of the mortgage, which must be judged of by the circumstances under which it was taken. In other words, the suit in assumpsit affirms the title of the vendee, but not the title of his mortgagee.

It is at least open to doubt whether, if the mortgagees had disposed of these goods, an action might not have lain against them for their value, upon the same principle that supports an action, where the seller is induced by fraudulent representations to sell goods to an insolvent third person, from whom the misrepresenting third person afterwards obtains them. An action lies on the assumption either of a fraudulent conspiracy rendering such participant liable, or upon the ground that the nominal purchaser was only a secret agent for the misrepresenting party, who finally bought the goods. *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; *Phelan v. Crosby*, 2 Gill, 462; *State use of Steinberger v. Schulein*, 45 Mo. 521; 2 Schouler, Pers. Prop. § 612; Benjamin, Sales, 4th ed. § 445.

The other cases cited by the plaintiffs are not in point. In **O'Donald v. Constant* 92 [205]

Ind. 212, the evidence showed that the debtor who purchased the goods fraudulently turned them over to certain preferred creditors, who had no knowledge of the fraudulent purchases. The case of *Bach v. Tuck*, 126 N. Y. 53, 26 N. E. 1019, merely holds that a suit for the price brought with knowledge of the fraud was a ratification of the sale, and estopped the vendor from rescinding it and suing in replevin. The cases of *First Nat. Bank v. McKinney*, 47 Neb. 149, 66 N. W. 280, and *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830, are to the same effect.

Upon the whole, we see no error in the judgment of the Supreme Court, and it is therefore affirmed.

PATRICK MORAN, *Plff. in Err.*,
v.

JOSEPH HORSKY, JR.

(See S. C. Reporter's ed. 205-215.)

Writ of error to state court—decision based on laches as independent of Federal question.

A decision by a state court sustaining the defense of laches against the assertion of a right to a mining claim after it had been abandoned for fourteen years, during which an apparent title had been obtained under a patent to a probate judge for the property as part of a town site, is based on a ground independent of any Federal question.

[No. 177.]

Argued and Submitted March 12, 1900. Decided May 21, 1900.

IN ERROR to the Supreme Court of the State of Montana to review a decision affirming a decree quieting title. *Dismissed.* See same case below, 21 Mont. 345, 53 Pac. 1064.

Statement by Mr. Justice **Brewer**:

The facts in this case are as follows: On June 15, 1872, a patent was issued to the probate judge of Lewis and Clarke County, Montana territory, for the townsite of Helena, in trust *for the benefit of the occupants. In 1874 Joseph Horsky, Jr., the plaintiff below, defendant in error, became by purchases from prior occupants and conveyances from the probate judge the holder of the legal title to certain lots, shown on the plat of the town. He entered into occupation at the date of his purchase, and has been in undisturbed and peaceful possession from that time to the present. Among these lots are two known and described as lots Nos. 19 and 20, in block 37, on the original plat of the townsite.

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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Subsequent surveys disclosed that, measured by the description on the plat and the calls of the deed, there was an extra area of ground 22 feet front by 103 feet deep. When that fact was discovered the grantor of the plaintiff applied to the probate judge for a conveyance of this extra ground, and paid him the requisite price therefor. However, he received no deed at that time, apparently supposing the deeds for lots 19 and 20 would carry the ground; but afterwards, and on December 15, 1888, on application of the plaintiff, and upon the basis of the prior application and the payment of the necessary price, the probate judge made a deed to him of that extra area known and described on a subsequent plat as lot 31, block 37. In 1891 he filed his complaint in the district court of the first judicial district of the state of Montana, setting forth these facts, and that the defendant, Patrick Moran, had, on December 11, 1888, obtained from the probate judge a deed for this lot 31, alleging that it was wrongfully obtained, and praying for a decree quieting his title.

The case thus presented was litigated in the state courts for two or three years, passed to the supreme court of the state (13 Mont. 250, 34 Pac. 360), where a decree in favor of the plaintiff was reversed, and finally came on for hearing in the district court upon the bill of plaintiff, setting forth the facts, as above stated, and an amended answer of the defendant, containing these averments: That on the 2d day of March, 1869, the probate judge of Lewis and Clarke county made an entry of the tract of land for the benefit of the occupants of the townsite of Helena; that prior to the entry of said townsite a certain placer mining claim had been located within the exterior limits of the tract so entered, which included within its boundaries the lot in controversy; *that the location had been made pursuant to the laws of the United States, the local laws, and the rules and regulations of the mining district, and all had been done required thereby to make a perfectly valid location of said placer mining claim, and that the title to this mining claim thus located passed to the defendant: that it was a valid and subsisting mining claim at the time of the entry of the land by the probate judge and of the patent to him; that after the entry of the townsite, and prior to 1874, the defendant left the state of Montana, leaving the mining claim in possession of an agent; that during his absence the plaintiff obtained his deeds for the premises referred to, and entered into possession; that when the defendant returned to Montana he found the plaintiff in possession; that he had ever since been, by the action of the plaintiff, prevented from entering upon or working such mining claim; and that in December, 1888, finding that no deed had ever been made to the plaintiff for this portion of the property, he obtained in furtherance and protection of his own title a deed from the probate judge, which was the deed referred to in plaintiff's complaint.

Upon these pleadings a decree was entered by the district court in favor of the plaintiff,

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quieting his title to the premises. On appeal to the supreme court of the state this decree was affirmed (21 Mont. 345, 53 Pac. 1064), whereupon the case was brought on error to this court.

Mr. Thomas J. Walsh argued the cause and, with **Mr. Rufus C. Garland**, filed a brief for plaintiff in error:

Every valid mining claim existing within the exterior limits of a town site at the time of its entry is expressly excepted from the operation of the town-site patent; and it is not possible by such a patent to obtain any interest or title thereto.

Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; *Talbott v. King*, 6 Mont. 76, 9 Pac. 434; *Butte City Smoke-House Lode Cases*, 6 Mont. 397, 12 Pac. 858; *King v. Thomas*, 6 Mont. 409, 12 Pac. 865.

These cases never came before this court for determination, but the conclusion reached in them was approved in the case of *Davis v. Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

The view of the law taken in these cases has been accepted by all the local courts having had occasion since to consider the questions involved.

Richards v. Dower, 81 Cal. 44, 22 Pac. 304; *The Tombstone Town-Site Cases* (Ariz.) 15 Pac. 26; *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69. See also *Lindley, Mines*, 177.

Mr. Thomas J. Walsh also filed a separate brief for plaintiff in error in reply:

Jurisdiction will be taken by this court where a state court has applied the statute of limitations while the legal title was in the United States.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534.

It has been repeatedly determined that where title is claimed under an act of Congress, and the highest court of a state rules against the title so asserted, the decision may be reviewed by this court.

Pollard v. Kibbe, 14 Pet. 353, 10 L. ed. 490; *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306; *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318; *Silver v. Ladd*, 6 Wall. 440, 18 L. ed. 828.

Mr. Edwin W. Toole submitted the cause for defendant in error.

[207] ***Mr. Justice Brewer** delivered the opinion of the court:

The supreme court of the state affirmed the decree of the trial court primarily on the ground of laches. If this be an independent ground, involving no question under the Federal

[208] *statutes, the decision of the supreme court must be sustained and the writ of error dismissed. *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

Indeed, if the matter of laches can be recognized at all, it is difficult, independently of the question of jurisdiction, to perceive any error in the ruling of the state supreme court. One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and

deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See, among others, *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Gallagher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition.

We therefore pass to an inquiry whether the question of laches is so intermingled with that of Federal right that the former cannot be considered an independent matter. As this case was disposed of upon bill and answer, we must take the facts to be as they are presented by the pleadings.

At the time of the commencement of the several proceedings referred to in the bill and answer, the entire area of ground compassed within the limits of the townsite of Helena was public land of the United States, subject to be taken under the pre-emption, homestead, townsite, or mineral laws. There was no reservation in behalf of any railroad company, or for military or other purposes. The whole tract was subject to private appropriation. Under those circumstances, the probate judge of the county made an application for an entry of the tract, as a whole, as a townsite. His application was entertained, the entry made, and thereafter a patent issued to him for the entire tract, including the premises in controversy. Apparently, therefore, by the terms of the patent the legal title to this land had passed to the probate judge in trust for the several occupants. But we are referred by counsel to *Deffebach v. Hawke*, 115 U. S. 392, 393, 29 L. ed. 423, 424, 6 Sup. Ct. Rep. 95, 96, in which it was held that a patent under "the townsite act is "inopera-[209] tive as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business under the townsite title;" and this by virtue of the express provisions of the law relating to the disposition of lands for town sites, as follows: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." Rev. Stat. § 2392.

The ruling in this case was qualified in *Davis v. Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628, and it was held that the title of a lotowner holding a deed from the probate judge who had entered the lands under the townsite act could not be defeated because after the issue of the patent there was a subsequent discovery of minerals and an issue of a patent therefor to the discoverer, the court saying, on p. 524, L. ed. p. 244, Sup. Ct. Rep. p. 634, after referring to some decisions of the land department:

"It would seem from this uniform con-

struction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

The allegations of the answer, are to the effect that there was a known mining claim, actually located and worked, at the time of the entry and patent of the townsite, and the argument is that the mining claim was excepted from the scope of the townsite patent as completely as though the exception had been in terms named on the face of the instrument and the boundaries claimed described. The probate judge, therefore, never took title, and, having none, conveyed none to the plaintiff; the title remained in the government, and neither laches nor limitation run against the rights and title of the government. The mining claim existed, and [210] although defendant had *abandoned it for years, yet as no one had taken steps to relocate it, he had the right to resume possession and continue his work in the way of perfecting his title.

In an opinion by the judge of the state district court, delivered in deciding this case, is an interesting discussion of the difference between a void and voidable patent, and many authorities from this court are quoted. We shall not attempt to refer to all of them, but content ourselves with noticing one or two. In *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167, it was held that mandamus would lie to compel the delivery of a land patent which had been duly signed, sealed, countersigned, and recorded; that by those acts the title had passed to the patentee, and nothing remained but the ministerial duty of delivering the instrument. In that case there was a matter of dispute between the patentee, who had made a homestead entry, and other parties who claimed that the land was within the incorporated limits of the town of Grantsville, and that the entry had been wrongfully sustained. In the course of a very careful opinion by Mr. Justice Miller, it was said (pp. 400, 401, L. ed. p. 173):

"It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is therefore void, and the law will not require the secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

"We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the distinction between a void and a voidable instrument, though sometimes a

very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it 'is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry, and *sale. The question whether any particular [211] tract, belonging to the government, was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the state of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

Now, as we have heretofore noticed, the patent in the case before us for the townsite purported to convey the entire tract. On the face of the instrument there was nothing to suggest any exception. While it may be conceded, under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of a mining claim at the time of its issue might be shown and be a valid defense to a recovery of so much of the ground as was included within the mining *claim, and in that view [212] it may perhaps be not inaptly said that the patent was to that extent void. But be this as it may, whenever the invalidity of a patent does not appear upon the face of the in-

strument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable and not void. Even in cases where it has been called void the right of the United States to maintain a bill to set aside the patent has been sustained. Thus, in *United States v. Stone*, 2 Wall. 525, 17 L. ed. 765, patents had been issued for certain lands (which were in fact within the limits of Fort Leavenworth Military Reservation), and a bill in equity was filed by the United States to set them aside. Mr. Justice Grier, delivering the opinion of the court, sustaining the decree of the circuit court in favor of the government, uses this language (pp. 535, 537, L. ed. p. 767):

"Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

"It is contended here, by the counsel of the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below canceling the patent should be affirmed.

[213] *"We are of opinion, therefore,—

"1. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

"2. That it is within the limits of a reservation legally made by the President for military purposes.

"Consequently, the patents issued to the appellant were without authority and void."

Suppose the United States had brought a bill to set aside so much of this townsite patent as included the mining claim referred to, as, under the authority last referred to and many others, it might have done, it would, under the circumstances disclosed, have been a suit in the interest of and for the benefit of the defendant, and in order to enable him to perfect his inchoate title to this mining property. But it is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an

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equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defenses of laches, limitation, and want of equity that would attach to a like suit by an individual. *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083, in which it was said by Mr. Justice Lamar, on page 347, L. ed. p. 125, Sup. Ct. Rep. p. 1088:

"When the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

*"These principles, so far as they relate to [214] general statutes of limitation, the laches of a party and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

See also *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 33 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Curtner v. United States*, 149 U. S. 662, 37 L. ed. 890, 13 Sup. Ct. Rep. 985, 1041.

Now, if the government, seeking, in order to discharge its duty to the defendant, to avoid so much of the patent as included this mining claim, is bound by the ordinary rules of equity in respect to laches, etc., *a fortiori* it is true that when he is the party to the litigation the same equitable rules are binding on him. The government cannot, when acting for him, avail itself of those principles of law which are designed simply for its own protection, and no more can he, in his own litigation, shelter himself behind those principles. It is a private right which he is relying upon, although a right created under the laws of the United States, and as to this private right he is subjected to the ordinary rules in respect to the enforcement and protection of such a right.

Carothers v. Mayer, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106, is worthy of notice, for in that case, although not under precisely similar circumstances, it was held that a question arising under the statute of limitations as against a title asserted under the Federal law presented no Federal

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question, and so also as to equitable rights asserted as against an original right under the laws of Congress. See also *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 270, *post*, 1065, 20 Sup. Ct. Rep. 931.

[215] Neither does this case in any of its aspects come within *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534. In that case it was held that one who acquired a legal title from the government could not be defeated in respect to that title on the ground that the party in possession had while the title was in the government acquired some equitable rights by possession or otherwise, which might *have been enforced against one who, during all the time, had as an individual held the legal title. In other words, that as no equitable rights could be asserted against the government while it held the legal title, so when it passed the legal title to an individual he acquired all the rights which the government had at the time of the passage of such legal title. So far as that case has any bearing upon this, it tends to support the conclusions of the supreme court of the state of Montana, because here at least the apparent legal title passed to the probate judge, and thereafter to the plaintiff, and it was only an equitable and inchoate right which the defendant was trying to assert.

We conclude, therefore, that the defense of laches, which in its nature is a defense conceding the existence of an earlier legal or equitable right, and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defense. It proceeds upon the concession that there was, under the laws of the United States, a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion the decision of the supreme court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and *the writ of error is dismissed.*

D. P. TARPEY, *Plff. in Err.*,
v.

ANDREW MADSEN.

(See S. C. Reporter's ed. 215-229.)

Public lands—conflict between entry and railroad grant—questions determined by records.

1. The right of one who has actually occupied public lands, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent, if he makes his entry as soon as an office is opened where he can do so.
2. The rule that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon," does not apply to one who, after the original

NOTE.—As to conflicting rights of claimant and railroad—see note to *Sweesey v. Sparling* (Iowa) 9 L. R. A. 777.

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entryman abandons his claim, attempts to dispossess a railroad company of its title under a land grant which has remained apparently perfect and unquestioned for many years.

3. It is matter of common knowledge that many people go on to the public domain, build cabins, and establish themselves, temporarily at least, as occupants, but have in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land.
4. The relative rights of a railroad company and an individual entryman in respect to public lands must be determined by record evidence; on the one part the filing of the map in the office of the Secretary of the Interior, and on the other, the declaration or entry in the local land office; and the mere occupancy of an entryman who does not file his declaratory statement is insufficient to protect his claim against a land grant.

[No. 119.]

Argued January 25, 26, 1900. Decided May 21, 1900.

IN ERROR to the Supreme Court of the State of Utah to review a decision affirming a decree for defendant in a suit to establish title to land. *Reversed.*

See same case below, 17 Utah, 352, 53 Pac. 996.

Statement by Mr. Justice **Brewer**:

*This case comes on error to the supreme [216] court of the state of Utah, and involves the title to the S. W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west. This tract is within the place limits of the grant to the Central Pacific Railroad of California. The map of definite location of that part of the road opposite this land was filed and approved by the Secretary of the Interior on October 20, 1868, and the entire road was constructed and accepted prior to 1870. The land is not mineral nor swamp land, nor was it returned or denominated as such; was agricultural in character; and at the date of the filing of the map of definite location there was nowhere any record evidence of a private claim. At that time no local land office had been established in the district in which this land is situated. Such office was opened some time in April or May, 1869. On May 29, 1869, this declaratory statement was filed:

Declaratory Statement for Cases Where the Lands are Not Subject to Private Entry.

I, Moroni Olney, of Box Elder county, Utah territory, being a citizen of the United States and the head of a family, have on the 23d day of April, 1869, settled and improved the S. W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west, in the district of lands subject to sale at the land office in Salt Lake City, Utah, and containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said *tract of land as [217] 178 U. S.

pre-emption right under the provisions of said act of 4th September, 1841.

Given under my hand this 29th day of May, 1869.

(Signed) Moroni Olney.

In the presence of—

Abraham Hunsaker.

Nothing further was done by Olney. He abandoned the land, and nothing appears to have been heard of him since the date of the entry. On June 20, 1896, Andrew Madsen, the defendant in error, who alleged that he had been a settler and in occupation of the tract since 1888, filed a homestead entry thereof in the local office. A contest had previously and in 1893 been instituted between the railroad company and Madsen, which was heard and decided by the register and receiver, whose decision was affirmed by the Commissioner of the General Land Office, the finding of the register and receiver, as appears from the record in this case, being—

"We find that the tract in question, which is the S. W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west, of the Salt Lake meridian, was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

A certified copy of that decision in full was filed by counsel for defendant in error on the hearing in this court, and that certified copy reads as follows:

"This case arises upon an application to enter a tract of land covered by a railway selection which it is sought to cancel, for the reason that a valid settlement had been made on the land prior to the date of the attachment of the grant to the railway company.

"Our decision is that the motion of the Central Pacific Railway Company to strike out, dismiss, and expunge the depositions from the records should be denied. We therefore find the issues in favor of Andrew Madsen, and that the tract of land in dispute was reserved and excepted from the grant to the railroad company because, 1st, a pre-emption claim had attached *to the land in dispute at the time the line of said road was definitely fixed.

"2d. There was a qualified pre-emption claimant upon the land at that time, which brought it within the first portion of the excepting clause of the act of 1864, which provides that any lands granted by that act, or the act to which it is an amendment, shall not defeat or impair any pre-emption claim.

"3d. On the 20th day of October, 1868, the land in dispute contained the improvements of a bona fide settler, which also excepted the land from the provisions of the grant.

"We further find that Central Pacific Railway selection No. 3 should be canceled as to the tract in dispute, and that Andrew Madsen should be permitted, if he so desires, to make pre-emption entry covering this land.

"We decide that he should be permitted to enter the land under the pre-emption law, 178 U. S.

because his right to do so, *i. e.*, his settlement upon the land, was initiated long prior to the act of March 3, 1891, repealing the pre-emption law, which repealing act expressly excepted all bona fide claims lawfully initiated before the passage of the act."

After the decision of the Commissioner affirming that of the register and receiver, the entry was made and a patent was issued to Madsen.

Prior thereto and on January 12, 1894, this action was brought in the fourth judicial district of the territory of Utah, county of Box Elder, by the plaintiff in error, grantee from the railroad company, to establish his title to the tract and to recover possession. In the trial court, after the issue of the patent and the admission of Utah as a state, a decree was entered in favor of the defendant. The case was taken by appeal to the supreme court of the state, and by that court the decree of the district court was affirmed (17 Utah, 352, 53 Pac. 996), to review which decree this writ of error was brought.

Mr. L. E. Payson argued the cause and filed a brief for plaintiff in error:

No pre-emption claim attaches to public land, so as to except it from a railroad grant, by mere occupation with qualification to enter on the part of the entryman at definite location of railroad line.

Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Whitney v. Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Lansdale v. Daniels*, 100 U. S. 113, 25 L. ed. 587; *Maddox v. Burnham*, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448.

The status of the land at the time of the definite location of the road constitutes the criterion by which the lands to which the company is entitled are to be determined.

Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566.

A notice of claim, or declaratory statement, is indispensably necessary to give the claimant any standing as a pre-emptor; the rule being that settlement alone is not sufficient for that purpose.

Lansdale v. Daniels, 100 U. S. 113, 25 L. ed. 587.

Mr. L. R. Rogers also filed a brief for plaintiff in error.

Mr. B. Howell Jones argued the cause and filed a brief for defendant in error:

The fact that the survey was not approved or filed, and the fact that the land office was not opened until 1869, did not destroy any pre-emption claim; it merely extended the time to make the filing until the land office was opened.

Lytle v. Arkansas, 9 How. 314, 13 L. ed. 153; *The Yosemite Valley Case*, 15 Wall. 77, *sub nom. Hutchings v. Low*, 21 L. ed. 82; *Baty v. Sale*, 43 Ill. 351, 92 Am. Dec. 128; *Kile v. Tubbs*, 23 Cal. 432.

The ruling of the land office, which shows that at the date of definite location the lands were settled and occupied, is unassailable except by direct proceedings for its annulment or limitation.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The ruling of the Department allowing the declaratory statement to be filed on this land, thereby deciding that it was not railroad land, is not subject to review. It was never appealed from, so far as the record shows. Nothing is shown as to the grounds on which the Land Department acted at the time.

Durango Land & Coal Co. v. Evans, 49 U. S. App. 305, 80 Fed. Rep. 425, 25 C. C. A. 523; *Moore v. Northern P. R. Co.* 18 Mont. 290, 45 Pac. 215.

Conceding that pre-emption or homestead claim means a filed claim, the words, "any other lawful claim," must mean something else than such claims as are filed. A lawful claim is not one contrary to law. It may well be that the government is not compelled to recognize the right of a mere settler without entry. Yet such a claim is lawful, and Congress has always, as its settled policy shows, tried to protect such claims. In that sense they are lawful and meritorious.

United States v. Tithing Yard, 9 Utah, 280, 34 Pac. 55.

If these lands were within the proviso of the act of July 2, 1864, they did not pass. And the fact that Moroni Olney's claim lapsed or failed did not cause the lands to revert to the railroad company.

Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

The Colburn Case, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98, is not in point. In that case it was claimed that the land was excepted from the grant because of the occupation of one Horace F. Kelly on the date of definite location, unaccompanied by a filing, "then or thereafter." The land was surveyed, and the survey filed, and the land office was open.

In *Barden v. Northern P. R. Co.* 154 U. S. 315, 38 L. ed. 997, 14 Sup. Ct. Rep. 1030, the court says that the case of *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158, is not in point. This case did not decide anything whatever respecting the exceptions in the land grant, "but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant." It never decided anything else.

Not only are prior reservations made by the government and rights of pre-emption excepted, but the improvements of bona fide

settlers, and any other lawful claim, are unaffected by the grant. Of course this means any honest claim evidenced by improvements or other acts of possession.

Broder v. Natoma Water & Min. Co. 101 U. S. 277, 25 L. ed. 791.

*Mr. Justice **Brewer** delivered the opinion of the court: [219]

A narrow but important question is presented by this record. The land in controversy is an odd-numbered section within the place limits of the grant to the Central Pacific Railroad Company. The identification of the lands which passed by that grant was made at the time the map of definite location was filed in the office of the Secretary of the Interior, and by him approved, to wit, October 20, 1868; and the question is whether there was anything in the occupation or entry by Olney to defeat the title apparently then passing to the railroad company. That there was nothing of record affecting the validity of that title is conceded. No one, by an investigation of any public record, could have ascertained at that time that there was any doubt in respect thereto.

It is true that there was then no local land office in which those seeking to make pre-emption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the supreme court of the state one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. In many states the statutory provision in respect to suits is that the defendant, on receiving service of summons, must within a certain time file his answer in the office of the clerk of the court. It cannot be doubted that if before he is thus called upon to file his answer the office is burned and the clerk dies, and there is no place or individual at which or with whom his answer can be filed, such accident or omission will not defeat his right to make a defense, or give to the plaintiff a right to take judgment by default. Where the accident or omission is not the fault of the party, but of the government, or some official of the government, such accident or omission cannot defeat the right of the individual, and in all that is said in respect to this by the supreme court of the state of Utah we fully agree. If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights. But when the office was opened he filed his declaratory statement, and in that he did not

suggest that he had been in the occupation of the premises prior to October 20, 1868, but declared that on the 23d of April, 1869, he settled and improved the tract. Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or pre-emption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States.

And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406; *Northern P. R. Co. v. Amacker*, 175 U. S. 564, 567, ante, 274, 275, 20 Sup. Ct. Rep. 236. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect; and if Olney, the original entryman, was pressing his claims, every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entryman, either because he does not care to perfect his claim to the land, or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title,—apparently perfect and unquestioned during these many years,—he does not come in the attitude of an equitable appellant to the consideration of the court.

[221] It must be remembered that mere occupation of the public *lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins, and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale. *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759. In that case it appeared that certain individuals settled on what is now the city of Portland, Oregon, and, laying off a town site, distributed among themselves the lots. Thereafter they bought and sold those lots as things of value, and although such settlement was antecedent to any act of Congress authorizing it, their contracts in respect to the lots were sustained, the court, speaking by Mr. Justice Miller, saying (314, L. ed. 761):

"And though these rights or claims rested
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on no statute or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well-understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid."

But notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. In *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864, this court sustained a bill filed by the United States to compel by mandatory injunction certain parties to vacate public lands which they were occupying without any intent to purchase, and whose occupancy therefore stood in the way of others who might wish to enter and acquire title under the land laws of the United States. See also *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, sub nom. *Hutchings v. Low*, 21 L. ed. 82.

*It is undoubtedly true that one occupying [222] land with a view of pre-emption is given thirty days within which to file with the register of the land office his declaratory statement (Rev. Stat. § 2264); and since 1880 the same right has been possessed by one desiring to make a homestead entry (21 Stat. at L. 141, chap. 89, § 3). So that any controversy between two occupants of a tract open to pre-emption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy; and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy, may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this court running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest, not on the mere matter of occupancy, but upon the state of the record. All the cases in this court, in which this question has been discussed and the conclusion announced, have been, since the act of 1880, giving to persons seeking a homestead the same rights in respect to occupancy as to persons intending a pre-emption.

The original Union Pacific Railroad act (12 Stat. at L. 492, chap. 120, § 3) excepted from the grant of the odd sections to the railroad company all those tracts to which an adverse right had attached "at the time the line of said road is definitely fixed." The act does not in terms prescribe how or by what evidence it shall be determined that the line of said road has become definitely fixed, and for many years after its passage, interpreting this and other like railroad land grants, the ruling of the Land Department was that the line was definitely fixed whenever it was surveyed, staked out, and marked on the face of the earth (*United States v. Wiona & St. P. R. Co.* 165 U. S. 463, 473, 41 L.

ed. 789, 794, 17 Sup. Ct. Rep. 368), and that if at that time there was no adverse right the title of the railroad company was settled. Of course, this left such date one to be determined by oral testimony, and so as to each individual odd-numbered tract within the place limits of the grant the question of title was determined by evidence of the time of surveying, staking, and marking on the face of the earth the line of *the railroad, and corresponding evidence of occupancy by an individual with a view to entry under the general land laws. No title, therefore, certainly passed to the railroad company until a patent had been issued to it; and, indeed, under the settled ruling that land which was held by a prior claim did not pass to the railroad company under its grant it was doubtful whether even then it had received a title beyond challenge. This unfortunate uncertainty and instability of title continued until the decisions of this court in *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; and *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566,—the first decided in October, 1882, and the latter in March, 1885. By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior. This eliminated all oral testimony, and established a date at which, by record, the title of the railroad company could be considered as definitely ascertained. In the latter of the two cases, *Kansas P. R. Co. v. Dunmeyer*, the same elimination of oral testimony, the same reference to the record as determining all opposing rights of the individual entryman, was also declared. That was a case of a homestead entry, but as, five years prior thereto, homestead and pre-emption entries had been placed in the same category so far as respects the right of preliminary occupation, it is not strange that the court in that opinion spoke generally of pre-emption and homestead entries.

After referring to the rule in reference to the filing of the map of definite location in the office of the Secretary of the Interior, Mr. Justice Miller, announcing the conclusions of the court, said (640, L. ed. 1126, Sup. Ct. Rep. 571):

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within 10 miles of the line had been sold, or disposed of, or reserved, *or a homestead or pre-emption claim had attached to any of them."

And again (641, L. ed. 1126, Sup. Ct. Rep. 571):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to re-

quire proof from the other of complete performance of its obligation. . . . The reasonable purpose of the government undoubtedly is that which it expressed; namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant."

And finally (644, L. ed. 1127, Sup. Ct. Rep. 573):

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The doctrine thus announced, that rights on either side as between the railroad company and the entryman are determined by the facts appearing of record, has been repeatedly recognized since. In *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112, these rights were discussed by Mr. Justice Lamar, who, by reason of his experience as Secretary of the Interior, was pre-eminently qualified to speak in reference thereto. And an entry which was clearly open to challenge by the government was held to be effective to withdraw the land from the operation of the railroad grant. On page 361, L. ed. 365, Sup. Ct. Rep. 114, Mr. Justice Lamar observed:

"In the light of these decisions the almost uniform practice of the department has been to regard land upon which an entry of record valid upon its face has been made, as appropriated *and withdrawn from subse-[225]quent homestead entry, pre-emption settlement, sale, or grant until the original entry be canceled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And then, after referring to the contention that the *Dunmeyer Case* was not conclusive because in that case the entry was valid on its face, while this was defective, he added (364, L. ed. 366, Sup. Ct. Rep. 115):

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's

road an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money,—an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based."

Still later, in *Whitney v. Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796, in which the validity of a pre-emption entry was challenged as against a railroad grant, we said (94, L. ed. 909, Sup. Ct. Rep. 800):

[226] "But it is also true that settlement alone, without a declaratory statement, creates no pre-emption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S. 113, 116, 25 L. ed. 587, 588. And the acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the pre-emption claim. While the cases of *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; and *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112, involved simply homestead claims, yet, in the opinion in each, pre-emption and homestead claims were mentioned and considered as standing in this respect upon the same footing."

And in *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98, we held distinctly that no mere occupation of a tract of public land in and of itself excepted that tract from the operation of a railroad grant; that a settler could not dispute the claim of a railroad company until, and unless, he had filed his entry in the proper land office. Still later, in *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 630, 41 L. ed. 1139, 1143, 17 Sup. Ct. Rep. 671, 674, we said:

"Any other interpretation would defeat the evident purpose of Congress in excepting from railroad grants lands upon which claims existed of record at the time the road to be aided was definitely located. What that purpose was has been frequently adverted to by this court."

And subsequently, on page 631, L. ed. 1143, Sup. Ct. Rep. 674, we quoted, as the settled law in this respect, from *Kansas P. R. Co. v. Dunmeyer*, the first of the quotations therefrom heretofore given in this opinion.

If it be said that this rule ignores the

privileges given to temporary occupants of land to make entry within a short time, it must be said that it also denies the personal right of the railroad company to fix definitely its line of road. For when the company has by resolution of its directors established such line, and that has been marked on the ground by posts and stakes, it has done all required by the letter of the statute. If it be said that the railroad company may, notwithstanding its personal action thereafter, vote to locate its road on a different line, so on the other hand may it be said that the individual occupant of a tract may abandon his thought of entry; and by making each of the parties' rights, to wit, those of the railroad company, and the individual, turn on a matter of record, the court simply gave definiteness and certainty to the congressional grant. It was said in *Missouri, K. & T. R. Co. v. *Kansas P. R. Co.* 97 U. S. 491, 497, [227] 24 L. ed. 1095, 1097, repeated in *United States v. Southern P. R. Co.* 146 U. S. 570, 598, 36 L. ed. 1091, 1098, 13 Sup. Ct. Rep. 152, 157: "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." And surely Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the railroad company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, someone should take possession of a tract apparently granted, and defeat the company's record title by oral testimony that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed. The conditions are very different from those which exist between two individual occupants and claimants of a particular tract, for each is there in possession to watch and know the action of the other, and the question of right is subject to immediate and certain determination. In the present case, on the other hand, years after the title of the railroad company had apparently vested, this defendant comes in and says that this tract was excluded from the grant because somebody was in occupation, and if this can be said at the end of twenty years, equally well can it be said at the end of half a century. So it is that, interpreting the act making the grant as a law as well as a grant, and recognizing that Congress must have intended a present donation with reasonable certainty of identification,

this court properly held that the records made in the office of the Secretary of the Interior and in the local land offices should be conclusive as between the company and the individual entryman. And if the ruling [228] at times may operate *against an individual entryman, it does so more frequently against the railroad company in preventing it from claiming rights existing at the time that it in fact definitely locates its line of road.

It will be noticed that the third finding of the register and receiver states that on the 20th day of October the land in dispute contained "the improvements of a bona fide settler," which, as they held, also excepted the tract from the grant. This matter is also referred to in the opinion of the supreme court of Utah. But the exception in the amendatory act of 1864 (13 Stat. at L. 358, chap. 216, § 4), of "the improvements of any bona fide settler," so far from sustaining the conclusion of the local officers, makes against it, for specifically exempting improvements contemplates cases in which the settler shall have a right to remove his improvements, although he may not have a right to perfect his title to the land. The exception is not of land on which are improvements of a bona fide settler, but simply the improvements of a bona fide settler, thus distinguishing between a right to the land and a right to be protected in respect to the improvements.

Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office. In this way, matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated, long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will [229] never come at which *it can be certain that the railroad company has acquired an indefeasible title to any tract.

For these reasons we are of the opinion that the judgment of the Supreme Court of the State of Utah is erroneous, and it must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Dissenting: The CHIEF JUSTICE; Mr. Justice Harlan; Mr. Justice White.

ADA F. McDONNELL, *Plff. in Err.*,
v.

LLEWELLYN JORDAN.

(See S. C. Reporter's ed. 229-239.)

Removal of causes—for prejudice or local influence—application too late.

An application for the removal of a will contest to a circuit court of the United States for "prejudice or local influence," if authorized by the act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, providing for the removal of causes "at any time before the trial thereof," comes too late when first made after a mistrial of the cause in a state probate court.

[No. 253.]

Argued April 19, 20, 1900. Decided May 21, 1900.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama to review a decision in a cause removed from a state court. *Reversed.*

Statement by Mr. Chief Justice Fuller:

*Mattie Lee Fennell, a citizen of the county of Madison, state of Alabama, died on the 5th day of August, 1897, leaving a will executed by her December 17, 1895, in which she devised and bequeathed all her property, real, personal, or mixed, to her mother, Mrs. M. E. Fennell, for life, and on her death to Llewellyn Jordan of the state of Mississippi. The will specifically provided that if the mother should die before the death of the testatrix, Llewellyn Jordan should take. Said Llewellyn Jordan and Walter E. Jordan, a citizen of Madison county, Alabama, were nominated and appointed executors of the will, *to act as such without bond. [229] The mother died in 1896. February 9, 1897, Walter E. Jordan, one of the executors named, presented his petition to the probate court of Madison county, Alabama, together with the original will, to have said will admitted to probate. The petition stated that the sister of testatrix, Ada F. McDonnell, resident of Madison county, was her next of kin, and would have been her only heir had she died intestate; that Llewellyn Jordan was temporarily residing at Washington, District of Columbia; that the attesting witnesses resided at Huntsville, Alabama; and prayed that a date might be set for the hear- [230]

NOTE.—As to removal of causes for prejudice or local influence—see *Schwenk v. Strang*, 3 C. C. A. 95, and note. See also notes to *Gaines v. Fuentes*, 23 L. ed. U. S. 524; *Jefferson v. Driver*, 29 L. ed. U. S. 897.

As to removal of causes generally—see notes to *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; *Torrence v. Shedd*, 36 L. ed. U. S. 528.

As to time within which application must be made—see *Huskins v. Cincinnati, N. O. & T. P. R. Co.* (C. C. N. D. Tenn.) 3 L. R. A. 545 and note, *Brodhead v. Shoemaker* (C. C. N. D. Ga.) 11 L. R. A. 567 and note. And see note to *Bierbower v. Miller* (Neb.) 9 L. R. A. 230.

ing of the petition and due notice thereof be given as required by law to the next of kin of said deceased, and that such decrees, orders, and other proceedings might be had and made in the premises as might be necessary to effect the due probate of said will according to law.

On the 11th day of February, 1897, Ada F. McDonnell, a sister, and only heir at law, of Mattie Lee Fennell, filed in the probate court her written contest of the alleged will, based on certain grounds therein set forth, and demanded a trial by jury. April 1, 1897, a jury was impaneled to try the contest, and an issue was then made up by the court between Walter E. Jordan, as plaintiff, and Ada F. McDonnell as defendant, and the trial entered upon. On April 15, 1897, after having considered the case, the jury came into court and reported that they were unable to agree upon a verdict, whereupon the jury were discharged, and the case was continued.

May 28, 1897, Walter E. Jordan applied to the probate court to amend his petition by alleging "that the said Llewellyn Jordan is the sole legatee and devisee under said will, and is the person really interested in defending the validity of said will and in answering and defending the contest filed in said court to annul and make invalid said will;" and to add to the prayer of his petition the following: "Petitioner prays that citation and all proper notice be given the said Llewellyn Jordan of this case and contest, and that he be made a party defendant to this petition."

[231] The following order was entered thereon by the probate court, August 3, 1897: "In the matter of the petition of W. E. *Jordan to make Llewellyn Jordan party defendant to this case, and that citation and all proper notice be given said Llewellyn Jordan as such, heretofore filed with the papers in this case, May 28th, 1897, was set for hearing this August 3d, 1897. This day argued by Shelby and Walker for proponent and Richardson and Cooper for contestant. Motion overruled and amendment not allowed and for reason good and satisfactory to this court the further hearing of this contest continued to Sept. 3d, 1897."

On the 4th of August, Llewellyn Jordan, without leave, filed with the clerk of the probate court a paper styled an "answer," which commenced as follows: "In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes in said proceeding and files this his answer to the contest of Ada F. McDonnell;" and on that day the probate court entered the following order: "In this cause a paper, purporting to be an intervention on behalf of Llewellyn Jordan, having been indorsed 'filed' by the clerk of this court, without the knowledge of the court, and said paper being so indorsed filed without an order authorizing said Llewellyn Jordan to intervene herein, and the motion made by Walter E. Jordan, the proponent, praying that said

Llewellyn Jordan be made a party defendant hereto, on the 3d day of August, 1897, being overruled and disallowed, it is therefore ordered that said paper purporting to be an intervention of said Llewellyn Jordan be stricken from the files in this cause."

August 5, 1897, Walter E. Jordan, the proponent of the will, filed in the probate court a renunciation of his right to have letters testamentary issued to him, and asked that the same be issued to Llewellyn Jordan, couched in these terms: "The undersigned, Walter E. Jordan, named in the will of Mattie Lee Fennell as one of her executors, renounces his right to have letters testamentary issued to him. He desires that the said will shall be probated, but that letters testamentary should issue alone to the coexecutor named in said will, Llewellyn Jordan."

August 12, 1897, Llewellyn Jordan filed his petition in the *circuit court of the United States for the northern division of the northern district of Alabama to remove to that court the matter of the proceedings to probate and to contest the will of Mattie Lee Fennell, then pending in the probate court, on the ground that from prejudice and local influence he could not obtain justice in the probate court, or any other state court. The circuit court, on the same day, entered an *ex parte* order removing the cause from the probate court of Madison county, Alabama, to that court. Mrs. McDonnell made motions in the circuit court to remand the cause to the probate court, and to dismiss and strike from the files the petition of Llewellyn Jordan for the removal of the proceedings and cause from the state court.

Among the grounds assigned for the motion to remand were that the circuit court had no jurisdiction of a proceeding to probate a will; that Llewellyn Jordan was not a party defendant "in any suit, proceeding, or controversy in the probate court of Madison county, Alabama, relating to the matter of the probate of the will of Mattie Lee Fennell, deceased," and the circuit court had no jurisdiction by virtue of the petition for removal; that the proceeding to establish the will was not a separate, but a single, controversy; that the application for removal was not made in time, or before the trial of the cause in the state court; and that the application for removal was made too late.

The circuit court maintained jurisdiction, and overruled each of the motions.

A trial was subsequently had in the circuit court, which directed a verdict in favor of Llewellyn Jordan, contestee. A verdict was returned accordingly, and thereupon the court, November 8, 1898, entered this judgment: "It is therefore considered by the court that the contest of Ada F. McDonnell of the last will and testament of Mattie Lee Fennell, deceased, and the several grounds of said contest be, and the same are hereby, overruled and denied. It is further considered and adjudged by the court that the contestee, Llewellyn Jordan, have and recover of the contestant, Ada F. McDonnell, the costs in this behalf expended, for which, if not otherwise paid, an execution may issue."

[233] *Under the same date the court certified to this court the following questions of jurisdiction:

"1. Whether this court has jurisdiction to hear and determine the matters of controversy shown in the record between said Llewellyn Jordan and Ada F. McDonnell.

"2. Whether this court has jurisdiction to hear and determine the cause removed to this court from the state court, wherein it is sought to establish and probate the will of Mattie Lee Fennell, deceased, late a resident citizen of the county of Madison, state of Alabama.

"3. Whether this court has jurisdiction to remove the proceedings shown in the record from the state probate court upon the petition of the said Llewellyn Jordan.

"4. Whether this court acquired jurisdiction of the matters in controversy between the said Llewellyn Jordan and Ada F. McDonnell upon the petition of the said Llewellyn Jordan to remove the said proceedings from the state probate court to this court.

"5. Whether this court has jurisdiction to entertain the petition of the said Llewellyn Jordan for the removal of said proceeding to this court after the mistrial of said cause in the state probate court as shown by the record filed herein.

"6. Whether this court has jurisdiction to entertain the petition of said Llewellyn Jordan to remove said cause from the state probate court to this court after a jury had been impaneled in the state probate court, the trial entered upon, the failure of the jury to agree, and a mistrial of said cause entered in said probate court.

"7. Whether this court has jurisdiction of the petition of said Llewellyn Jordan to remove said cause from said probate court to this court after filing in said probate court an answer to the contest of said will."

A writ of error was applied for and allowed March 15, 1899, and the record showed an order on March 16 adjourning "the circuit and district courts of the United States for the northern district and northern division" *sine die*. On the 4th of April, 1899, the judge of the circuit court entered on the certificate a statement that though it was [234] dated November 8, 1898, *it was actually signed "on the 15th day of March, 1899, at Birmingham, Alabama."

Mr. Lawrence Cooper argued the cause and, with Mr. William Richardson, filed a brief for plaintiff in error:

A mistrial is a trial of a cause within the meaning of the provision of the act of Congress of 1888, authorizing a petition for removal to be filed "at any time before the trial thereof."

Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207; *Farmers' & M. Nat. Bank v. Schuster*, 52 U. S. App. 612, 86 Fed. Rep. 161, 29 C. C. A. 649; *Gregory v. Boston Safe-Deposit & T. Co.* 88 Fed. Rep. 3; *Young v. Andes Ins. Co.* 1 Flipp. 599, Fed. Cas. No. 18,151; *Martin v. Baltimore & O. R. Co.* 151 U. S. 687, 38 L. ed. 316, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v.*
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Burns, 124 U. S. 165, 31 L. ed. 333, 8 Sup. Ct. Rep. 421; *Edrington v. Jefferson*, 111 U. S. 770, 28 L. ed. 594, 4 Sup. Ct. Rep. 683; *Fox v. Southern R. Co.* 80 Fed. Rep. 945; *Ayers v. Watson*, 113 U. S. 594, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641; *Gurnee v. Brunswick County*, 1 Hughes, 270, Fed. Cas. No. 5,872; *Alley v. Nott*, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; *American Bible Soc. v. Grove*, 101 U. S. 610, 25 L. ed. 847; *Holland v. Chambers*, 110 U. S. 59, 28 L. ed. 70, 3 Sup. Ct. Rep. 427; *Babbitt v. Clark*, 103 U. S. 606, 26 L. ed. 507; *Myers v. Swann*, 107 U. S. 546, 27 L. ed. 583, 2 Sup. Ct. Rep. 685; *Rosenthal v. Coates*, 148 U. S. 142, 37 L. ed. 399, 13 Sup. Ct. Rep. 576.

Mr. Richard W. Walker argued the cause and, with Mr. Heber J. May, filed a brief for defendant in error:

A removal is never too late when the application is made as soon as the proceeding assumes the shape of a removable cause in the court in which it originated.

Powers v. Chesapeake & O. R. Co. 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12; *Burdick v. Peterson*, 2 McCrary, 135, 6 Fed. Rep. 840; 20 Am. & Eng. Enc. Law, 990, note; *Hack v. Chicago G. S. R. Co.* 23 Fed. Rep. 356; *Snow v. Texas Trunk R. Co.* 4 Woods, 394, 16 Fed. Rep. 1.

After the time for removal is out, if the complaint is amended so as to create a new cause of action the case may then be removed.

Bailey v. Mosher, 95 Fed. Rep. 223; *Mattoon v. Reynolds*, 62 Fed. Rep. 417.

The same principle would authorize a removal when a new party appears, whose presence then for the first time injects into the case the features which gives the right of removal.

*Mr. Chief Justice Fuller delivered the [234] opinion of the court:

The question of jurisdiction was certified before the adjournment of the term of the circuit court of the United States for the northern district and northern division of Alabama, at which term the judgment was entered, and we decline, under the circumstances disclosed, to discuss what the effect might have been if the certificate had shown on its face that it was in fact signed in the southern division of the district within which the presiding judge had jurisdiction.

Petitions for removal and motions to remand are matters of record proper. Ordinarily papers filed in support thereof are not so unless made part thereof by bill of exceptions, though sometimes this is otherwise. *England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643.

We are not concerned here with the proofs as to prejudice or local influence.

By § 4272 of the Civil Code of Alabama, it is provided that, "upon the death of a testator, any executor, devisee, or legatee named in the will, or any person interested

in the estate, may have the will proved before the proper probate court." As Mrs. Fennell was an inhabitant of Madison county at the time of her death, the probate court of that county was the proper probate court (§ 4273); and as Walter E. Jordan and Llewellyn Jordan were named executors, and Llewellyn Jordan was the sole devisee and legatee, either of them could propound the will for probate. By § 4284 it was [235] provided that, "whenever *an application is made to prove a will in this state, at least ten days' notice must be given to the widow and next of kin, or to either of them, residing and being within the state, before such application is heard." In this case Mrs. McDonnell was the next of kin and sole heir at law, and was duly notified.

Section 4287 provides that "a will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

Section 4298 reads that "any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within eighteen months after the admission of such will to probate in this state, contest the validity of the same by bill in chancery, in the district in which such will was probated, or in the district in which a material defendant resides."

Mrs. McDonnell filed her allegations in writing contesting the will on the grounds that it was not signed by the subscribing witnesses in the presence of the alleged testatrix; nor by testatrix in the presence of the subscribing witnesses; nor was the alleged will signed by the witnesses at the request of the testatrix; nor by the subscribing witnesses in the presence of each other and in the presence of testatrix; that the testatrix at the time the alleged will was signed and executed was of unsound mind and memory, and not mentally capable of making a will; that the execution of the will was procured by fraud and undue influence of Llewellyn Jordan; and that the paper propounded was not the last will and testament of Mrs. Fennell; and she demanded a jury trial. The cause was duly set down for trial as between [236] W. E. Jordan, proponent, and *Ada F. McDonnell, contestant, and was subsequently tried, the trial continuing some days, and on April 15, 1897, the jury being unable to agree upon a verdict, was discharged.

After this mistrial Walter E. Jordan applied to the probate court to allow him to make Llewellyn Jordan a party defendant to his petition that the will be admitted to probate. As Llewellyn Jordan was a coexec-

tor, and the sole devisee and legatee, the probate court, on the 3d of August, declined to grant the application. If Llewellyn Jordan had applied to be formally admitted as co-proponent, it must be assumed that he would have been permitted to become such of record, but he made no such application. Then, on August 4, the paper purporting to be an "answer" of Llewellyn Jordan was filed by the clerk, without leave, or knowledge of the court, and on the same day was struck from the files as improvidently placed thereon. The succeeding day, August 5, Walter E. Jordan renounced the executorship, and asked that letters issue to his coexecutor, Llewellyn Jordan. August 12 the order of removal was entered by the circuit court.

The contention of plaintiff in error is that the proceeding in the probate court of Madison county was simply a proceeding to establish and probate the will, and as such was not a "suit of a civil nature, at law or in equity," and therefore not removable; that if the proceeding were otherwise removable, Llewellyn Jordan was not a defendant and could not remove; and that the application for removal came too late.

The decisions of the supreme court of Alabama recognize that an application for the probate of a will is a proceeding *in rem*, but it is held that it becomes a suit *inter partes* where there is a contest, that is, "a suit between the party alleging the existence of the will and the contestant." And that the result of the statutory provisions is to afford two modes of contest, in the probate court before the will has been proved, or in the chancery court after probate by the institution of a suit by those who were not parties to a contest in the probate court. *Knox v. Paull*, 95 Ala. 505, 11 So. 156, and cases cited.

Undoubtedly the courts of the United States possess no jurisdiction over an *ex parte* application for the probate of a will, *that [237] is, for the proof thereof in common form, which is purely a proceeding *in rem*; but it is insisted by defendant in error that, by the institution of a contest, a case of controversy *inter partes* arises, which may be removed to the circuit court just as such a contest may be under the state statute removed by change of venue from the probate court, where the will is propounded, to the probate court of another county, and that the judgment of the Federal court in such a case must be recognized by the probate court of original jurisdiction, just as by statute the judgment of another probate court to which the proceeding has been remitted is certified to that court that the will may be probated or rejected as that judgment is for or against the validity. Code 1896, § 4296.

Assuming, without deciding, this to be so, the question presents itself as to the position occupied by the proponent and the contestant, respectively, and the statute says that on a contest on admission to probate, "an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will, as defendant."

And the issue on this contest was made up

by the probate court of Madison county accordingly.

Notwithstanding this, defendant in error contends that the contestant is the real plaintiff, and that, within the meaning of the act of Congress in respect of removals, "the contestee is a defendant because he is brought into court against his will by the necessity of defending his right under the will, and his involuntary presence there subjects him to the local prejudice and influence, protection against which is the object of the statute."

[238] In this connection it is proper to say that it is obvious on the face of these proceedings that the effort of Llewellyn Jordan to become a party to the record was so limited to being made such in a particular capacity as to clearly indicate that it was with the object of making the application for removal. But whether as coexecutor or as sole legatee and devisee, his appearance in the cause would be as proponent of or on behalf of the will, and not against it, and without going into the authorities *as to where the burden of proof lies when a contest is initiated as to the validity of a will, when it is presented for probate, and even conceding that the specific provision of this state statute may be disregarded, we are nevertheless of opinion that the application to remove came too late.

Under the statutes of Alabama, Llewellyn Jordan might have propounded the will, either as executor or legatee. He might have intervened as interested, if he had feared that his coexecutor, who did propound the will, would not do justice, of which there is no pretense here. But he could not lie by, permit the will to be propounded, a contest to be initiated, and a trial had, and at that stage intervene and remove the case.

This was a will and testament, disposing of personal as well as of real property; and was propounded by one of two executors named therein. The statute required notice only to the widow and next of kin, and not to beneficiaries under the will.

There is nothing whatever in the evidence to indicate that Llewellyn Jordan was in fact ignorant of the will, of its presentation for probate, or of the initiation of the contest. The presumptions are against him, and he was at least so far represented by his coexecutor that when he applied to come in, and treating the case as if he had come in, he took his place by intervention subject to such disabilities as to the right of removal as then existed.

In *Hanrick v. Hanrick*, 153 U. S. 192, 197, 38 L. ed. 685, 687, 14 Sup. Ct. Rep. 835, 837, it was said: "The act of March 3, 1887, chap. 373, corrected by the act of August 13, 1888, chap. 866, was intended, as this court has often recognized, to contract the jurisdiction of the circuit courts of the United States, whether original over suits brought therein, or by removal from the state courts. It not only amends the act of 1875, but it allows to none but defendants the right to remove any case whatever, and, by new regulations of removals for prejudice or local influence, supercedes and repeals the earlier statutes upon

this subject. 24 Stat. at L. 553; 25 Stat. at L. 434; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207; *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654."

In *Fisk v. Henarie*, there cited, this court ruled that the words in the act of March 3, 1887, as corrected by the act of *August 13, [239] 1888, "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," require the application to remove to be filed before or at the term at which the cause could first be tried and before the trial thereof. Tested by that ruling this application to remove came too late.

The judgment is reversed, and the cause remanded to the Circuit Court with directions to remand it to the Probate Court of Madison County, Alabama.

WESTERN UNION TELEGRAPH COMPANY, *Appl.*,

v.

ANN ARBOR RAILROAD COMPANY.

(See S. C. Reporter's ed. 239-244.)

Removal of causes—allegation that suit arose under Constitution and laws of the United States—jurisdiction.

A bill does not show that the suit arises under the Constitution and laws of the United States by an averment in a suit by a telegraph company for specific performance of a contract for the use of a railroad right of way and for an injunction against interference with its rights, to the effect that it has a right to maintain its telegraph line on the railroad "under the provisions of the statute of the United States," as it has long been settled that the statute does not confer on telegraph companies the right to enter on private property without the consent of the owner.

[No. 202.]

*Argued and Submitted March 19, 20, 1900.
Decided May 21, 1900.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Sixth Circuit affirming a decree of the Circuit Court dismissing a bill for an injunction against interfering with a telegraph line along a railroad. *Reversed.*

See same case below, 61 U. S. App. 741, 90 Fed. Rep. 379, 33 C. C. A. 113.

Statement by Mr. Chief Justice Fuller:

*This was a bill filed in the circuit court [239] of Benzie county, Michigan, by the Western

NOTE.—As to removal of causes from state to Federal courts when United States Constitution, Act of Congress, or treaty comes in question—see note to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656.

As to removal of causes generally—see notes to *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; *Torrence v. Shedd*, 36 L. ed. U. S. 528.

[240] Union Telegraph Company against the Ann Arbor Railroad Company, to restrain defendant from interfering with the rights of complainant in a certain telegraph line along defendant's railroad. The bill stated the Western Union Telegraph Company to be "a corporation organized and existing under the laws of the state of New York, and a citizen of the said state of New York," and the Ann Arbor Railroad Company to be "a corporation organized and existing under the laws of the state of Michigan and a citizen of said state of Michigan." The bill alleged that on the 25th day of September, 1890, the Frankfort & Southeastern Railroad Company, a corporation of the state of Michigan, owned and operated a railroad from Frankfort to near Copemish, Michigan; that on that day complainant entered into a contract with the Frankfort & Southeastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its road; that in pursuance of the contract and in May, June, and July, 1891, complainant built the telegraph lines provided for therein; that one wire was erected for the joint use of the railroad company and complainant, and a loop to Frankfort and back was put on the poles for the exclusive use of complainant. It was further alleged that the railroad of the Frankfort & Southeastern Railroad Company was sold some time in May, 1892, and transferred to the Toledo, Ann Arbor, & North Michigan Railroad Company, a corporation organized and existing under the laws of the state of Michigan; that afterwards said last-mentioned company mortgaged their entire railroad to the Farmers' Loan & Trust Company as trustee, and said mortgage being in default a bill was filed to foreclose it in September, 1893, in the circuit court of the United States for the northern district of Michigan, to which foreclosure suit complainant was not a party; that the whole road was sold under order of court and conveyed to the Ann Arbor Railroad Company, and the sale and conveyance were confirmed; that the last-mentioned company now claimed to be in possession and operating the road formerly known as the Frankfort & Southeastern Railroad. And, further, that the Ann Arbor Railroad Company purchased the road with full knowledge of complainant's rights, but that it insisted that it was not bound by the contract made with the Frankfort & Southeastern Railroad Company, and had given complainant written notice to that effect.

The sixth and seventh paragraphs of the bill were as follows:

[241] "6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort & Southeastern Railroad Company are binding on said Ann
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Arbor Company, and that, independent of said contract, it has a right to maintain its telegraph line on what was formerly said Frankfort & Southeastern Railroad under the provisions of the statute of the United States."

It was further averred that about October 1, 1895, the Ann Arbor Railroad Company took possession of complainant's wires between Thompsonville, near Copemish, and Frankfort, and cut off their connection with its other wires, and deprived complainant of telegraphic connection with Frankfort; that the value of the telegraph lines was at least the sum of \$3,000, and the damages arising through loss of business large, but incapable of accurate calculation; that October 14, 1895, complainant reconnected the telegraph lines running from Thompsonville to Frankfort, and so again opened telegraphic communication with the latter place, and was now in full possession and use of said lines; but that complainant was justly apprehensive that, unless restrained by injunction, defendant would again seize said telegraph lines and deprive complainant of their use.

The prayer was for process and answer, "and that an injunction, both preliminary and final, may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant as alleged in this bill, in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago & West Michigan Railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience."

Defendant filed its petition and bond for the removal of the cause into the circuit [242] court of the United States for the eastern district of Michigan, alleging that it was a citizen of the state of Michigan, and that complainant was a citizen of New York, and then stating: "Your petitioner further shows to the court that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars (\$2,000); that this suit is one arising under the Constitution and laws of the United States, and especially under the act of Congress of July 24, 1866, now contained in § 5263 of the Revised Statutes of the United States and the amendments thereto." The cause having been removed, defendant filed an answer and cross bill, setting up the existence of a mortgage prior to the alleged contract and its foreclosure, and other matters. Certain facts were stipulated, and the cause submitted. The circuit court decreed a dis-

missal of the bill. From this decree an appeal was taken to the circuit court of appeals, and that court affirmed the decree. 61 U. S. App. 741, 90 Fed. Rep. 379, 33 C. C. A. 113. From the decree of the circuit court of appeals the Western Union Telegraph Company appealed to this court.

Mr. John F. Dillon argued the cause and, with Messrs. Rush Taggart and George H. Fearons, filed a brief for appellant.

Mr. Alexander L. Smith submitted the cause for appellee.

[242] *Mr. Chief Justice Fuller delivered the opinion of the court:

The Western Union Telegraph Company might have instituted its suit in the circuit court, but it sought the state tribunals, as it had the right to do, and the defendant could not remove the case on the ground of diverse citizenship, although that fact existed, because it was itself a resident of the state. Defendant's application to remove, therefore, was based on the averment that the suit arose "under the Constitution and laws of the United States." Whether it did so arise depended on complainant's statement of its own case. *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup.

[243] Ct. Rep. 654. *And the 6th and 7th paragraphs of the bill contain all that defendant could have relied on as bringing the case within that category. These paragraphs were to the effect that complainant had accepted the provisions of the act of Congress of July 24, 1866, and that, independent of the contract, it had "a right to maintain its telegraph line on what was formerly said Frankfort & Southeastern Railroad, under the provisions of the statute of the United States."

The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by defendant, "and that defendant be required to carry out said contract in good faith," and for general relief.

It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; "but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708. In that case Mr. Chief

Justice Waite further said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination *of which the result depends, it is [244] not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, ante, 276, 20 Sup. Ct. Rep. 222.

We are unable to perceive that paragraphs 6th and 7th meet this requirement, and it does not appear to us that they were intended to do so by the pleader. As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute we could not permit such a contention to be recognized as the basis of jurisdiction. But it was argued that by virtue of the statute the telegraph company was possessed of a public character and was discharging public duties, and that, although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the circuit court should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court. It is sufficient to say that the bill was not framed in that aspect, and, though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. And it is entirely clear that there were no averments in the bill in respect of this contention, which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground.

The result is that *the decrees of the Circuit Court of Appeals and of the Circuit Court must be reversed*, and the cause be remanded to the latter court with a direction to remand it to the state court. And it is so ordered.

[245]*CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY and S. H. H. Clark *et al.*, Receivers of the Union Pacific Railway Company, *Plffs. in Err.*,
v.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased.

(See S. C. Reporter's ed. 245-251.)

Removal of causes—necessity that defendants must unite in petition.

All the defendants must unite in a petition for the removal to a Federal court, under the act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, of a cause arising under the Constitution and laws of the United States, where a joint cause of action is alleged against all the defendants for causing the death of a person.

[No. 135.]

Submitted January 31, 1900: Decided May 21, 1900.

IN ERROR to the Supreme Court of the State of Kansas to review a decision affirming a judgment rendered in a state court after refusing a petition for its removal to a Federal court. *Affirmed.*

See same case below, 59 Kan. 437, 53 Pac. 461.

Statement by Mr. Chief Justice **Fuller**:

[245] *This was an action brought by Lissa Martin as administratrix of William Martin, deceased, against the Chicago, Rock Island, & Pacific Railroad Company, and Clark and others, receivers of the Union Pacific Railway Company, in the district court of Clay county, Kansas, to recover damages for the death of the decedent. Plaintiff's petition was filed January 26, 1894, and on February 14, 1894, the Chicago, Rock Island, & Pacific Railroad Company filed its separate answer thereto. February 20, 1894, defendants Clark and others, as receivers, presented their petition and bond, praying for the removal of the cause to the United States circuit court for the district of Kansas, on the ground that the case arose under the Constitution and laws of the United States, which application was overruled by the district court, and the receivers duly excepted. The cause was tried, the jury returned a verdict in favor of plaintiff and against all the defendants, and judgment was entered thereon. The cause was taken on error to the supreme court of Kansas by the defendants, and the judgment was by that court affirmed. 59 Kan. 437, 53 Pac. 461.

NOTE.—As to removal of causes from state to Federal courts when United States Constitution, Act of Congress, or treaty come in question—see note to Little York Gold Washing & Water Co. v. Keyes, 24 L. ed. U. S. 656.

As to removal of causes generally—see notes to Butler v. National Home for Disabled Volunteer Soldiers, 56 L. ed. U. S. 346; Torrence v. Shedd, 36 L. ed. U. S. 528.

As to removal by one of two or more defendants—see note to Sloane v. Anderson, 29 L. ed. U. S. 899.

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*The refusal of the state court to remove the cause to the circuit court of the United States on the application of the receivers was relied on as error throughout the proceedings, and the supreme court of Kansas held, among other things, that the application for removal was properly denied because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal.

Messrs. Winslow S. Pierce, A. L. Williams, W. R. Kelly, N. H. Loomis, M. A. Low, and W. F. Evans submitted the cause for plaintiffs in error:

As the removal was sought on the ground that the case was one arising under the Constitution and laws of the United States, the requirements of the law were satisfied by having the application made by the parties entitled to raise the Federal questions involved, without joining their codefendant.

Fisk v. Union P. R. Co. 6 Blatchf. 362, Fed. Cas. No. 4,827; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Southern P. R. Co. v. Townsend*, 62 Fed. Rep. 161; *Landers v. Felton*, 73 Fed. Rep. 311; *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. Rep. 385.

A person having a defense arising under the Constitution or laws of the United States cannot be deprived of his right to maintain his defense in the Federal courts, by joining other defendants not affected by the Federal question.

Sonnenheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233.

Mr. A. A. Godard submitted the cause for defendant in error. Mr. F. B. Dawes was with him on the brief.

Even if a Federal question was involved, it was absolutely necessary for the defendant railroad company to join in the application, to effect the removal to the Federal court.

Dillon, Removal of Causes, 5th ed. § 80; *Shearing v. Trumbull*, 75 Fed. Rep. 33; *Chesapeake, O. & S. W. R. Co. v. Smith*, 101 Ky. 707, 42 S. W. 538.

The courts are unanimous that this is the law in all cases where removal is on the grounds of diverse citizenship.

Thompson v. Chicago, St. P. & K. C. R. Co. 60 Fed. Rep. 773, and cases cited; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Kane v. Indianapolis*, 82 Fed. Rep. 770; *Ruohs v. Jarvis-Conklin Mortg. Trust Co.* 84 Fed. Rep. 513; *Deere v. Chicago, M. & St. P. R. Co.* 85 Fed. Rep. 876; *Carr v. Kansas City*, 87 Fed. Rep. 1.

*Mr. Chief Justice **Fuller** delivered the [246] opinion of the court:

Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the Chicago, Rock Island, & Pacific Railroad Company, defendant, to join in the application of its codefendants, the receivers of the

Union Pacific Railway Company, to effect a removal to the circuit court.

The Rock Island Company was not a corporation of Kansas, and all the receivers of the Union Pacific Railroad Company were citizens of some other state than the state of Kansas. But the receivers applied for removal, after the Rock Island Company had answered, on the ground that the suit was, as to them, "one arising under the laws of the United States," in that they were appointed receivers by the circuit court of the United States for the districts of Nebraska and Kansas, to take charge of and to operate a corporation created by the consolidation, under acts of Congress, of a corporation of the United States, a corporation of Kansas, and a corporation of Colorado.

The act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, § 2), provides:

[247] "That any suit of a civil nature, at law or in equity, arising *under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court."

It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different states, the defendant, if there be but one, may remove, or the defendants if there be more than one; but where the suit is between citizens of different states, and there is a separable con-

troversy, then either one or more of the defendants may remove.

Under the 1st clause of § 2 of the act of 1875 (18 Stat. at L. 470, chap. 137), which applied to "either party," but in its re-enactment in the 2d clause of § 2 of the act of 1887, *above quoted, is confined to the defend- [248] ant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition; and so as to the 2d clause of the 2d section of the act of 1875, which corresponds with the 3d clause of the 2d section of the act of 1887, it was held that that clause only applied where there were two or more controversies in the same suit, one of which was wholly between citizens of different states. *Hanrick v. Hanrick*, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835, and cases cited; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726, and cases cited. In the latter case Mr. Justice Gray said: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" And see *Whitcomb v. Smithson*, 175 U. S. 635, ante, 303, 20 Sup. Ct. Rep. 248.

There was no separable controversy here. The case presented a joint cause of action against all the defendants, and, indeed, the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It therefore came within the first clause of the section quoted, and if the same rule governs proceedings under that clause that obtains in respect of the second clause, the judgment of the supreme court of Kansas must be affirmed. And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application under either clause.

We do not regard *Sonnenheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233, as in point. There an action had been brought in the circuit court of the United States for the eastern district *of Texas by a citizen of Texas, [249] against an Ohio corporation and a United States marshal, the jurisdiction depending as to one defendant on diverse citizenship, and as to the other on the case arising under the Constitution and laws of the United States, and the question was whether the judgment of the circuit court of appeals was made final by the act of March 3, 1891, which

we held it was not, as the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different states.

Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840, is, however, justly pressed on our attention as of weight in the disposition of the particular question raised in this case.

The case was this: Mitchell was a citizen of Illinois, and commenced an action of ejectment in the circuit court of Cook county, in that state, against three defendants, Jabez G. Smale, and John J. and Frank I. Bennett. The Bennetts, who were attorneys, appeared specially for Conrad N. Jordan, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him, Jordan, and had no other interest. The court denied the motion, and thereupon Jordan was admitted to defend the cause as landlord and codefendant. Afterwards, and in due time, Jordan filed a petition, under the act of 1875, for the removal of the cause into the circuit court of the United States, alleging as ground of removal that the plaintiff was a citizen of Illinois, and that he, Jordan, was a citizen of New York, and was the owner of the property, and that the sole controversy in the case was between him, Jordan, and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts, and the tenancy of Smale. Subsequently Jordan obtained leave to amend his petition, and amended it so as to set up that as between him and plaintiff the controversy involved the authority of the Land Department of the United States to grant certain patents, under which he claimed the right to hold the land in dispute, after and in view of the patent under which plaintiff claimed the same [250] land. As Smale was merely a tenant, *the court held that there was no good reason why the contest respecting the title might not have been carried on between Jordan and plaintiff alone so far as Smale was concerned; but as to the Bennetts the court thought there was greater difficulty in sustaining a removal, because they were made defendants apparently in good faith, and were not acknowledged to be tenants of Jordan, and plaintiff might well insist on prosecuting his action against them, as well as against Jordan, in order that, if he should be successful, there might be no failure of a complete recovery of the land claimed by him, but inasmuch as Jordan exhibited a claim under the authority of the United States, which was contested by Mitchell on the ground of the want of that authority, while it was true that laws of the state of Illinois might be invoked by the parties, still it was no less true that the authority of the United States to make the grant relied on would be necessarily called in question. In view of that defense the jurisdiction was sustained apparently on the ground that there [250] 178 U. S.

was a separable controversy, and the particular terms of the different clauses of the statute were really not discussed.

The case was a peculiar one, and we must decline to allow it to control the determination of that before us.

In *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. ed. 656, 658, Mr. Chief Justice Waite said: "A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law *or treaty of the [251] United States." *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, ante, 276, 20 Sup. Ct. Rep. 222.

In *Mitchell v. Smale* the claim of Jordan was treated by the court as coming within that ruling, but the case before us does not. This was an ordinary action under a state statute for wrongfully causing the death of plaintiff's intestate. No Federal question was in fact presented by the pleadings nor litigated at the trial. The liability depended on principles of general law applicable to the facts, and not in any way upon the terms of the order appointing the receivers. Whatever the rights of the receivers to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the 1st and the 2d clauses of § 2 of the act of 1887-8.

Judgment affirmed.

FRANK M. RIDER, John F. Burgess, and Samuel M. Rutledge, Commissioners of Muskingum County, Ohio, *Plffs. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 251-261.)

Bridges—order of Secretary of War to alter—liability of municipal officers.

1. Failure to comply with an order of the Secretary of War directing an alteration in a bridge to facilitate navigation will not sub-

ject municipal officers to criminal prosecution under the river and harbor act of August 11, 1888, as amended by the act of Congress of September 19, 1890, where such officers have not in their hands the funds to do the work, and under the laws of the state cannot obtain them within the time fixed by the Secretary's order for the completion of the work.

2. The failure of municipal officers to suggest any want of public moneys in their hands for the alteration of a bridge, or any want of power to obtain the funds, until after the Secretary of War has made an order for such alteration, does not preclude them from setting up those facts in defense of their criminal liability under the river and harbor act of August 11, 1888, as amended by the act of Congress of September 19, 1890.

[No. 40.]

Argued January 26, 27, 1899. Ordered for reargument February 20, 1899. Reargued November 1, 1899. Decided May 14, 1900.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment of conviction in a prosecution for failure to comply with an order of the Secretary of War as to the alteration of a bridge. *Reversed.*

For report of case in District Court, see *United States v. Rider*, 50 Fed. Rep. 406.

The facts are stated in the opinion.

Messrs. Frank H. Southard and Simon M. Winn argued the cause and filed a brief for plaintiffs in error.

Mr. George Hines Gorman argued the cause and, with *Solicitor General Richards*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Harlan delivered the opinion of the court:

[253] This is a prosecution under a criminal information filed on *behalf of the United States against the plaintiffs in error as commissioners of the county of Muskingum, Ohio, having power under the laws of Ohio to control, alter, and keep in repair all necessary bridges over streams and public canals on all state and county roads.

The information was based upon the 4th and 5th sections of the river and harbor act, approved September 19th, 1890.

Those sections are as follows:

"§ 4. That section 9 of the river and harbor act of August 11th, 1888, be amended and re-enacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable op-

portunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

"§ 5. That section 10 of the river and harbor act of August 11th, 1888, be amended and re-enacted so as to read as follows: That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, *or associa- [254] tion shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above described." 26 Stat. at L. 426, 453, chap. 907.

Under power conferred by an act of the general assembly of Ohio, approved March 9th, 1836, the authorities of the state, between 1836 and 1840, constructed a series of locks and dams on the Muskingum river between Marietta and Zanesville.

About the year 1838, under the authority of the state, a dam was constructed across the main channel of the Muskingum river at the rapids, which entirely obstructed navigation at that point, but locks and a side-cut canal were constructed so that boats could pass southward to the river below the rapids. Immediately below that dam the commissioners of Muskingum county, about the year 1874, under the authority of the state, constructed a bridge across the river,—the bridge here in question,—whereby the town of Duncan Falls and Taylorsville on opposite sides of the river were connected.

On the 2d day of May, 1885, the state of Ohio made a cession to the United States of the Muskingum river with its improvements. The act of cession contained this provision: "And for the purpose of enabling the United States to expend any sum of money that is or may hereafter be appropriated by Congress for the improvement of the Muskingum river, the state of Ohio hereby transfers and cedes to the United States the eleven locks and dams heretofore constructed by said state on said river, together with all the grounds, canals, and appurtenances belonging to the same, subject to the provisions of the preceding sections of this act as to the jurisdic-

tion of the United States over the lands and buildings authorized to be acquired and constructed by said sections, and imposing penalties for injuries to said work which shall extend and apply to the said eleven locks and dams and their appurtenances hereby transferred and ceded to the United States, but the custody and ownership of said Muskingum river improvement shall remain [255] in the state of Ohio until such time as the United States appropriates sufficient money to properly improve and operate the same." 82 Laws of Ohio, 220, 221.

The cession was accepted by the United States, as is shown by the river and harbor act of August 5th, 1886, which contained this clause: "And the United States hereby accepts from the state of Ohio the said Muskingum river improvement, and all the locks, dams, and their appurtenances, and the canals, belonging to said improvement, and all the franchises and property of every kind, and rights, in said river, and its improvements, now owned, held, and enjoyed by the state of Ohio, including all water leases and rights to use water under and by virtue of any lease of water now running and in force between the state of Ohio and all persons using said water, hereby intending to transfer to the United States such rights in said leases and contracts as are now owned, held, or reserved by the state of Ohio; but not to affect any right to the use of the water of said river now owned and held by the lessees of any water rights under any lease or contract with the state of Ohio. And the United States hereby assumes control of said river, subject to the paramount interest of navigation. The provisions of this act, so far as they relate to the Muskingum river, shall not take effect, nor shall the money hereby appropriated be available, until the state of Ohio, acting by its duly authorized agent, turns over to the United States all property ceded by the act of the general assembly aforesaid, and all personal property belonging to the improvement aforesaid and used in its care and improvement, and any balance of money appropriated by said state for the improvement of said river, and which is not expended on the 15th day of July, 1886. 24 Stat. at L. 310, 324, chap. 929.

By deed of January 31st, 1887, the board of public works of Ohio, under legislative sanction, conveyed to the United States all the lands and tenements, with the rights and appurtenances thereto belonging, then owned, held, and enjoyed by the state, and theretofore occupied and used for canal and other purposes, and known as the Muskingum river improvement.

[256] *During the years 1890 and 1891 the United States caused to be constructed a lock at the head of the rapids in the dam which the local authorities had maintained, and constructed from that lock down the river, under the bridge and through the rapids, an artificial canal outside of the main channel of the river, and raised the locks and dam on the river below, thus providing a new means of navigation at that point.

In the judgment of the United States en- 178 U. S.

gineer having in charge the improvement of the Muskingum river, the construction by the government of the new lock at Taylorsville made it necessary to place a draw in the Taylorsville bridge just below that lock. Of this fact the county commissioners were informed, and they were given an opportunity to submit such statements, propositions, and evidence bearing upon the matter as they might deem pertinent. Finally the following notice was issued from the War Department and served upon the commissioners:

War Department,
Washington City, February 25th, 1891.
To the County Commissioners of Muskingum County, Ohio:

Take notice that—

Whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum county, Ohio, across the Muskingum river, between Taylorsville and Duncan Falls, is an unreasonable obstruction to the free navigation of said river (which is one of the navigable waters of the United States) on account of not being provided with a draw-span below the new United States lock No. 9 in said river; and

Whereas the following alteration will render navigation through it reasonably free, easy, and unobstructed; to wit, the construction of a draw span in said bridge below the said lock in accordance with the span shown on the map hereto attached; and

Whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of the 4th *and 5th sections of an act of [257] the Congress of the United States, entitled "An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes," approved September 19th, 1890, Redfield Proctor, Secretary of War, does hereby notify the said county commissioners of Muskingum county, Ohio, to alter the said bridge as described above, and prescribes that said alteration shall be made and completed on or before the 30th day of September, 1891. L. A. Grant,

Assistant Secretary of War.

No alteration of the bridge having been made by the commissioners within the time limited by the Secretary of War, the present information was filed against them on the 23d day of November, 1891. The information, after referring to the official character of the defendants and setting out the facts showing the action of the War Department touching the proposed alteration of the bridge, charged that the defendants as county commissioners of Muskingum county "did unlawfully, on, to wit, the 15th day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail and refuse to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, con-

trary to the form of sections 4 and 5 of an act of Congress approved September 19th, 1890."

A trial was had which resulted in a verdict of guilty. A motion for new trial having been entered, the judges before whom it was argued differed in opinion, and certified the following points of disagreement to this court: 1. Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections 4 and 5 of the act of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river. 2. Whether the failure to comply, by persons owning and controlling the said bridge, with the order of the Secretary of War, could lawfully subject them to a penalty for a misdemeanor. *This court held that since the passage of the judiciary act of March 3d, 1891 (26 Stat. at L. 826, chap. 517), certificates of division of opinion in criminal cases, according to §§ 651 and 697 of the Revised Statutes, were not authorized. *United States v. Rider*, 163 U. S. 132, 139, 41 L. ed. 101, 103, 16 Sup. Ct. Rep. 983. The certificate of division of opinion in this case was accordingly dismissed. Upon such dismissal the motion for new trial was denied in the circuit court in accordance with the opinion of the presiding judge, and it was adjudged that each of the defendants be fined in the sum of \$10. From that judgment the present writ of error has been prosecuted.

We have seen that by the 4th section of the river and harbor act of 1890 the Secretary of War was authorized, after due notice to the parties interested and after hearing them, to require persons or corporations owning or controlling any bridge over a navigable waterway of the United States, which he had good reason to believe was an unreasonable obstruction to the free navigation of such waterway, to so alter the bridge as to render the navigation through or under it reasonably free, easy, and unobstructed; and that by the 5th section of the same act it was made a misdemeanor for any person, corporation, or association to wilfully fail or refuse to comply with the lawful order of the Secretary.

The plaintiffs in error contend that those provisions are inconsistent with the Constitution of the United States, in that Congress has assumed to give the Secretary of War authority to determine matters that are legislative in their nature.

On behalf of the government it is contended that the act of Congress has not delegated legislative power to the Secretary, but has only given to that officer authority to determine the existence of certain facts as the foundation of such action by him as might be necessary to give effect to the declared purpose of Congress to remove unreasonable obstructions to the free navigation of the waterways of the United States. *Field v. Clark*, 143 U. S. 649, 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495.

The discussion of counsel also involved the question whether, assuming the act in question not liable to the objection that it delegated legislative power to the head of an

executive department, *the expense to be incurred in the alteration of the bridge in question, which was originally constructed in accordance with law, must not be borne by the United States, which by its own agents made the proposed alteration of the bridge necessary for the purposes of navigation.

These are questions of very considerable importance. But in the view we have taken of the case their determination is not now necessary. The record presents another question which, being determined in favor of the plaintiffs in error, requires a reversal of the judgment upon grounds that will protect them altogether against the present prosecution for not complying with the order issued from the War Department.

At the trial in the circuit court it was proved that the notice from the War Department to the county commissioners to make and complete the required alteration of the bridge between Taylorsville and Duncan Falls on or before September 30th, 1891, was served in March of that year; that there were then no funds in the hands of the commissioners legally available for the purpose of making the proposed changes in the bridge, and that, under the laws of Ohio defining and limiting the powers of the commissioners, it was not possible for them by any levy of taxes to raise the money necessary to alter the bridge within the time limited by the notice from the Secretary of War, or before the commencement of this prosecution.

It has not been suggested, nor could it reasonably be held, that the county commissioners were bound, in any case, to provide out of their own private estates the money (several thousand dollars) necessary for the proposed alteration of the bridge, or that they could be made liable criminally for not so doing. The notice was addressed to them in their official capacity, and the prosecution against them was for failing to perform the duty alleged to be imposed upon them by the act of Congress. What they could or could not lawfully do, in the execution of the powers conferred upon them, must of course be determined by the laws of the state under whose authority they acted.

Assuming, for the purposes of the present decision, that the words "the persons, corporation, or association owning or controlling *any railroad or other bridge" may, under some circumstances, apply to officers of municipal corporations charged generally with the control and repairing of bridges owned by such corporations, the question remains whether any error of law was committed at the trial to the prejudice of the plaintiffs in error. The court charged the jury, among other things: "Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply by the person owning and controlling any such bridge, as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, after

due notice and otherwise full compliance with the act of Congress in that behalf, lawfully subjected them to prosecution for a misdemeanor, as provided by the act of Congress."

To this instruction the defendants duly excepted. Assuming the act of 1890 not liable to any constitutional objection, we think that the court, in view of the evidence, erred in saying, as in effect it did, that the mere failure of the defendants to comply with the order of the Secretary brought them within the act of Congress and subjected them to prosecution. The charge ignored altogether the proof showing that the defendants had no public moneys which they could have applied to the alteration of the bridge, and that under the laws of the state no money could be obtained, by way of taxation, so as to make the required alteration within the time fixed by the Secretary of War. The court made the guilt of the accused depend alone upon the inquiry whether they had complied with the order of the Secretary of War. This was error. It ought not to be supposed that Congress intended, even if it had the power, to subject officers of a state to criminal prosecution for not doing that which it was impossible for them to do consistently with the laws of the state defining and regulating their powers and duties.

[261] It is said that the record does not show that the commissioners, prior to the order of the Secretary of War, suggested any want of public moneys in their hands that could be used in *altering the bridge, or any want of power under the laws of the state to raise money for such a purpose by taxation, within the time limited for doing the work ordered. This is an immaterial circumstance. The record does show that the Commissioners from the outset protested against the expense of the proposed alteration being put upon the county, and insisted that the United States, acting by its officers, having made that alteration necessary, it should bear such expense. Nothing done or omitted to be done by the commissioners estopped them from making any defense which the facts in the case justified. The liability of the commissioners to criminal prosecution could not depend upon their mere failure to state to the engineer in charge of the Muskingum river improvements all that might have been urged against the demand made upon them by that officer.

We are of opinion that, however broadly the act of 1890 may be construed, it ought not to be construed as embracing officers of a municipal corporation owning or controlling a bridge, who had not in their hands, and under the laws of their state could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge. If the court on its own motion had instructed the jury, under the evidence in this case, to find for the defendants, it could not be held to have erred.

The judgment is reversed, with directions
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for further proceedings consistent with this opinion.

Reversed.

*NORTH AMERICAN TRANSPORTATION [262]
& TRADING COMPANY, Plff. in Err.,
v.

DONALD MORRISON.

(See S. C. Reporter's ed. 262-269.)

Federal courts—jurisdictional amount—effect of ad damnum clause—prospective wages or profits as damages—adding assigned claims to give jurisdiction—costs against plaintiff in error on reversal.

1. A mere *ad damnum* clause will not confer jurisdiction on a circuit court of the United States, where the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain by evidence, to the extent of the jurisdictional amount.
2. The amount of wages or profits which plaintiff alleges he could have earned by securing employment at the place of destination cannot be included in the damages recoverable for a carrier's breach of contract of transportation, where plaintiff did not know what his occupation or business would be at the place of destination.
3. Claims assigned to plaintiff by those whose citizenship and residence do not appear either in the complaint or in the petition for removal cannot be added to his own cause of action in order to give jurisdiction to a Federal court on removal from a state court on the ground of diverse citizenship.
4. Costs may be imposed on plaintiff in error where a judgment is reversed for lack of jurisdiction of the circuit court, if the cause was removed into that court at his instance.

[No. 203.]

Submitted March 20, 1900. Decided May 21, 1900.

IN ERROR to the Circuit Court of the United States for the District of Washington to review a judgment in a cause removed from a state court. *Reversed.*

See same case below, 85 Fed. Rep. 802.

Statement by Mr. Justice Shiras:

*This was an action originally brought in [262] December, 1897, in the superior court of the state of Washington for King county, by

NOTE.—As to diverse citizenship as ground for Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & Iron Co.* (C. C. W. D. Va.) 1 L. R. A. 108, and note; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

As to jurisdiction of United States circuit court as dependent upon amount—see *Auer v. Lombard*, 19 C. C. A. 72, and note; *Tennent-Stribbling Shoe Co. v. Roper*, 36 C. C. A. 455, and note.

As to damages for carrier's default or delay as to transportation of passenger—see *Hansley v. Jamesville & W. R. Co.* (N. C.) 32 L. R. A. 543, and note.

Donald Morrison against the North American Transportation & Trading Company, and subsequently, on petition of the defendant company, removed to the circuit court of the United States for the district of Washington. To the declaration, containing several counts, the defendant demurred. The demurrer was overruled, and the cause was tried before the district judge and a jury. After verdict and judgment in favor of the plaintiff, the district judge certified the following statement of facts and questions of jurisdiction to this court:

"I, C. H. Hanford, district judge, presiding in the circuit court, aforesaid, and the judge before whom the above-entitled cause was tried, do now, on the 29th day of December, 1898, being the December term, at which the judgment and verdict were entered herein, certify as follows:

"Morrison, the plaintiff, alleging himself to be a citizen and resident of the state of Minnesota, began this action in the superior court of King county, state of Washington, against the defendant, alleging it to be a corporation organized and existing *under the laws of the state of Illinois, and engaged in business in the state of Washington. The suit was upon eight causes of action, the first on plaintiff's own account, the other on account of seven alleged assignors of plaintiff. The citizenship of these assignors was nowhere alleged.

"Defendant removed the case to this court on the ground of diversity of citizenship between it and plaintiff Morrison, and the involving of a sum exceeding \$2,000, exclusive of interest and costs. After removal defendant demurred to each cause of action in the complaint as not sufficient to constitute a cause of action, and as to the last seven causes of action on the additional ground that the court had no jurisdiction to hear it, and this was overruled, with exception to defendant. Issue was then joined, and, after two trials, judgment was entered as now complained of in error in the sum of \$2,119.50. After the verdict and before judgment defendant moved to dismiss or remand the whole cause and each cause of action on the ground that as to the first cause of action it did not involve \$2,000, exclusive of interest and costs, and as to the second and each subsequent cause of action—that is to say, as to the assigned causes of action—that each of these did not involve \$2,000, exclusive of interest and costs, and because, also, it did not appear that proper diversity of citizenship existed at the time of the commencement of the action, or at the time of its removal, between the assignors of plaintiff and defendant so as to confer jurisdiction upon the Federal court; which said motion to dismiss and remand was denied, with exception to defendant.

"The original complaint shows that the aggregate sum sued for by Morrison was \$18,173.50, divided, as already stated, into eight causes of action. The suit was upon eight contracts of carriage, between defendant as a carrier and plaintiff and his seven assignors, from Seattle to Dawson City, by

way of St. Michaels and the Yukon river, which contracts were alleged to have been broken by the carrier by 'failure and refusal to transport the passengers farther than Fort Yukon on the river.

"The first cause of action—that of plaintiff himself—alleged himself to be a citizen and a resident of Minnesota and defendant *a[264] corporation organized and existing under the laws of the state of Illinois. The contract was alleged to have been made at Seattle on the 30th day of July, 1897, and the agreed date of the delivery of the plaintiff at Dawson by the carrier was alleged to be September 15, 1897, and this suit was brought on the 17th day of November, 1897. On the breach of the contract at Fort Yukon, plaintiff alleged himself compelled to return to Seattle. The damages claimed by him were as follows: (a) The price of his ticket from Seattle to Dawson City, \$200; (b) \$72.50, returning to Seattle after the breach of contract at Fort Yukon; (c) expense of \$1 a day and loss of time at \$3 a day at Seattle since his return there, the 18th day of October, 1897; (d) \$3 a day from the 30th day of July, 1897, which he could have earned if he had not started on the journey at all; (e) \$15 a day which he could have earned for a year at Dawson after the 15th day of September, 1897; (f) lost baggage, \$29.50; the total prayer of this cause of action being \$2,301.75.

"The second and subsequent causes of action, being the assigned causes, arose on exactly similar contracts of carriage. The citizenship of the respective assignors was not averred. The damages claimed were exactly the same as those claimed by plaintiff himself, excepting that none of the assignors claimed the item of lost baggage, and that the item of cost in returning from Fort Yukon to Seattle was as low as \$61.50 in some instances, and as high as \$103.25 in others. The lowest sum claimed by any of the assignors as his total damage was \$2,261.25, and the highest claimed was \$2,303.25.

"Neither in the original nor the assigned causes of action was it alleged that any of these passengers had ever lived in Dawson before, had any previous engagement or business there, or any promise of employment. the allegation in each cause of action as to the passenger's damage in this respect being that 'he could have obtained employment and engaged in business by him competent to perform and transact at or about said Dawson City, and thereby secured wages and profits at the rate of \$15 per day continuously from September 15, 1897, for the period of the year thence next ensuing,' and that 'he *has wholly lost all of said employment and time, and all of said wages and profits, to his damage in the sum of \$2,000.' It was not alleged what, if any, occupation either plaintiff or any of his assignors had before departure on the journey, nor was it alleged what occupation was expected at the point of destination, or that any expected occupation was communicated to the defendant.

"Now, therefore, I do certify to the Su-
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preme Court the following question of jurisdiction, as follows:

"Whether the motions to dismiss and to remand should have been granted because at the time of removal to this court the cause was one of which this court could not take jurisdiction—that is to say, whether—

"(a.) In each of the causes of action the sum or value of the matter actually in dispute, as shown in the pleadings, was less than \$2,000, exclusive of interest and costs, and a controversy was involved substantially within the jurisdiction of this court; and whether—

"(b.) If the foregoing be answered in the affirmative, the amounts claimed in the assigned causes of action could be united to that in the first to make up the jurisdictional amount, the citizenship of the assignors not being alleged; and whether—

"(c.) Supposing the jurisdictional amount was sufficient in each cause of action, the case was even then removable to this court when the necessary diversity of citizenship was alleged only in the first cause of action, and was not alleged in those assigned."

Mr. Frederick Bausman submitted the cause for plaintiff in error:

The passenger here cannot recover for lost time at Dawson.

Hadley v. Baxendale, 9 Exch. 341.

Where a passenger is delayed in his journey, and ultimately completes it, he cannot recover for any loss of time, though he may recover what are often his heavy expenses in finishing the journey.

1 Fetter, Carriers, § 124; *Le Blanche v. London & N. W. R. Co.* L. R. 1 C. P. Div. 286, 45 L. J. C. P. N. S. 521, 34 L. T. N. S. 667, 24 Week. Rep. 808; *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500.

The jurisdictional objection on assigned claims applies under the existing statutes to removed causes, like the present, as well as to original.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

If, then, this was a case solely of assigned causes of action, it is not to be doubted that the removal was improper because the citizenship and residence of the assignors nowhere appeared, either in the complaint or in the petition for removal. Their citizenship must affirmatively appear.

Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912.

Messrs. John Arthur and **L. H. Wheeler** submitted the cause for defendant in error.

[265] ***Mr. Justice Shiras** delivered the opinion of the court:

This is a suit by Donald Morrison, alleging himself to be a citizen of the state of 178 U. S.

Minnesota, against the North American *Transportation & Trading Company, a corporation of the state of Illinois, for damages arising out of a breach of a contract whereby the transportation company had agreed to carry the plaintiff and his baggage from Seattle in the state of Washington to Dawson City in the Northwest Territory, in the Dominion of Canada. [266]

It is conceded that the defendant company failed, without sufficient excuse, to fulfil its engagement, and the question upon which the jurisdiction of the court below depended is as to the nature and amount of the damages to which the plaintiff is entitled. The allegations in the complaint in that respect were, first, the sum paid by the plaintiff as a fare being \$200; second, the expenses caused by having to return to Seattle, amounting to \$72.50; third, the wages which he could and would have earned at Seattle if he had not proceeded upon the attempted journey, being wages at the rate of \$3 per day during all the time intervening between August 3, 1897, and November 17, 1897, amounting to about \$320; fourth, the loss of a certain portion of plaintiff's baggage, amounting to \$29.25; and, fifth, the loss occasioned plaintiff by the defendant's failure to transport him to Dawson City, "where the plaintiff could have obtained employment and engaged in business which he was competent to perform and transact, at or about Dawson City and thereby have secured wages and profits at the rate of \$15 per day continuously from September 15, 1897, for the period of the year next ensuing;" "by reason whereof there is due and owing the plaintiff from the defendant by reason of the premises, for said expenditures, outlay, and damages, the sum of \$2,301.75."

It was obvious, on the face of the plaintiff's complaint, that if he was not entitled to recover the money which he alleged "he could have earned and secured by obtaining employment and engaging in business at or about Dawson City," the amount necessary to give the circuit court jurisdiction was not involved.

While it has sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the circuit court, that was in suits for unliquidated *damages, in which [267] the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose and could not disclose but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the court would not be defeated. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265.

But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a 1063

mere *ad damnum* clause will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case.

We do not consider it necessary to enter upon a discussion of the rule that a person is not to be held responsible in damages for the remote consequences of every negligent act, but only for those which are proximate or natural, and shall content ourselves by stating our conclusion that, in the circumstances disclosed by the plaintiff's declaration and in the certificate of the trial judge, the defendant company, though liable in a court of competent jurisdiction for the other claims asserted, cannot be held for the amount of wages or profits which the plaintiff suggests he might have earned had he reached Dawson City.

In the district judge's certificate it is stated that the plaintiff did not allege that he had ever lived in Dawson City before, or had any previous engagement or business there or any promise of employment; that it was not alleged what, if any, occupation the plaintiff had before his departure on the journey, nor what occupation was expected at the point of destination, or that any expected occupation or employment was communicated to the defendant company.

The plaintiff was traveling to a land of promise, hoping to there procure some occupation, he knew not what, or to engage in some business, he knew not what. The result of such an adventure cannot be foretold, and the plaintiff's anticipations afford no safe ground on which to base a claim for damages.

If, then, the plaintiff, in respect to his own [268] claim, did not disclose *a case of which the circuit court had jurisdiction, did he overcome that difficulty by the additional counts in which he alleged himself to be the assignee of several other voyagers who had suffered loss and damages similar to those claimed by him on his own behalf? The citizenship of the assignors was not alleged, and the greater portion of the respective claims consisted of matter which we have held in reference to plaintiff's own claim to be too remote and uncertain to be allowed.

It is somewhat uncertain, upon the facts alleged in the declaration and those stated to us in the certificate of the district judge, whether, if all the claims, as well those assigned as those held by the plaintiff in his own right, omitting those which we have held to be too remote and uncertain, were aggregated, they would reach the necessary jurisdictional amount. But however that may be, as it is not alleged that the assignors could have themselves prosecuted suit in the circuit court, it is the settled construction of the statutes of the United States that the suit cannot maintain in favor of the assignee.

Seré v. Pitot, 6 Cranch, 332, 3 L. ed. 240, was an action commenced to foreclose a

mortgage given by a citizen of Louisiana to another citizen of the same state. The language of the judiciary act of 1789 was as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." 1 Stat. at L. 78, chap. 20, § 11. The plaintiff was the general assignee in insolvency of the mortgagor, and was an alien; and it was said by Chief Justice Marshall, delivering the opinion of the court:

"Without doubt assignable paper, being the chose in action most usually transferred, was in the mind of the legislature when the law was framed, and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature was not equally disposed to except from the jurisdiction of the Federal courts those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be *permitted to sue in equity in his own [269] name, and there would be as much reason to exclude him from the Federal courts as to exclude the same person when the assignee of a particular note. The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The 'contents' of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account."

And the same construction was put upon the language of the act of August 13, 1888, chap. 866 (25 Stat. at L. 433). *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

We do not think that it was competent for the plaintiff to add to his own cause of action in order to obtain jurisdiction in the circuit court, claims assigned by those whose citizenship and residence did not appear either in the complaint or in the petition for removal. As, however, the plaintiff brought his action in the state court, where he was entitled to join the assigned claims with his own, and as the case was removed into the Federal court at the instance of the defendant company, whose motion to remand the case we are now obliged to sustain, we impose the costs in the circuit court and in this court on the North American Transportation & Trading Company, the plaintiff in error.

These views render it needless to answer severally the questions certified.

Accordingly *the judgment of the Circuit Court is reversed*, and the cause is remanded to that court, with directions to remand the cause to the state court.

It is so ordered.

[270]*PITTSBURGH & LAKE ANGELINE
IRON COMPANY, *Plff. in Err.*,

v.

CLEVELAND IRON MINING COMPANY
and Lake Superior Iron Company.

(See S. C. Reporter's ed. 270-280.)

*Error to state court—Federal question—in-
dependent ground of decision.*

A decision by a state court holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a Federal question for review by the Supreme Court of the United States on writ of error.

[No. 260.]

*Argued April 24, 25, 1900. Decided May
21, 1900.*

IN ERROR to the Supreme Court of the State of Michigan to review a decision affirming a decree dismissing a bill in a suit to determine rights in the bed of a lake. *Dismissed.*

See same case below, 118 Mich. 109, 76 N. W. 403.

The facts are stated in the opinion.

Mr. F. O. Clark argued the cause and, with Mr. Alfred Russell, filed briefs for plaintiff in error.

Mr. James H. Hoyt argued the cause and, with Mr. George Hayden, filed a brief for the Cleveland Iron Mining Company.

Mr. A. C. Dustin, with Messrs. Hoyt, Dustin, & Kelly, also filed a brief for the Cleveland Iron Mining Company.

Mr. Benton Hanchett argued the cause and, with Mr. Dan H. Ball, filed a brief for the Lake Superior Iron Company.

[270] *Mr. Justice McKenna delivered the opinion of the court:

The plaintiff in error and the defendants in error were respectively plaintiff and defendant in the court below, and we will so designate them. They were riparian owners on a body of water called Lake Angeline, in the state of Michigan, and this suit is to determine the extent of their respective ownerships to the bed of the lake. They all derived title through United States patents, and the controversy is claimed by plaintiff to arise from their construction and effect.

The trial court dismissed plaintiff's bill, and its action was affirmed by the supreme court of the state (118 Mich. 109, 76 N. W. 403), and this writ of error was then sued out.

A motion is made to dismiss for want of jurisdiction in this court, on the ground that

NOTE.—As to Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kitley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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no Federal question was raised in the state court, or, if one was raised, the decision of the state court was rested on a question not Federal, which was sufficient to sustain the judgment.

Under the circumstances of this case it will be more orderly *to consider the latter[271] ground first, and its proper determination requires a consideration of the opinion of the supreme court, of its statement of facts (which we condense), and of its conclusions from those facts:

"Lake Angeline was situated on sections 10, 11, and 15, township 47 N., range 27 W., and was within the corporate limits of the city of Ishpeming, in Marquette county. It contained 148.61 acres within the government meander lines. It was a mile in length east and west, and 1,690 feet in width on the center line of section 10, which was its widest point.

"The three parties to this litigation own all the lands surrounding this lake,—the complainant owning that part of section 15 bordering upon the lake; the defendant, Cleveland Iron Mining Company, owning that part of sections 10 and 11 bordering on the lake east of the center line of section 10; and the defendant, Lake Superior Iron Company, owning that part west of said center line. These three mining corporations have owned this land about thirty years, and have been engaged in mining upon their respective properties for more than twenty years. For the sake of brevity, these companies will be designated by their initial letters."

No ore was known to exist in the bed of the lake until the winter of 1886 and 1887, when it was discovered on territory not owned by plaintiff, but plaintiff was informed of the discovery. Afterwards ore was discovered on its territory. The extent and locality of the ore beds were not exactly known, and negotiations were entered into for pumping out the lake, and ended in a contract between the parties.

It recited the discovery of the ore and the necessity of pumping out the lake, in order to "economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to."

It provided for the purchase of a pumping apparatus which one B. C. Howell had, and in consideration of the "mutual considerations received each from each, the receipt of which is hereby respectively acknowledged."

The agreement then provided what proportion of the cost of *the pumping appar- [272] atus and plant should be respectively borne by the parties both for its purchase and maintenance, and the expenses of the work. And it was found by the supreme court that the agreement was formally executed. The acknowledgment by plaintiff recited that it was done by its president and secretary, and also that it was done on behalf of the corporation.

The total cost of draining and keeping water out of the lake until January 1, 1897, was \$76,488.38. "Of this the C. I. M. Co.

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paid \$44,149.68; the L. S. I. Co. \$17,147.18; and the complainant \$7,601.38. . . . The water under the southeast arm of the lake was comparatively shallow. A vast body of mud was found in the bottom of the lake, and the two defendants incurred an expense, in attempting to remove it, of \$20,227.53."

"After the execution of this contract, each party worked upon its own property as defined thereby. The complainant mined out all the valuable ore under the southeast arm, and afterwards filled its opening with the waste rock. The L. S. I. Co. made explorations at considerable expense, and the C. I. M. Co. made the five drill holes above referred to from the complainant's mine, and ran a drift through the rock underneath the lake nearly to the south line of section 10, and, after reaching ore, ran drifts and crosscuts with a view of determining the value of the ore and ascertaining if there was sufficient to open and equip a mine. All this involved large expense.

"The section line was regarded as the line dividing these properties. Nails were driven in the timbers underground to indicate the line. In 1894 complainant made an innocent trespass north of the line, for which an amicable settlement was made. In 1896 the C. I. M. Co. trespassed upon complainant's property south of the line, and amicably settled for it. Maps were frequently exchanged with each other. Complainant asked and obtained permission from the C. I. M. Co. for the construction of a railroad track north of the section line, which was constructed and has ever since been in operation by complainant. On March 21, 1894, the C. I. M. Co. executed a lease to complainant, granting it the right to use land north of the section line for stock-pit [273] grounds and the erection of temporary structures for mining purposes. Other acts also were done by the respective parties in recognition of the fact that the south line of section 10 was the boundary line as stated in the above agreement. This state of affairs continued until November, 1896, when complainant served a notice upon the defendants that it claimed title to certain lands north of the section line.

"Complainant commenced mining on lots four and five in 1863. The hill was very near the shore of the lake, and complainant dumped its waste rock into the lake and filled in several acres north of the section line. Upon this made land north of the line it erected some buildings, the most of which it removed to the south of the line in 1887. Complainant filed its bill of complaint November 23, 1896."

Chief Justice Grant, delivering the opinion of the court, stated the theory of the plaintiff's bill to be—

"That the territory formerly covered by the waters of this lake should be divided among the shore owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be

partitioned by convergent lines drawn from the outside limits of each frontage to a convergent point called the 'equitable center.' To the bill is attached a map purporting to contain such equitable division."

And after stating in what apportionment of the bed of the lake this would result, stated the claims of the defendants as follows:

"(1) The patent under which the defendant, the Cleveland Iron Mining Company, claims title, gave it title to the whole east half of section ten (10) to the south line thereof, and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value, and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

"(2) Because it has title by adverse possession for more than fifteen (15) years.

"(3) Because the south section line of [274] section ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts, and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

"(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

"(5) Because the complainant is estopped by matter *in pais* from asserting title to the land.

"(6) Because the complainant is estopped by its laches.

"(7) Because as a tenant of a portion of the premises in dispute complainant is estopped to deny defendant's title."

That of Lake Superior Iron Company as follows:

"1. That there has been a practical division of the lake bed between the parties; that contracts, explorations, and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

"2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

"3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that in such case, not only is the agreement to continue the drainage of the lake at an end, but either party

[275] has a right to demand that the drainage of the lake must stop and the water allowed to rise to its original level—a result which, after all that has *been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

"4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common-law rule for division of the bed of fresh-water streams."

Commenting on the claims the learned Chief Justice said:

"The situation is anomalous, and the books present no similar case. In March, 1892, the parties entered into an agreement to extinguish the lake by pumping out the water, leaving the territory dry ground. They agreed upon an apportionment of expense substantially according to the territory within the lines of the government survey. The lake no longer exists. Nearly five years after this suit is planted upon the theory that the lake exists, and that the court must make an equitable division from a common equitable center. All the parties, however, seem to have discussed the question as of a lake actually in existence."

The difficulties of apportionment on plaintiff's theory were stated, and the opinion proceeded as follows:

"The above statement is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory south of the line, and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed under the [276] bed of the *lake ore worth mining. The contract, if valid, established the line beyond dispute.

"The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract, recognized as valid, and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the established law until the decision of *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 78 U. S.

Mich. 227, 25 L. R. A. 815, 60 N. W. 681, claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed. The former case was decided in February, 1887, and the latter in September, 1894."

The case of *Clute v. Fisher* was discussed, and disposing of the question raised upon the theory that plaintiff relied upon that case in its negotiations and contract with the defendant, and that all the parties so understood it, it was said:

"We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of *Clute v. Fisher* as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following then is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. All parties are chargeable with knowledge that each was to incur risks of its own, make its own expenditures upon its own land according to the agreement, and, by reason of its expenditures and improvements, would be placed in such a position that it could not be restored to its former *status quo*.

"The anticipated result came. The explorations, expenditures, and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to *render exact justice be- [277] tween the parties, because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars.

"The result of complainant's contention would be that, whenever any case had been overruled, every transaction or agreement based upon that decision may be set aside by the courts, if not barred by the statute of limitations. The agreements and settlements of parties, made with full knowledge of the facts and in reliance upon the law, ought to be as binding as the judgment of the court in a particular case. If ten other similar suits had been pending when *Clute v. Fisher* was decided, and judgments had been rendered in reliance upon that decision, the courts could not now set them aside. The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of the court, in the absence of fraud or misrepresentation, must stand. When that decision is overruled, the overruling decision controls only subsequent transactions. Such is the rule recognized by the decisions and text writers."

The opinion then proceeded to say that the

mistake of plaintiff was one of law, and the case was "stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility, or surprise. Neither said or did anything to mislead the others. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled."

And it was decided that the case did not come "within any exception to the rule that a mistake of law does not furnish any ground for relief."

[278] It was then considered if the contract settling the boundary line and acquiescence therein and the acts done thereunder estopped plaintiff from asserting a different line, and it was held that it did against the claim that the statute of frauds prevented estoppel—against the claim that a corporation could not settle a boundary line without a meeting and vote of its stockholders. "The contract was the act of the three parties to it;" the court said:

"It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity.

"Complainant is entirely without equity. It doubted the correctness of the rule of *Clute v. Fisher*, and thought that a different rule might some time prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contest and explorations involving over \$100,000. It should at least have informed the defendants of its claim, and given them the opportunity to make a contract with that in view.

"This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy, and money of that company developed a valuable property. It ought in justice to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 592, 23 L. ed. 331; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

"It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

"Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Everyone is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L. R. A. 1068

815, 60 N. W. 681. It had an able attorney, who keeps well versed in the decisions of the courts of this state. Yet it waited two and a half years before asserting its claim, and still nine months after obtaining the opinion of its attorney that *Clute v. Fisher* was no longer the law. It waited until "circumstances and conditions have so changed that it is impossible to restore the *status quo*." [279]

It is manifest that the supreme court rested its decision on the grounds (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff, in asserting its claim whereby the *status quo* could not be restored.

It requires no argument to demonstrate that neither of these grounds involve a Federal question. But plaintiff in error contends that they were all made to depend upon a Federal question, which the court erroneously decided, and therefore that they necessarily involve such question.

It is claimed to arise under conflicting claims under United States patents. "This," counsel for plaintiffs say, "presents the *fundamental Federal* questions [the italics are counsel's] involved in this case, viz.: Did the complainant acquire title to the center of the lake by virtue of its ownership of said government lots 2, 3, 4, and 5; or did defendants obtain title by virtue of their several patents, to a point where the south line of section 10, if projected east and west through the water of the lake, would run?" And this asserted Federal question is said to have been decided by the supreme court of Michigan in the following language of its opinion: "The Cleveland Iron Mining Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity."

What this language means we do not think the opinion of the court leaves in doubt. But whether plaintiff did or did not own land of section 10 which could be or could not be measured by metes and bounds, whatever its rights and the rights of the other parties were, they could be settled by agreement, and could be made the foundation of business transactions and enterprises. The supreme court determined they were so made and could be so made under the laws of Michigan.

But again, and whatever the error in that conclusion (we do not assert there was any), [280] the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment.

The case must therefore be dismissed for want of jurisdiction.

And it is so ordered.

CORRALITOS COMPANY, *Appt.*,

v.

UNITED STATES and The Apache Indians.

(See S. C. Reporter's ed. 280-289.)

Indian depredations—claims for—depredations in Mexico.

Indian depredations committed in Mexico on property of a citizen of the United States, although the property was taken by Indians in amity with the United States and brought by them into the United States, do not create any claim against the United States under the act of Congress of March 3, 1891, giving jurisdiction to the court of claims for depredations by Indians in amity with the United States.

[No. 267.]

Submitted April 24, 1900. Decided May 28, 1900.

A PPEAL from a decision of the Court of Claims dismissing a petition in an action for Indian depredations. *Affirmed.*
See same case below, 33 Ct. Cl. 342.

Statement by Mr. Justice **Peckham**:

- [280] *The appellant herein filed its original petition in the court of claims, against the United States and the Apache Indians, on September 6, 1892. Subsequently, and by leave of court, an amended petition was filed
- [281] March 2, 1894, from which it appears *that the petitioner is a corporation chartered under the laws of the state of New York and doing business in the state of Chihuahua, county of Guleana, Republic of Mexico, and that property to the value of nearly \$75,000, belonging to the petitioner, and situated at the time in the Republic of Mexico, was taken therefrom in 1881 and 1882, and stolen and carried off by the Apache Indians, then in amity with the United States, and brought from the Republic of Mexico into the United States. By virtue of the act of Congress, entitled "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations," approved March 3, 1891, judgment for the value of the property thus taken by the Indians was demanded.

The United States filed a plea in bar, alleging that the claimant ought not to have and maintain its suit, "because the depredation complained of is alleged to have occurred in the Republic of Mexico, beyond the jurisdiction of the United States and the courts thereof; and that the court therefore had no jurisdiction to entertain this suit."

The plaintiff demurred to the plea in bar as bad in substance.

The court of claims overruled the demurrer, sustained the plea in bar, and dismissed the petition. 33 Ct. Cl. 342. The petitioner appealed from that judgment to this court.

NOTE.—As to jurisdiction to punish crimes committed by or against Indians—see *State v. Campbell* (Minn.) 21 L. R. A. 169, and note. 178 U. S.

Mr. John Critcher submitted the cause for appellant:

This is a statutory remedy,—a civil action to recover the value of property taken. It is a transitory action and follows the person. Any court of the United States which has jurisdiction of the subject-matter and of the parties to the suit may take cognizance of such action.

Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75.

This is a case of trespass *de bonis asportatis*, and, being a transitory action, it is only necessary to lay the place of trial under *videlicet*.

McKenna v. Fisk, 1 How. 241, 11 L. ed. 117; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439.

An action may be maintained for a trespass committed out of the limits of the United States, in a circuit court for any district in which the defendant may be found, upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States.

Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75.

The judiciary power of every government looks beyond its local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.

The Federalist, No. 82.

There is nothing in the act of 1891 so ambiguous as to make it necessary to turn back to the act of 1834 to ascertain the claims within the jurisdiction of the court.

Assistant Attorney General Thompson submitted the cause for appellees. Mr. Lincoln B. Smith was with him on the brief.

The statute should be construed strictly because it is a statute granting jurisdiction to a court of limited jurisdiction; because the liability which it enforces is of an extraordinary character, unknown to the common law; because it is a statute giving the right to sue the United States in derogation of sovereignty.

Leighton v. United States, 161 U. S. 291, 40 L. ed. 703, 16 Sup. Ct. Rep. 476.

Another reason for a strict construction of the statute is found in the fact that it is legislation by Congress affecting the rights of Indian tribes.

Marks v. United States, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476.

The act of March 3, 1891, is purely remedial in its nature; it provides a forum where certain alleged rights may be litigated; but it creates no rights except in so far as it imposes a liability on the United States for plaintiff's benefit. To find a wrong which it hopes to remedy we must turn to the act of 1834.

Leighton v. United States, 29 Ct. Cl. 288.

*Mr. Justice **Peckham**, after stating the foregoing facts, delivered the opinion of the court:

The very satisfactory opinion of the court

of claims in this case leaves little to be said by us in affirming the judgment of that court.

[282] It would require very plain language from Congress by which to impose a liability on the part of the United States for the seizure or stealing by Indians of property belonging to a citizen *of the United States, but situated at the time of such seizure or stealing within the confines and jurisdiction of a foreign sovereignty. Generally the government admits no liability for the destruction of the property of its citizens by third parties, even when it occurs within the limits of the United States. Still less reason would exist for the acknowledgment of any such liability for property of its citizens destroyed or stolen within the limits and under the jurisdiction of a foreign nation.

Upon proof of the existence of certain facts the United States, however, at an early day, admitted an exceptional liability in favor of its citizens whose property within the United States had been destroyed by friendly Indians. By chapter 30 of the act of 1796 (1 Stat. at L. 469, chap. 30), provision was made for a boundary line to be established between the United States and various Indian tribes, which was to be clearly ascertained and distinctly marked; and by section 14 of that act it was provided: "That if any Indian or Indians belonging to any tribe in amity with the United States shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States," then, in such case, it was made the duty of such citizen to make application to the superintendent, or such other person as the President of the United States should authorize for that purpose, who, being furnished with the necessary documents and proofs, and under the direction of the President, was to make application to the nation or tribe to which the Indian or Indians belonged, for satisfaction, and provision was made for obtaining the same, if possible.

The section contained a provision that, "in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification."

No particular method was provided for obtaining such indemnification, and it rested with Congress when and how to make it.

[283] The property mentioned in this section, it will be seen, is *property in any state or territory of the United States; and it must have been stolen or destroyed by Indians belonging to a tribe in amity with the United States, who had come over or across the boundary line mentioned in the first section of the statute. The language of the statute is plainly confined to the destruction or stealing of property situated at the time within a state or territory of the United States. The statute acknowledges and provides for no responsibility or liability for

property of citizens of the United States situated within the domain of a foreign state at the time of its seizure or destruction.

By the act approved March 30, 1802 (2 Stat. at L. 139, chap. 13), a boundary line was again established between the United States and various Indian tribes; and the 14th section of that act again provided for an eventual indemnification by the United States for property lost under the same conditions as were stated in the act of 1796; and no liability was acknowledged, or provided, for any loss or destruction of property outside and beyond the jurisdiction of the United States.

Although there was, subsequent to the act of 1802, frequent legislation by Congress upon the subject of trading with the Indians, yet the liability of the government for property stolen or destroyed remained the same.

No change in regard to such liability was made by the act approved June 30, 1834 (4 Stat. at L. 729, chap. 161). Section 17 of that statute provided that, "if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy" certain property, substantially the same proceedings as in the former statutes should be taken against the tribe to which the Indians belonged, for recovering the value of the property so taken; and the United States guaranteed eventual indemnification to the citizen whose property was taken, the same as in the former statutes. The "Indian country" mentioned in the act included the country contained within the boundary lines mentioned in *the preceding[284] acts above referred to. The liability of the government for property was still limited, by the act of 1834, to that taken or destroyed in the Indian country or in a state or territory of the United States.

By section 8 of the act approved February 28, 1859, making appropriations for the expenses of the Indian department, so much of the act of 1834 as provided that the United States should make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians trespassing on white men, was repealed, thus taking away the obligation of the government to eventually indemnify the citizen for property taken by the Indians, as provided in the former statutes.

By a general resolution approved June 25, 1860 (12 Stat. at L. 120), the repeal of the indemnity provision by the act of 1859 above mentioned was directed to be so construed as not "to destroy or impair any right to indemnity which existed at the date of said repeal." Citizens whose property had been taken or destroyed under the circumstances provided for in the statute of 1834 had generally been paid by deducting the value of the property destroyed from annuities due the respective tribes, without any specific

appropriation having been made therefor, though there were some acts passed prior to 1859 for the payment of such claims out of the Treasury of the United States.

These various acts are referred to, and a history of the legislation upon the subject of claims for Indian depredations is given, in the opinion delivered in the court of claims in the case of *Leighton v. United States*, 29 Ct. Cl. 288.

It is evident from the legislation enacted that claims for Indian depredations had prior to 1872 become quite frequent. By section 7 of the Indian appropriation act, approved May 29, 1872 (17 Stat. at L. 165, 190, chap. 233), it was provided that the Secretary of the Interior should prepare and cause to be published such rules and regulations as he deemed necessary to prescribe the manner of presenting claims "arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims." By existing laws or treaty stipulations there was no pretense of any obligation of the government "to guarantee the eventual payment for property destroyed or stolen beyond the limits of the United States. It was further provided in the act of 1872, that the Secretary should carefully investigate such claims as might be presented, subject to the rules and regulations prepared by him, and report to Congress at each session the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based; and it was provided that no payment on account of any claim should be made without a specific appropriation therefor by Congress.

It will be seen that the claims which the Secretary of the Interior was authorized to investigate were claims "arising under existing laws or treaty stipulations." That act did not enlarge the character of the responsibility of the government beyond what it was prior to its passage.

By the Indian appropriation act, approved March 3, 1885 (23 Stat. at L. 362, 376, chap. 341), an appropriation was made for the investigation of certain Indian depredation claims, which, it is obvious, were claims of the description included in the former statutes upon the subject; and the appropriation was plainly not meant to provide for the investigation of claims for property destroyed outside the limits of the United States.

Pursuant to the provisions in these appropriation acts, it seems that the Secretary of the Interior had caused to be examined, and allowed, numerous claims for the loss or destruction of property by Indians, and had reported the same to Congress; but Congress had made no appropriation to pay them. In addition to the claims thus approved by the Secretary of the Interior and reported to Congress, it is said that a still greater number were pending in the department for investigation; and in this state of affairs

Congress passed the act of 1891 (26 Stat. at L. 851, chap. 538), providing as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the court of claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States *taken or destroyed [286] by Indians, belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts, subject, however, to the limitations hereinafter provided."

Here, for the first time, jurisdiction is conferred upon a court to inquire into and finally adjudicate in regard to the validity of claims against the government arising out of Indian depredations, as described in this act. Up to the time of its passage, and since the passage of the act of 1872, claimants had been compelled to rely for compensation for losses so incurred upon a special application to Congress, made in each case to that body directly or through the Secretary of the Interior.

The purpose of Congress in enacting the statute of 1891 undoubtedly was to provide thenceforth a judicial tribunal for the hearing of such claims, and for their payment in accordance with the judgment of the court. It is true that the language of the provision in the act of 1891, which confers jurisdiction upon the court of claims, differs somewhat from that used in the various prior statutes, which had guaranteed the eventual indemnification of the claimant by the government; but such difference is not in our judgment at all significant of an intention to enlarge the liability of the government to a greater extent than had ever before been recognized.

Considering the prior legislation of Congress in regard to claims for Indian depredations, none of which recognized any liability of the nature of the claim now made, is it reasonably possible for us to say that Congress intended by the act of 1891 to increase the liability of the government, and to extend it to property destroyed within the limits and jurisdiction of a foreign *state, when [287] it has failed to use any language to plainly signify so extraordinary a departure from its past policy? Up to 1891 there is not the slightest ground for asserting that any such obligation had ever been acknowledged on the part of Congress in any legislation en-

acted by that body. Up to that time it had always confined the liability of the government, in any event, to a claim for the stealing or destruction of property within the limits of the United States; and we think that, if any such radical and material departure from the policy of the government from its foundation had been intended by the act of 1891, plain language to accomplish such a change would have been found in that act. We look in vain for any such language.

Instead of enlarging its liability beyond that which it provided for in the earlier statutes, we find that in 1859 Congress repealed the law by which the government became a guarantor for eventual indemnification to the owner for property destroyed by Indians. The act of 1891 again altered that liability, and provided for the rendition of judgment against the government for the value of the property taken or destroyed, and also against the tribe of Indians committing the wrong, if it were possible to identify such tribe; and the judgment in that case was to be deducted from the annuities due the tribe from the United States, as provided in the 6th section; and if payment could not be procured from the tribe, then the amount of the judgment was to be paid from the Treasury of the United States, which payment was to remain a charge against the tribe, and was to be deducted from any annuity fund or appropriation which might thereafter become due from the United States to such tribe.

By this act of 1891 the obligation of the United States as a substantial guarantor is again acknowledged, notwithstanding the act of 1859; but it is acknowledged in the plain language contained in the 6th section, which provides a means of payment of the judgment obtained pursuant to the provisions of the act. Correspondingly plain language would have been used in this act had it been intended to enlarge the general scope of the liability of the government so as to include Indian depredations committed within the borders of a foreign state.

[288] *A decision of the question of what would be the nature of an action like this, if between private individuals, whether transitory or not, would give us no aid in determining the meaning of this act of Congress. The jurisdiction of the court depends wholly upon the act, and we must construe its meaning from the language used in connection with the previous legislation on the subject. In so construing the act we have no doubt that it does not include claims for property destroyed or stolen within the limits of a foreign country.

It was said by the court of claims, in the opinion delivered in this case, as follows:

"The United States (unless for some express agreement between the two nations) may not discipline or control Indian tribes within the Mexican territory; and being without power to enter that territory in time of peace, without Mexico's consent, is without direct responsibility for what may there occur. Wrongs sustained by a citizen

of the United States while in Mexico can only be remedied through the executive branch of the government, and do not present causes of action in the courts. If citizens of the United States resort to Mexico, they may expect, and their government may demand for them, equality of safety and protection with the citizens of that country, an unbiased administration of the laws in relation to them and their property, and any special advantages (if such there happen to be) expressly reserved by treaty. Beyond this there is no right.

"It is not alleged that this plaintiff was subjected to any loss other than that which occurred at the hands of Indians within the territorial jurisdiction of Mexico; to remedy that loss he must resort to the Mexican courts, if the law of that Republic happen to provide a remedy through its judiciary for such misfortunes. Failing that, an appeal might possibly be made upon the Mexican government through the executive department of the government of the United States, if the facts so authorize and that department deem such an appeal advisable and wise. In any event, the matter in dispute does not fall within the jurisdiction of this court."

For these reasons, among others, the court came to the conclusion that Congress did not intend by the act of 1891 to enlarge *the liability of the government so as to include property destroyed or stolen in foreign territory. [288]

We agree with the results arrived at by the court of claims, and think it unnecessary to add to what has been so well said by that court.

The judgment is right, and must be affirmed.

WILBERFORCE SULLY, Trustee, etc., and
Others, *Plffs. in Err.*,

v.

AMERICAN NATIONAL BANK *et al.*

(See S. C. Reporter's ed. 289-304.)

Error to state court—who may be heard—time for raising question—citizenship of party—constitutional law—discrimination against nonresident creditors of foreign corporations—nonresident mortgagee—due process of law—equal protection of laws.

1. In order to be heard in the Supreme Court of the United States on writ of error to a

NOTE.—As to equality of rights and privileges—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *Peo-*

state court on a question as to a right to share in the distribution of a fund, the party who seeks to raise the question must have raised it in the state court, and cannot avail himself of the fact that someone else has raised it there, if he failed to do so.

2. A question raised in the supreme court of a state, and there decided, not on the ground that it was not raised in the lower court, but on its merits, is not raised too late for the purpose of review on writ of error from the Supreme Court of the United States.
3. The citizenship of a party who claims that his constitutional rights as a citizen have been infringed by the decision of a state court sufficiently appears, for the purpose of a review by the Supreme Court of the United States, when he is described in the pleadings as a "resident" of a certain state and city, and no question as to his citizenship seems to have been made throughout the litigation.
4. An unsecured nonresident creditor of a foreign corporation is entitled, under U. S. Const. art. 4, giving equal privileges and immunities to the citizens of the several states, to share in the distribution of its assets upon the same level as like creditors of the company who reside within the state.
5. A preference in favor of resident creditors of a foreign corporation over a nonresident mortgagee whose mortgage is not registered when their debts are created, when such preference is not given them over a resident mortgagee, constitutes an illegal discrimination against the nonresident.
6. The fact that there are no resident mortgagees in a particular case does not make the question of discrimination between nonresident and resident mortgagees by a statute a merely abstract or moot question, so as to preclude a decision against the validity of the statute, if it makes a discrimination against nonresident mortgagees with respect to sharing in the distribution of the assets of an insolvent foreign corporation.
7. No discrimination is made between nonresident and resident mortgage creditors by Tenn. act 1877, § 5, providing for a preference of the creditors of an insolvent foreign corporation "over mortgage . . . creditors" for debts made before registration of the mortgages.
8. A nonresident mortgagee is not deprived of property without due process of law by Tenn. act 1877, § 5, simply because his claim is subordinated to the claims of Tennessee creditors of an insolvent foreign corporation.
9. A nonresident mortgagee is not within the jurisdiction of the state merely because he has a mortgage on property therein, so as to be deprived of the equal protection of the laws in violation of U. S. Const. 14th Amend. by denying him the right to participate on terms of equality in the distribution of the assets of an insolvent foreign corporation.

[No. 266.]

Argued April 26, 1900. Decided May 28, 1900.

IN ERROR to the Supreme Court of the State of Tennessee to review a decision modifying a decree of the court of chancery

appeals in a case involving the question of discrimination against nonresident creditors in distributing the assets of a foreign corporation. *Reversed.*

Statement by Mr. Justice **Peckham**:

*The contest in this case arises out of the [291] insolvency of the Carnegie Land Company, a Virginia corporation doing business at the time of its insolvency in the state of Tennessee, under the provisions of the act of the legislature of that state passed in 1877, and which was under review in this court in *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; 176 U. S. 59, ante, 371, 20 Sup. Ct. Rep. 307.

The contest is between creditors of the company above named, who are nonresidents of the state of Tennessee, both those who are unsecured, as well as those who are secured, by mortgages upon the property of the company in that state, and creditors of such company who are residents of the state.

The questions to be decided arise out of the provisions of the fifth section of the above-mentioned act, the material portion of which reads as follows:

"Sec. 5. That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities, and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements, and contracts. Nevertheless, creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged, as against all debts which may be incurred subsequent to the date of their registration or rendition." Acts of Tennessee, 1877, p. 44.

On November 27, 1893, the American National Bank and *others filed their bill [292] against the Carnegie Land Company and various named creditors of that company, and prayed that the bill might be taken as a general creditors' bill against the company on behalf of the complainants and of all the other creditors of the company, and that those named as creditor defendants might represent the class, their number being too great to make them all parties to the bill. The complainants alleged that they were creditors of the land company; that the com-

ple v. O'Brien (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to Federal jurisdiction over state courts; necessity of Federal question—see notes to 178 U. S.

Hamblin v. Western Land Co. 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to Re Buchanan, 39 L. ed. U. S. 884.

pany was insolvent; that it had a large amount of property in the state; that it had assigned the same for the benefit of its creditors without giving preferences, which was in disregard of the statute of the state (above referred to), and asked that the creditors of the company should prove their claims in that suit; that a receiver should be appointed, the assets marshaled, and the creditors paid according to law.

To this bill the land company made answer, denying its insolvency, or that it had ceased to do business, or had abandoned its franchises, and claimed that its assignment was good and valid, and that the trust should not be taken out of the hands of its assignee.

During the pendency of this suit, Wilberforce Sully and A. B. Carhart, residents of the state of New York, filed a bill against the land company and certain corporations in the state of Connecticut, called the Travelers' Insurance Company and the Connecticut Trust & Safety Deposit Company. The complainants alleged that the Carnegie Land Company had duly determined to issue \$300,000 worth of bonds, secured by mortgage upon its property in the state of Tennessee, and of that amount of bonds but \$85,000 had actually been issued; that Sully was the mortgagee in trust in the mortgage executed by the company for securing the payment of the bonds, and that Carhart was the bona fide holder of all of the \$85,000 of such bonds; that the mortgage was executed on January 2, 1893, and was duly registered in the office of the register of Washington county, Tennessee, on February 10, 1893; that the interest had not been paid as it became due; and that, by virtue of a provision of the mortgage, the whole principal sum had become due [293] and payable; and that the land company was in default in the payment of the principal and interest due on such bonds. The bill alleged the commencement of the suit already spoken of, brought by the American National Bank and others against the land company; and it alleged that nearly all of the assets, if not all of them, in the hands of the assignee of the company, and sought to be impounded by the bill filed by the American National Bank, were covered and conveyed to the complainant Sully, as trustee, and that the complainant Carhart, the holder of the outstanding bonds, was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust executed to Sully, as above stated. Complainants prayed that they might be allowed to file this bill as a general bill against the land company; or, if for any reason this could not be done, that they should be allowed to file the same in the above cause of the bank against the land company and others as a petition in the nature of a cross-bill against the said company.

To this bill the complainants in the first bill, the American National Bank and others, made answer, and denied that the land company had ever executed any mortgage, or that any bonds were ever issued under any

mortgage, and denied that the land company ever in any way or manner, either in law or in fact, authorized the issuing of any bonds under such mortgage, or to be secured thereby, and they denied that any such bonds constituted any binding obligation as against the land company.

The bank also alleged that if the bonds to the extent of \$85,000 had in fact been issued, yet still the debts sued on by the bank and its coplaintiffs in the first bill above mentioned were contracted by the land company, and were incurred long before the execution and registration of the mortgage securing such bonds, and therefore they claimed that the debts owing to citizens and residents of Tennessee prior to the execution and registration of the mortgage above mentioned should have priority under the law over any debts secured or pretended to be secured by the mortgage.

The Travelers' Insurance Company and the Connecticut Trust & Safety Deposit [294] Company also filed an answer to the bill of Sully and Carhart, in which the Travelers' company alleged that the land company was indebted to it in the sum of \$30,000 and three years' interest, and in other sums amounting to several thousand dollars, which amount was secured by a mortgage or deed of trust to the Connecticut Trust & Safety Deposit Company, on what is known as the Carnegie hotel property, which is a portion of the property of the land company, and is situated in the state of Tennessee. It also denied the existence of the bonded indebtedness claimed on the part of complainants, and alleged that in any event the debt of the Travelers' company against the land company was older than, and the mortgage to the Trust company was prior to, that of the complainants Sully and Carhart, and it denied that these last-named parties had any debt as claimed by them, or a lien of any kind on the property of the land company.

The insurance company also filed a petition in the suit brought by the bank, in which it set up the existence of its mortgage, and also prayed to be allowed to become a party to that cause, and to have its note, which was secured by the mortgage, declared a preferred claim, and decreed to be paid in full out of the proceeds of the sale of the property specifically mortgaged to it.

An amended petition was filed by it, in which it alleged that it was the owner of another claim against the land company in favor of P. Fleming & Company, for a little less than \$2,000, under the circumstances mentioned in the petition.

October 11, 1895, Mary P. Myton and A. B. Carhart filed a petition in each of the above suits, in which they described themselves as Mary P. Myton, a resident of the state of New York, and A. B. Carhart, a resident of the city of Brooklyn. In that petition Mary P. Myton alleged a claim against the land company, as existing on November 27, 1894, in the sum of \$4,094.54, with interest from November 27, 1892; while A. B. Carhart alleged a claim as of the date of November 27, 1894, of \$2,248.66; and they asked

[295] to become parties to the above-named causes, for the purpose of setting up these demands, and for a decree against the company for their amounts, with interest.

(It is stated that the two debts represented by these notes were actually in existence prior to the execution of the mortgage to secure the bonds owned by Carhart; the notes being, in truth, renewals of other ones executed prior to that time.)

These various proceedings were consolidated into one action, and the case was referred to a master to take proof of all the facts. The master made his report, upon which a final decree by the chancellor was entered. It was decreed that the land company, by its deed of general assignment of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over nonresident creditors and mortgagees whose mortgages were made subsequent to the creation of the debts due resident creditors; and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company; and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill; and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending.

The decree further adjudged that Carhart was a bona fide holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company, by its mortgage, acquired a valid lien upon the property covered by it, subordinate, however, to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company.

The case was taken to the court of chancery appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the supreme court the [296] case was there heard, and that *court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that state, was constitutional, and was not in contravention of any provision of the Constitution of the United States. The decree of the court of chancery appeals was modified in some respects, and after modification it was affirmed, and the cause remanded to the chancery court for execution.

The case has been brought here on writ of error in behalf of certain unsecured creditors, nonresidents of Tennessee, and also in behalf of the Travelers' Insurance Company and of the holder of the bonds issued by the land company.

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Mr. R. E. L. Mountcastle argued the cause and, with Mr. Quincy Ward Boese and Messrs. Shields & Mountcastle, filed a brief for plaintiffs in error.

Mr. T. S. Webb argued the cause and, with Mr. H. H. Carr and Messrs. Webb & McClung, filed a brief for the Travelers' Insurance Company.

Mr. Samuel C. Williams argued the cause and, with Mr. John H. Bowman, filed a brief in behalf of certain defendants in error.

Mr. E. J. Baxter argued the cause and, with Messrs. Deaderick & Epps, filed a reply brief for other defendants in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice Peckham, after stating the [296] foregoing facts, delivered the opinion of the court:

There are two classes of creditors before the court, both of whom insist upon the erroneous character of the decree of the supreme court of the state. They are (a) general unsecured and nonresident creditors, and (b) nonresident creditors who are also mortgagees. The creditors suing out this writ of error are all nonresidents of the state of Tennessee, and they claim to have been illegally discriminated against in the courts below by reason of the statute of Tennessee providing for preferences to Tennessee creditors.

In regard to the unsecured nonresident creditors, objection is first made that there is only one of them, A. B. Carhart, who can be heard upon the question of the validity of the act of 1877, because he is the only person who has raised the point in any of the state courts. It is also claimed that the question was raised too late, even by Carhart himself, inasmuch as it is alleged to have been raised by him for the first time in the supreme court of the state.

*In reply to the first objection, it is urged [297] on the part of creditors, other than Carhart, that they are general creditors in like class with him, and that if he can raise the question, they are entitled to participate with him in the benefits of a decision thereof in his favor, to the same extent as if they had each personally raised the same question in the state court.

Cases are cited by counsel for these creditors from the courts of Tennessee, in which they say it has been held that "a broad appeal by any one party from an entire chancery decree, where the matter is purely of equitable cognizance, carries up the whole case, so as to allow relief to be granted to those who do not appeal;" and it is said that Carhart made a broad appeal.

In reply, counsel for defendants in error say that the rule in Tennessee is that an appeal by an antagonistic party, even though a broad one, will not avail his opponent. It is also argued that the other creditors cannot be heard under Carhart's appeal, because the interests of such other creditors are not joint or common with him, but they are sim-

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ply interested in the same question, which has never been held sufficient.

However it may be in regard to the rights of parties on appeal in the state court, we think that, in order to be heard in this court, the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here; and it will not aid him to show that someone else has raised it in the state court, while he failed himself to do so.

The two plaintiffs in error here, Sully, as the assignee of Manning, and Mrs. Myton, failed to appeal from the decree of the chancellor, as well as from the decree of the court of chancery appeals; nor did they except to the report of the master, nor to the decree affirming it; and their first mention of the point in their own behalf is after the decision of the state supreme court.

This is not a case where, by the reversal of a decree at the instance of those who particularly raised the question in the courts below, the whole decree is opened and nullified so as to necessarily let in all parties standing in [298] the same position to *share in the benefits of the decision. The fund is to be distributed in this case according to the decision of the court; and, of the parties to this suit, those only can avail themselves of the benefits of the decree who have properly raised the question and in whose favor the decree is rendered.

We must hold, therefore, that neither Sully, as assignee of Manning, nor Mrs. Myton, is in a position to raise the question of the invalidity of the state statute.

In regard to the objection that even Carhart has raised the question too late, we think it is without foundation. He raised it in the supreme court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the supreme court the statute was a valid and constitutional exercise of the legislative powers of the state.

The further objection made to Carhart is that it does not appear that he is a citizen of another state than Tennessee, and hence cannot avail himself of the fact of such citizenship in order to claim that his rights as such citizen have been infringed within the meaning of section 2 of article 4 of the Constitution, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. We think the objection untenable.

In his original bill to foreclose the mortgage securing the \$85,000 of bonds held by him, he described himself as a resident of the state of New York; and in the petition of Mrs. Myton and Mr. Carhart, filed October 11, 1895, in the two cases of the bank against the land company, and Sully, trustee, against the land company, Mrs. Myton is described as a resident of the state of New York, and A. B. Carhart is described as a resident of the city of Brooklyn. No question seems to have been made throughout the litigation as

to the citizenship of those parties. The question does not seem to have arisen in any stage of the case up to the argument in this court. Although there may be some slight difference in the facts between this case and those which are stated in *Blake v. McClung*, 172 U. S. at page 246, 43 L. ed. 434, 19 Sup. Ct. Rep. 165, we yet think that Carhart brings himself within the principle decided in that case, and that his citizenship *in the [299] state of New York should be regarded as sufficiently proved.

Being entitled to raise the question, we must hold, in conformity to our decision in the *Blake Case*, that Carhart, as an unsecured creditor and a citizen of New York, is entitled to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company residents of the state of Tennessee; and as the decree denies him that right, it must be reversed for that reason.

The next question arises out of the mortgage given as security for the payment of the bonds of the land company, of which Carhart held all that had been issued,—\$85,000.

Part of the 5th section of the act of 1877 provides—

"Nevertheless, creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by said corporation previous to the filing and registration of such valid mortgages or the rendition of such valid judgments."

Under this provision of the section, creditors of the land company residing in Tennessee, whose debts accrued prior to the filing and registration of the Sully, trustee, mortgage, were by the decree of the court below preferred in payment over the mortgagee. By reason of such preference Carhart did not receive what he would have received, but for the preference so given. He claims that this preference in favor of resident creditors whose debts existed when his mortgage was registered is an illegal discrimination against him as a nonresident mortgagee, because the statute, as he says, while directing such a discrimination against a nonresident mortgagee, does not permit it as against a resident mortgagee. Such a discrimination, if it existed, is invalid within the decision of *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

It is objected, however, on the part of the defendants in error, that this is a merely abstract or moot question, because *there are [300] no resident mortgagees, and their rights have not, therefore, been determined. The objection is not well taken. Although there are no resident mortgagees in this case, yet the decree of the court below, following the statute, has postponed the payment of the mortgage in favor of resident creditors whose debts accrued prior to the registration of that mortgage. If the statute does not permit such postponement against a resident

mortgagee, then the postponement in the case of a nonresident mortgagee would be invalid. The postponement has in fact been made as against the nonresident mortgagee, and whether that postponement was legal and valid is no mere abstraction because by reason thereof this nonresident mortgagee has actually suffered a loss in the payment of his mortgage. It is therefore entirely immaterial whether in this particular case there are or are not resident mortgagees. We are in this case necessarily brought to a decision of the question whether the postponement was valid; and that depends upon the question whether the act permits a similar postponement in the case of a resident mortgagee. If it does, it is conceded that the act is valid, so far as this particular question is concerned.

For us to hold that such postponement is not permitted in the case of a resident mortgagee is to condemn the statute on that point as a violation of the Constitution of the United States. Such a construction should not be adopted if the statute is reasonably susceptible of another which renders it valid. That rule applies, even though on some other point the statute has been already held to be a violation of the Federal Constitution.

We think the true construction of the statute requires us to hold that the resident owner of a mortgage would be postponed in its payment in favor of those debts made or owing by the corporation prior to the filing and registration of his mortgage. In other words, that the Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a nonresident, and the same burden that is placed upon nonresident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment *creditors. [301] We do not think that this construction leads to any absurd result.

It is urged that if it were to be so construed, a Tennessee creditor who had no mortgage or judgment would share with all other unsecured Tennessee creditors in the assets of the insolvent company, but that if he, being such creditor, took a judgment or mortgage as a security for the payment of his debt, he would thereby lose his right to share with the other resident nonsecured creditors, and the latter would have a preferred right of payment over him for all debts of the company existing at the time of the registration of the mortgage. The creditor, it is said, would thus lose his right as a general creditor, and he would obtain no lien by his mortgage or judgment as against those creditors of whom he was one before he took his mortgage.

We agree that a construction which leads to such a result would be absurd, but such a result does not follow from our construction of the statute. When the Tennessee creditor takes his mortgage or recovers his judgment to secure an existing indebtedness, a new debt is not thereby created, but he has simply received, or obtained, a security for

its payment, and a preference as against all other creditors whose debts may accrue subsequently to the filing and registration of his mortgage or the recovery of his judgment. He gains no priority over existing creditors of his class by taking a mortgage or judgment. The debts existing at that time, including his own, are to be paid; and it is only against debts subsequently incurred that the mortgage, or the judgment, has a preferential lien. If the debt for which he took the mortgage existed prior to the execution thereof, the mortgagee did not, by taking his mortgage, lose his right to share with the other unsecured creditors; but he did not acquire the right to assert the lien of his mortgage in preference to and against those creditors whose debts existed at the time of its registration. His rights as a general creditor of the land company, existing prior to the registration of the mortgage, were not in any manner lost or affected by the mortgage. He cannot assert the lien of his mortgage against prior creditors, but he does not lose his own right as a prior creditor *by taking the mortgage. Although the [302] act was evidently passed for the purpose of awarding certain preferences to Tennessee over foreign creditors, yet we see nothing in its general purpose which requires us to consider the act as making a distinction in favor of a Tennessee mortgagee as against a nonresident mortgagee.

While the effect of this construction deprives both classes of mortgagees, in case of insolvency of the mortgagor, of any benefit from their mortgages as against resident nonsecured creditors, existing when the mortgages were registered, yet, at the same time, it permits such mortgagees to share in the distribution of assets with such unsecured creditors, provided their own debts existed prior to the taking of the mortgage, and did not spring into existence simultaneously with the mortgage.

The rights of Carhart as a secured creditor must be adjusted with reference to these views. If his secured debt, or any portion thereof, did in fact exist prior to his mortgage, he is entitled to share with other unsecured creditors who are residents of the state of Tennessee.

Plaintiff in error Carhart also insists that section 5 of the act of 1877 violates section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the nonresident mortgagee of his property without due process of law.

We are unable to perceive any foundation for the claim, and we think the question has been already so decided in *Blake v. McClung*, which we have so frequently referred to. It was stated in that case, at page 260, L. ed. p. 440, Sup. Ct. Rep. p. 173:

"It does not follow that, within the meaning of that amendment [14], the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived

[303] of its claim, nor was its right to reach the assets of the British corporation in other states or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that state. It had notice of the proceedings in the state court, became a party to those *proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the 2d section of article 4 of the Constitution of the United States relating to the privileges and immunities of citizens in the several states, as its coplaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution."

That language fits this case. The principle is not altered by the fact that in this case the creditor had a mortgage which was postponed, while in the case cited his debt was unsecured, but it was also postponed to the Tennessee creditor.

Nor can we see that there has been any denial by the state of Tennessee to any person within its jurisdiction of the equal protection of the laws. Upon this point also we refer to the same case of *Blake v. McClung*, where, at page 260, the question is decided.

These two last points would apply also to the mortgage of the Travelers' Insurance Company. That company, being a corporation of the state of Connecticut, could not raise the question of a denial of any privilege or immunity as such citizen, under the provision of section 2, article 4, of the Constitution. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165. But the questions as to the deprivation of property without due process of law and of being denied the equal protection of the laws are raised by that corporation, and must be decided in a way similar to the case of *Carhart*.

With the exception of *Carhart* as a non-resident unsecured creditor, we do not see that the plaintiffs in error herein have any right to complain of the decree of the supreme court of Tennessee, but as such non-resident unsecured creditor he has the right to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company who are residents of the state of Tennessee; and as the decree below denies him that right, it must be reversed as to him for that reason, [304] and the case remanded to the supreme *court of the state for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice **Brewer** and Mr. Justice **White** did not hear the argument, and took no part in the decision of this case.

JOHN FITZPATRICK, *Plff. in Err.*,

v.
UNITED STATES.

(See S. C. Reporter's ed. 304-316.)

Error to territorial court—sufficiency of indictment for murder—evidence to connect several persons with crime—cross-examination of accused—examination in rebuttal.

1. A conviction of murder, punishable with death, is a conviction of a capital crime within the meaning of the act of Congress of March 3, 1891, as amended by the act of January 20, 1897, providing for writs of error to a district court from the Supreme Court of the United States, although the jury are given the power by the act of January 15, 1897, to qualify the verdict by adding the words "without capital punishment," and by reason of their exercise of that power the punishment actually imposed is imprisonment for life.
2. An indictment for murder, which avers that defendants did, with deliberate and premeditated malice, inflict a mortal wound, of which the victim instantly died, and that they killed and murdered him in the manner and form aforesaid, is not insufficient as failing to aver deliberate and premeditated malice in the killing, under Hill's (Or.) Ann. Laws, § 1268, which provides that an indictment must contain a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.
3. Evidence of any fact having a tendency to connect with a murder either one of several persons, some of whom are not on trial, is admissible in a murder trial, where there is some evidence tending to show a joint action on their part in committing the crime, although a statement by either of them after the commission of the crime would not be admissible against others who were not present when it was made.
4. An accused who waives his constitutional privilege of silence, takes the stand in his own behalf, and testifies to an *alibi*, may be asked on cross-examination as to every fact which has a bearing upon his whereabouts upon the night when the crime was committed, and as to what he wore, what he did, and the persons with whom he associated that night.
5. Witnesses are properly examined by the prosecution in rebuttal with respect to the effect of light from the flash of a revolver and its sufficiency for the identification of the person firing it, where the defense has put in a calendar, apparently for the purpose of showing the time when the moon rose that night, as having some bearing on this question.

[No. 499.]

Submitted April 30, 1900. Decided May 28, 1900.

NOTE.—As to jurisdiction of the Supreme Court to review territorial decisions—see note to *Miners' Bank v. Iowa ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

As to sufficiency of indictment for murder—see note to *Bergemann v. Backer*, 39 L. ed. U. S. 845.

As to cross-examination of defendant in criminal cases—see *People v. Tice* (N. Y.) 13 L. R. A. 669, and note.

IN ERROR to the District Court for the District of Alaska to review a conviction for murder. *Affirmed.*

Statement by Mr. Justice **Brown**:

[305] *This was a writ of error to review the conviction of Fitzpatrick, who was jointly indicted with Henry Brooks and William Corbett for the murder of Samuel Roberts, on March 13, 1898, at Dyea, in the territory of Alaska.

The indictment, omitting the formal parts, was as follows:

The said John Fitzpatrick, Henry Brooks, and William Corbett, at or near Dyea, within the said district of Alaska, and within the jurisdiction of this court, and under the exclusive jurisdiction of the United States, on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice make an assault upon one Samuel Roberts; and that they, the said John Fitzpatrick, Henry Brooks, and William Corbett, a certain revolver, then and there charged with gunpowder and leaden bullets, which said revolver they, the said John Fitzpatrick, Henry Brooks, and William Corbett, in their hands then and there had and held, then and there feloniously, purposely, and of deliberate and premeditated malice did discharge and shoot off to, against, and upon the said Samuel Roberts; and that said John Fitzpatrick, Henry Brooks, and William Corbett with one of the bullets aforesaid out of the revolver aforesaid then and there by force of the gunpowder aforesaid by the said John Fitzpatrick, Henry Brooks, and William Corbett, discharged and shot off as aforesaid then and there feloniously, purposely, and deliberate and premeditated malice did strike, penetrate, and wound him, the said Samuel Roberts, in and upon the right breast of him, the said Samuel Roberts, then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the revolver aforesaid by the said John Fitzpatrick, Henry Brooks, and William Corbett, in and upon the right breast of him the said Samuel Roberts one *mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died; and so the grand jurors duly selected, impaneled, sworn and charged as aforesaid upon their oaths do say: That said John Fitzpatrick, Henry Brooks, and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. Burton E. Bennett,

U. S. District Attorney.

After a demurrer to the indictment, which was overruled, and a motion for a continuance, which was denied, Brooks and Corbett moved and obtained an order for separate trials. The court thereupon proceeded to the trial of Fitzpatrick, the jury returning

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a verdict of guilty "without capital punishment." Motions for a new trial and in arrest of judgment were entered, heard, and overruled, and defendant sentenced to hard labor for life in the penitentiary at San Quentin, California. To review such judgment a writ of error was sued *in forma pauperis*.

Messrs. **A. B. Browne, Alexander Britton, and Julius Kahn** submitted the cause for plaintiff in error:

It is almost universally the rule that, in an indictment for murder, the purpose to kill must be specifically averred as a part of the description of the offense. Such purpose is an essential element of the statutory crime, although not essential at common law.

10 Enc. Pl. & Pr. p. 116; *State v. Brown*, 21 Kan. 38; *Schaffer v. State*, 22 Neb. 557, 35 N. W. 384.

Where an intent is to be proved in order to indicate the character of the act,—as, when there is an attempt or assault to commit an offense,—the intent must be averred and must be attached to all the material allegations.

Wharton, *Crim. Pl. & Pr.* ¶ 163a, § 1063; *Leonard v. Territory*, 2 Wash. Terr. 381, 7 Pac. 872; *Hagan v. State*, 10 Ohio St. 459; *State v. McCormick*, 27 Iowa, 402; *Com. v. Boynton*, 12 Cush. 499; *State v. Young*, 55 Kan. 349, 40 Pac. 659; *Jewell v. Territory*, 4 Okla. 53, 43 Pac. 1075; *Holt v. Territory*, 4 Okla. 76, 43 Pac. 1083; *Wright v. Territory*, 5 Okla. 78, 47 Pac. 1069; *Slover v. Territory*, 5 Okla. 506, 49 Pac. 1009; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 939; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

The testimony of the witness Ballard was inadmissible against Fitzpatrick.

Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273.

When the fact of a conspiracy has been proved or established by reasonable inference, the acts and declarations of one conspirator in furtherance of, or made with reference to, the common design, are admissible in evidence against his associates.

2 Am. & Eng. Enc. L. tit. *Conspiracy*, p. 866.

Until the conspiracy is found *aliunde*, the acts and declarations of an alleged conspirator are inadmissible to establish the connection with the conspiracy, of one charged as a co-conspirator.

2 Am. & Eng. Enc. L. tit. *Conspiracy*, p. 866.

The accused may, in his direct examination, stop at any point he chooses, and his constitutional privilege protects him from cross-examination on any point not touched upon in his examination in chief.

State v. Lurch, 12 Or. 99, 6 Pac. 408; *State v. Bacon*, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; *State v. Gallo*, 18 Or. 425, 23 Pac. 264; *Cooley, Const. Lim.* 6th ed. 384, 386.

The cross-examination of the accused

must be confined to the matters concerning which he testified in his direct examination.

State v. Saunders, 14 Or. 300, 12 Pac. 441.

As murder is a capital offense which may be punishable with death, the jurisdiction of this court remains to review such conviction, even with a life sentence (under the verdict of the jury) so imposed.

Re Claasen, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

Solicitor General Richards submitted the cause for defendant in error:

The indictment was sufficient.

State v. Dougherty, 4 Or. 200; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

The testimony relating to Corbett was clearly competent, not for the purpose of connecting Corbett with the crime, but of showing the entire transaction.

People v. Cleveland, 107 Mich. 367, 65 N. W. 216; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *State v. Struble*, 71 Iowa, 11, 32 N. W. 1; *Angle v. State*, 35 Tex. Crim. Rep. 427, 34 S. W. 116; *State v. Shields*, 45 Conn. 256; *Phelps v. State*, 15 Tex. App. 45; *Fisher v. State*, 73 Ga. 595.

[306] *Mr Justice **Brown** delivered the opinion of the court:

1. A suggestion is made by the government of a want of jurisdiction in this case, upon the ground that it is not one of a "conviction of a capital crime" within § 5 of the court of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517), as amended by act of January 20, 1897 (29 Stat. at L. 492, chap. 68), specifying the cases in which a writ of error may be issued directly to a district court. It is clear, however, that, as § 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given

[307] *the jury by the act of January 15, 1897 (29 Stat. at L. 487, chap. 29), to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offense, or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which is imposed, but that which may be imposed under the statute. As was observed in *Re Claasen*, 140 U. S. 200, 205, 35 L. ed. 409, 411, 11 Sup. Ct. Rep. 735, 737, with respect to infamous crimes under the court of appeals act prior to its amendment: "A crime which is punishable by imprisonment in the state prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one." See also *Ex parte Wilson*, 114 U. S. 417, 426, 29 L. ed.

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89, 92, 5 Sup. Ct. Rep. 935; *Logan v. United States*, 144 U. S. 263, 308, 36 L. ed. 429, 445, 12 Sup. Ct. Rep. 617; *The Paquete Habana*, 175 U. S. 677, 682, ante, 320, 20 Sup. Ct. Rep. 209; *Motes v. United States*, 178 U. S. 458, post, 1150, 20 Sup. Ct. Rep. 993.

conviction of murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualifies the punishment.

2. The first question raised by the plaintiff in error relates to the sufficiency of the indictment, which was for a violation of Rev. Stat. § 5339. This section, eliminating the immaterial clauses, declares that "every person who commits murder . . . within any fort . . . or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death." This section does not define the crime of murder, but prescribes its punishment.

By § 7 of an act providing a civil government for Alaska, approved May 17, 1884 (23 Stat. at L. 24, chap. 53), it is enacted "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States." We are, therefore, to look to the law of Oregon and the interpretation put thereon *by the highest court of that state, [308] as they stood on the day this act was passed, for the requisites for an indictment for murder, rather than to the rules of the common law.

By Hill's Annotated Laws of Oregon, § 1268, relating to criminal procedure, an indictment must contain:

"1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

"2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

In *State v. Dougherty*, 4 Or. 200, the supreme court of that state had held that "the indictment should contain such a specification of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offense, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law."

By § 1270, Hill's Laws, it is provided that "the manner of stating the act constituting the crime, as set forth in the appendix to this Code, is sufficient, in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit;" and in an appendix to this section the following form is given for murder: "And purposely and of deliberate and premeditated malice killed C. D. by shooting him with a gun or pistol, or by administering to him poison, or," etc.

It will be noticed that § 1270 only declares

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[309] that the form given in the appendix is sufficient in all cases where the forms there given are applicable, but it does not purport to be exclusive of other forms the pleader may choose to adopt. It does not declare the insufficiency of other forms, but merely the sufficiency of those contained in the appendix. We are therefore remitted to § 1268 to inquire whether the indictment contains "a statement of the acts constituting the offense, in ordinary and concise language, without repetition, *and in such manner as to enable a person of common understanding to know what is intended." This section was doubtless intended to modify to a certain extent the strictness of the common-law indictment, and simply to require the statement of the elements of the offense in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not. *People v. Dolan*, 9 Cal. 576; *People v. Ah Woo*, 28 Cal. 205; *People v. Rodriguez*, 10 Cal. 50. As was said by this court in *United States v. Cruikshank*, 92 U. S. 558, 23 L. ed. 593: "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in this case, omitting the immaterial parts, avers that the accused "did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice, make an assault upon one Samuel Roberts," and a certain loaded revolver "then and there feloniously, purposely, and of deliberate and premeditated malice did discharge and shoot off to, against, and upon the said Samuel Roberts," and one of the bullets aforesaid, discharged as aforesaid, "feloniously, purposely, and deliberate and premeditated malice did strike, penetrate, and wound him, the said Samuel Roberts, in and upon the right breast, . . . one mortal wound, of which he, the said Samuel Roberts, instantly died;" and further, that the defendants "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary," etc.

Defendant criticises this indictment as failing to aver deliberate and premeditated malice in killing Roberts, although it is averred that the defendants did, with deliberate and premeditated malice, inflict a mortal wound, of which he instantly died, and that they killed and murdered him in the manner and form aforesaid. If, as alleged in the indictment, they, with deliberate and premeditated malice, shot Roberts in the [310] breast with a *revolver, and inflicted a mortal wound, of which he instantly died, they would be presumed to contemplate and intend the natural and probable consequences of such act; and an additional averment that they, with deliberate and premeditated

malice, intended to kill him, was quite unnecessary to apprise the common understanding of their purpose. If they purposefully inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what it was intended to aver, namely, that the defendants had been guilty of a deliberate and premeditated murder; and while a number of cases are cited which lend some support to the argument of the defendant, there was no such statute involved as § 1268 of the Oregon Code. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction, within the ruling in the *Cruikshank Case*. While we should hold an indictment to be insufficient that did not charge in definite language all the elements constituting the offense, we have no desire to be hypercritical or to require the pleader to unduly repeat as to every incident of the offense the allegation of deliberateness and premeditation. We are bound to give some effect to the provisions of § 1268 in its evident purpose to authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfies the "common understanding" of men.

3. Certain exceptions to the admission of testimony render it necessary to notice the more prominent facts of the case. The murder took place at Dyea, Alaska, just outside the cabin of Roberts. Roberts conducted certain games at the Wonder Hotel or saloon, and slept in his cabin across the street, about 150 feet from the saloon. Ross and Brennan, two of the government witnesses, were employed by Roberts in connection with the games. Ross testified that, about 2 o'clock in the morning, Roberts, the deceased, asked the witnesses to accompany him from the Wonder Hotel to the cabin, and to carry a sack of money used at the games. Roberts was *in the habit of going [311] to his cabin every night accompanied by a man carrying the sack. They entered the cabin, and, while Roberts struck a match, something suspicious seemed to occur, and both stepped outside the door. Instantly there was a report of a gun inside the cabin. Roberts crowded witness off the porch, the sack of money fell off witness's shoulder, and he fell off the steps. As he fell he heard the report of a pistol from outside the cabin, and soon heard hurried footsteps close to him. He then heard the report of a gun from inside the cabin, and in a few seconds a man came out, stood on the porch, raised his gun and fired two shots in the direction of the Wonder Hotel, turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. Witness recognized this man as Fitzpatrick, the defendant. As Fitzpatrick disappeared, witness called for help, and Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back,

fatally wounded, and almost immediately died.

Brennan, who was at the hotel, saw Roberts start with Ross, with the sack, to go to the cabin. In a few minutes he heard a shot, and started toward the door, but before he got to the door there was another shot, and, when he reached the pavement, still another, which seemed to come from the cabin. Witness ran back to the hotel, got a gun and lantern, ran across the street, found Ross first, and then Roberts on his back dying. There was some other testimony to the same general effect.

The testimony to which objection was made was that of Ballard, a soldier on guard duty at Dyea on the night of the occurrence, who testified that about 2 o'clock in the morning he heard four or five shots from the direction of Roberts' cabin and the Wonder Hotel, and that some fifteen or twenty minutes or half an hour thereafter, a man came to him. "I was in the cabin, and he rapped on the door, and I went and opened the door for him, and he said he would like to get a doctor. He was shot. . . . I directed him to the hospital in town, and he went that way." Witness said that he did not know the man, but was afterwards told that his name was Corbett. He was brought into court, but witness could not identify him with certainty.

[312] *Objection was also made to the testimony of Dr. Price, who swore that about 3 o'clock in the morning Corbett applied to him for medical assistance; that he was wounded in the right shoulder, and witness was in attendance upon him about three weeks or a month. Also to the testimony of John Cudihee, deputy United States marshal, who arrested Fitzpatrick, Brooks, and Corbett the day of the murder, and made an investigation. He found Roberts in his cabin dead, then went to Fitzpatrick and Corbett's cabin, and found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explained that Fitzpatrick had identified the shoes in his office, and pointed out which pair was Corbett's and which was his. Witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprints in the sand which the witness found in the rear of Roberts' cabin, where the shooting occurred. The shoe had hobnails in it, and the heel of one was worn off so the print in the sand was a peculiar one.

Objection was made to the admission of any testimony relating to the acts of Corbett, and especially that which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during, or after the commission of the crime for which Fitzpatrick was then on trial. Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inad-

missible against him upon the principle announced in *Sparf v. United States*, 156 U. S. 51, 34 L. ed. 343, 15 Sup. Ct. Rep. 273, that statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In that case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of law; but the statement of Ballard was not within this rule. Corbett had evidently been wounded, and was asking for a doctor. His accompanying statement that he was shot was clearly competent *to explain his condi- [313] tion, and had no tendency whatever to connect Fitzpatrick with the transaction. This statement, as well as that of Dr. Price, to the effect that he found Corbett with a wound in his right shoulder, and that of Cudihee as to finding a lot of shoes and clothing covered with blood, and connecting one pair of these shoes with the footprints found near Roberts' cabin, were all facts connected with the crime which the government was entitled to lay before the jury. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett in their affidavit for a continuance swore in effect that they were together that night, and attempted to establish a joint *alibi*.

There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. Of course, statements made in the absence of Fitzpatrick implicating him with the murder would not be competent, but none such were admitted; but any act done, whether in Fitzpatrick's presence or not, which had a tendency to connect him with the crime, was proper for the consideration of the jury, and the fact that Corbett was not then on trial is immaterial in this connection. As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants:

but such as it is, it is competent to be laid before the jury.

[314] *In *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216, error was assigned by the defendant in permitting the prosecution to show the acts of one Mehan, jointly indicted with Cleveland in the affray; his appearance on the way to Jackson, and on the succeeding days; the excuse he gave for his then condition, and the result of an examination of his clothing. But the court said: "It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery, . . . and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial for the purpose of establishing his identity as one of the men who accompanied the respondent Cleveland from Jackson to Somerset Center, thus identifying the latter's connection with the robbery."

So, in *Angley v. State*, 35 Tex. Crim. Rep. 427, 34 S. W. 116, error was assigned upon the admission of testimony to show the character of shoes Rice (who was connected with the transaction but not jointly indicted) had on when arrested the day after the assault. One ground of the objection was that Rice was not jointly indicted with Angley. When Rice was arrested and his shoes examined it was found that one of them had a hole in the sole fitting a corresponding peculiarity in the track found upon the ground. The court held this testimony proper, though Rice was separately indicted, because the conspiracy had been shown. This was a circumstance tending to show that he was one of the parties present at the time the assault was committed.

4. Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defense, who was connected with the transaction; and he was asked but a single question, and that related to his whereabouts upon the night of the murder. To this he answered: "I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half-past twelve or one o'clock—about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down about as far as Clancy's, and then he [315] took me down *to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street."

On cross-examination the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 178 U. S.

12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw anyone else in the cabin besides Brooks and Corbett. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited, and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an *alibi*, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow *occupants of the same room. [316]

While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury (*State v. Ober*, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State v. Lurch*, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State v. Saunders*, 14 Or. 300, 12 Pac. 441, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.

5. Error is also assigned to the action of the court in permitting the government to call and examine witnesses in rebuttal with respect to the effect of light from the flash of a revolver, and whether such light would be sufficient to enable a person firing the re-

volver to be identified. One of the witnesses, Ross, testified on cross-examination that although the night was dark, he identified Fitzpatrick by the flash of the pistol shots.

Had the defense put in no evidence whatever upon the subject, the question would have been presented whether it was or was not a matter of discretion for the court to admit this testimony in rebuttal; but in view of the fact that the defense put in a calendar apparently for the purpose of showing the time that the moon rose that night as having some bearing upon this question, there was no impropriety in putting in this testimony.

There was no error committed upon the trial prejudicial to the defendant, and the judgment of the District Court is therefore affirmed.

[317]**Ex parte* UNION STEAMBOAT COMPANY, *Petitioner*.

(See S. C. Reporter's ed. 317-320.)

Mandamus—to compel obedience to mandate—questions open under mandate.

1. The decision by an inferior court upon any matter left open by the mandate and opinion of a higher court can be reviewed only upon a new appeal, and not by mandamus.
2. A question as to the recoupment of one half the damages to a cargo from a moiety of damages awarded to one of the vessels in collision, if not raised or passed upon on an appeal which directs a decree for a division of the damages between the vessels which are held to be in fault, remains open for determination by the lower court under a mandate to enter a decree in conformity to the opinion on appeal.

[No. 12, Original.]

Submitted May 14, 1900. Decided May 28, 1900.

PETITION for writ of mandamus. *Denied.*

Statement by Mr. Justice **Brown**:

[317] *This was a petition for a writ of mandamus to the district court for the eastern district of Michigan, commanding it to set aside a decree entered in the case of *The New York*, 175 U. S. 187, *anti*, 126, 20 Sup. Ct. Rep. 67, and enter a decree dividing the damages equally, so that petitioner would not be decreed to pay more than one half the total damages arising out of the collision between the *New York* and the *Conemaugh*, with interest thereon not exceeding 5 per cent per annum.

Upon the opinion of this court in the case of the *New York* being filed, a mandate is—

NOTE.—As to mandamus to inferior tribunal—see *State ex rel. Bayha v. Kansas City Ct. of Appeals* (Mo.) 3 L. R. A. 476, and note.

As to mandamus in aid of appeal—see note to *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 450.

As to mandamus, when the proper remedy and when not—see note to *United States ex rel. International Contracting Co. v. Lamont*, 39 L. ed. U. S. 303; *McCluny v. Silliman*, 4 L. ed. U. S. 263.

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sued that the decree of the court of appeals be reversed, and the case remanded to the district court, with direction "to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the state of Michigan." Upon the case coming on to be heard in the district court, the petitioner, the Union Steamboat Company, owner of the propeller *New York*, submitted a decree to the effect that both vessels were in fault for the collision, and that the damages resulting therefrom be equally divided between the *Erie & Western Transportation Company*, owner of the *Conemaugh*, and the Union Steamboat Company, owner of the *New York*; that such damages amounted in all to the sum of \$74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the steamboat company, \$19,841.56; that the transportation company, as trustees for the underwriters and owners of the cargo of the *Conemaugh*, not intervening, suffered damages in the sum of \$19,627.67; that, as owner of the propeller, it had suffered damages in the sum of \$30,508.46, aggregating the sum of \$50,136.13; that the transportation company recover of the petitioner one half of \$50,136.13, less one half the sum of \$19,841.56, decreed to be paid to the intervening petitioners, etc.

The court, however, declined to enter this decree; refused to permit the petitioner to recoup any sum that it might pay to the owners or underwriters of the cargo of the *Conemaugh*, from any sum that was due from the steamboat company for damages sustained by the *Conemaugh*, so that such company was compelled to pay of the total damages about 76 per cent instead of 50 per cent thereof.

Messrs. **C. E. Kremer**, **H. C. Wisner**, **F. C. Harvey**, and **O. W. Johnson** submitted the cause for petitioner.

Messrs. **Harvey D. Goulder**, and **F. S. Masten** submitted the cause for respondent. *Mr. S. H. Holding* was with them on the brief.

Mr. Frank H. Canfield submitted the cause for intervening underwriters.

*Mr. Justice **Brown** delivered the opinion of the court: [318]

Petitioner applies for this writ of mandamus upon the ground that the district court refused to enter a decree in conformity with the opinion of this court dividing the damages, but in effect entered a decree imposing upon the Union Steamboat Company, the petitioner, about 76 per cent of the damages occasioned by the collision:

The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject (*Sibbald v. United States*, 12 Pet. 488, 492, 9 L. ed. 1167, 1169): "Whatever," said he, "was before the court, and is disposed of, is considered as finally *settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution [319]

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according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. . . . If the special mandate directed by the 24th section [of the judiciary act] is not obeyed or executed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go," although an appeal will also sometimes lie. *Perkins v. Fourniquet*, 14 How. 328, 330, 14 L. ed. 441, 442; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 440, 443, 17 L. ed. 860, 861. See also *Boyce v. Grundy*, 9 Pet. 275, 9 L. ed. 127; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, *sub nom. Dubuque & P. R. Co. v. Litchfield*, 17 L. ed. 514; *Durant v. Essex Co.* 101 U. S. 555, 25 L. ed. 961; *Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *City Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; *Re City Nat. Bank*, 153 U. S. 246, 38 L. ed. 705, 14 Sup. Ct. Rep. 804; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 263, *sub nom. Re C. & A. Potts & Co.* 41 L. ed. 994, 17 Sup. Ct. Rep. 520.

It is equally well settled, however, that such writ, as a general rule, lies only where there is no other adequate remedy, and that it cannot be availed of as a writ of error. *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; *Re Morrison*, 147 U. S. 14, 26, 37 L. ed. 60, 65, 13 Sup. Ct. Rep. 246; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 26 L. ed. 461; *Ex parte Baltimore & O. R. Co.* 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208. The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (*Re Sanford Fork & Tool Co.* 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled. *West v. Brashear*, 13 Pet. 51, 10 L. ed. 350; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Gaines v. Rugg*, 148 U. S. 228, 238, 244, 37 L. ed. 432, 435, 437, 13 Sup. Ct. Rep. 611; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291.

[320] The libel in this case was for a collision between the Conemaugh* and the New York. The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages against the New York, notwithstanding 178 U. S.

the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the New York. It may be true that the decree holds the New York liable for 76 per cent of the entire damages, and not 50 per cent, but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and, upon the other hand, if petitioner be entitled to the recoupment claimed, it would apparently result in an affirmative decree in its favor. But no question of recouping one half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that, under the cases of *The Chattahoochee*, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491; and *The Albert Dumois*, 177 U. S. 240, *ante*, 751, 20 Sup. Ct. Rep. 595, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of the New York, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal.

No disobedience of the mandate having been shown, *the petition must be denied.*

*JOHN M. WHEELER *et al.*, Plffs. in Err., [321]
v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(See S. C. Reporter's ed. 321-326.)

Error to state court—Federal question—constitutionality of taking of land, to abolish grade crossing—due process of law.

1. A claim that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because the act authorizes an increase

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to liability for cost of changing grade of street to prevent the crossing of a railroad at grade—see *Kelly v. Minneapolis* (Minn.) 26 L. R. A. 92, and note.

in the number of tracks, and requires the city to pay part of the expense in violation of the state Constitution, which prohibits donations by a city to a railroad corporation, raises a Federal question for the purpose of a writ of error from the Supreme Court of the United States to a state court.

2. The condemnation of property under a special statute for the abolition of grade crossings is not a taking of the property of the owners, whether as property owners or as taxpayers, without due process of law, by reason of the fact that the statute authorizes an increase in the number of tracks, and provides for payment of part of the expense by the city in which the property is situated, whether the provision for payment by the city is valid under the state Constitution or not, since the condemnation of the property and the apportionment of the cost are distinct and separable portions of the statute.

[No. 534.]

Submitted May 14, 1900. Decided May 28, 1900.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a decision affirming an order for the appointment of appraisers under a statute for the abolition of grade crossings. Motion to dismiss or affirm. *Affirmed.*

See same case below, 70 Conn. 326, 39 Atl. 443.

Statement by Mr. Justice **Brown**:

- [321] *This was a motion to dismiss the writ of error, and in default thereof to affirm the judgment of the supreme court of errors of Connecticut.

The case originated in an application by the railroad company to the judge of the superior court to appoint appraisers to estimate the damages that might arise to the plaintiffs in error from the taking of certain real estate in the city of Bridgeport, for the purpose of carrying out an agreement between the railroad company and the city of Bridgeport for the abolition of grade crossings. This agreement, which was entered into under the provisions of an act of the general assembly, "providing for the abolition of grade crossings in Bridgeport," provided the manner, plans, method, and time in

- [322] *which the grade crossings should be abolished, and the proportion of the cost thereof to be borne by the city of Bridgeport and the railroad company—the proportion of such cost to be paid by the city being one sixth and that by the railroad company five sixths, provided the total cost to be paid by the city should not exceed the sum of \$400,000.

A demurrer to the application of the railroad company having been overruled, and a special defense in the answer having been stricken out as irrelevant and impertinent, an order was made appointing the appraisers. An appeal was taken to the supreme court of errors, which affirmed the judgment of the judge of the superior court, and defendant sued out this writ of error, which defendant in error moves to dismiss for want of jurisdiction, or to affirm upon the ground that the question upon which the jurisdiction depends is frivolous.

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Messrs. Robert E. De Forest and George P. Carroll submitted the cause for plaintiffs in error.

Mr. William D. Bishop, Jr., submitted the cause for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Brown** delivered the opinion [322] of the court:

Plaintiffs assign as error that, in view of the fact that, by the agreement between the city and the railroad company, it was provided that the city should pay one sixth of the entire cost of the land required for the construction of a four-track road, as well as of all damages resulting from the changes of grade, there would be a reimbursement to the company for expenses in doing work and acquiring land not necessary or germane to the work of eliminating crossings at grade of the two present main tracks over the highways; and that, under these circumstances, the condemnation of defendants' property will be in furtherance of a scheme whereby the city of Bridgeport will contribute and donate to such company the credit, money, and property of the city, and of its property owners and taxpayers, in aid of the railroad company, contrary to the provisions of twenty-fifth amendment to the Constitution of the state of Connecticut, and the taking [323] and condemnation of said Wheeler and Howes' said property will be a taking thereof without due process of law, etc.

1. We cannot say that there is no Federal question in this case. In their demurrer to the application of the railroad company plaintiffs in error relied upon the unconstitutionality of this special act of the Connecticut legislature as contravening the twenty-fifth amendment to the Constitution of the state, and the Fourteenth Amendment of the Federal Constitution. The amendment to the state Constitution provides as follows: "That no county, city, town, borough, or other municipality shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of, any such corporation."

The claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that the pay for work for the benefit of the company, in the construction of a four-track road, which was not necessary or germane to the work of grade crossing elimination, would be contrary to the above amendment to the state Constitution; and therefore that, as the land of Wheeler and Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law. The substance of the defense seems to have been that the land was not taken solely for the purpose of abolishing grade crossings, but also for the purpose of laying two extra tracks, and making the road through the city of Bridgeport a four-track road instead of an

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[324] ordinary double track. It seems that the railroad company had laid a complete four-track road all the way from New York to New Haven, except in that section which lay in the city of Bridgeport—a distance of more than 4 miles, and crossing at grade twenty-four streets, some of them the most frequented in the whole city. There is no doubt that the special act did authorize an increase in the number of tracks, and there was some reason for saying that in requiring the city to pay one sixth of *the expenses incurred for this purpose, it was making a donation in aid of the railroad company in violation of the twenty-fifth amendment to the state Constitution, and as Wheeler and Howes were property owners and taxpayers of the city, they were incidentally affected by this, and therefore their lands were illegally taken.

2. But, assuming that there was color for the motion to dismiss, we are clearly of the opinion that the decree of the supreme court of errors should be affirmed. That court had already decided, not only that the legislature might compel the removal of grade crossings and the payment of the expenses therefor, either by the railroad company or by the city, or by both (*Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849, a case arising under a former act), and that a statute compelling the removal of grade crossings, as well as imposing upon the railroad the entire expense of the change of grade, was constitutional (*New York & N. E. R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 670; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437); but the very act in question in this case has also been held to be constitutional. *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080. That court also held in this case that, whether the land be taken only for the purpose of abolishing grade crossings or to straighten its line and construct additional tracks, the taking is in either case for railroad purposes and for a public use. It also held that the right of the railroad company to condemn defendants' property did not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which were alleged in the application, the railroad company was entitled under section 3461 of the General Statutes to take the land for the uses named in the resolution.

The plaintiffs in error contended before the supreme court of errors, as they contend here, that the agreement and order made in pursuance thereof, imposing upon the city a proportion of the expense of constructing the two additional elevated tracks, not necessary to the work of eliminating grade crossings, violated the state Constitution as well as the Constitution of the United States. "But," [325] said the court, "if the railroad company *desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The

ability of the defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land the company must compensate the defendants." It was further said that, even if the employment of appraisers had established the liability of the city to pay a proportion of the expense of laying the additional tracks, such a defense was not open to the defendants, because they had not alleged that they were taxpayers or had any right or authority to represent the city in such proceedings, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order. "But," says the court, "the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one-sixth part of the expense of the whole, or of any portion of the work of this undertaking. The two purposes of the act of 1895 were: First, the removal of all existing grade crossings in Bridgeport, and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities, and duties of the railroad company and of the city, and the rights of other parties concerned, of a four-track railroad through the city, in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made as authorized by § 2, *the commissioners, [326] after the work shall have been completed, shall apportion the entire expense among the proper parties."

The court intimated no opinion as to whether the agreement and order fixing the proportionate part of the entire expense to be paid by the city was of doubtful validity. It thought the question was one which could not properly be raised in this proceeding.

The court held in substance (1) that the right to have appraisers appointed did not depend upon the obligation of the city to pay a part of the expense, and that defendants could not prevent a condemnation by showing that the company might not afterwards be able to obtain reimbursement from the city; and (2) that the defendants, not alleging that they were taxpayers, or specially interested, were not in a position to question the validity of the proceedings. If this be so, it requires no argument to show

that they are not in a position to contend that their property has been taken without due process of law. If the court had gone farther, and held that the taking of defendants' property for the purpose, not only of abolishing grade crossings, but of enabling the railroad company to lay additional tracks, was not a violation of the twenty-fifth amendment to the state Constitution, that would have been exclusively a local question, and would have involved no question of an unlawful taking of defendants' property within the Fourteenth Amendment.

If the fact that the city of Bridgeport contributed to the expense of abolishing grade crossings, and, incidentally thereto, to the construction of additional tracks, does no violence to the constitutional provision that no city shall make a donation in aid of a railroad corporation, as held by the supreme court of Connecticut, much less does it make a case of taking the property of petitioners, whether as property owners or as taxpayers, without due process of law.

The decree of the Supreme Court of Errors of the State of Connecticut is therefore affirmed.

Mr. Justice **Gray** did not sit in this case, and took no part in the decision.

[327]*MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, *Petitioner*,
v.

NELLIE PHINNEY, Executrix of Guy C.
Phinney, Deceased.

(See S. C. Reporter's ed. 327-344.)

Appeal—failure of clerk to indorse filing on writ of error—insurance—abandonment and rescission of policy after default—presumption as to knowledge of law governing contract—expression of opinion as to matter of law—waiver of exception to instruction by asking court to repeat it.

1. The failure of a clerk of the circuit court of appeals to indorse a writ of error as filed cannot defeat the transfer of the case, when the judge has done all that is necessary for him to do, and the party has done all that is required of him.
2. An abandonment and rescission of a contract of life insurance by mutual agreement of the parties after the insured is in default by nonpayment of premiums will put an end to the contract, although a forfeiture could not have been declared, by reason of the failure of the insurer to give notices required by statute.
3. It is conclusively presumed that both parties to a contract know the law in respect to which they make it, when they agree that it shall be determined by the laws of a certain state.
4. A mere expression of opinion as to a condition of a contract, which is a matter of law,

NOTE.—As to expression of opinion as fraud—see *Hedin v. Minneapolis Medical & Surgical Inst.* (Minn.) 35 L. R. A. 417, and note. And see note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.* (N. D.) 37 L. R. A. 604.

in respect to which both parties are equally chargeable with knowledge, cannot constitute a false representation or deceit.

5. An exception to instructions is not waived by subsequently asking the court to repeat them, in connection with certain answers made to questions propounded by the jury, as this merely asks the restatement so as to qualify those answers.

[No. 12.]

Argued January 22, 23, 1900. Decided May 28, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision dismissing a writ of error for lack of jurisdiction. *Reversed.*

See same case below, 48 U. S. App. 78, 76 Fed. Rep. 617, 22 C. C. A. 425.

Statement by Mr. Justice **Brewer**:

*On September 22, 1890, Guy C. Phinney, [328] a resident of the state of Washington, applied to the Mutual Life Insurance Company of New York for a policy of insurance on his life for the sum of \$100,000 payable to his executors, administrators, or assigns. This application was forwarded by the local agent at Seattle to the general agent of the company at San Francisco, and by him to the home office of the company in New York city. By reason of such application a policy was issued to Phinney, bearing date September 24, 1890, forwarded to the general agent at San Francisco, by him to the local agent at Seattle, and by the latter delivered to Phinney, who received it, and at the same time paid the first year's premium, amounting to \$3,770. The policy provided that Phinney should pay the annual premium of \$3,770 on September 24 of each year thereafter for twenty full years, provided he should live so long, and also "this policy shall become void by nonpayment of the premium; all payments previously made shall be forfeited to the company, except as hereinafter provided." This last exception referred to certain provisions as to surrender value and readjustment of the amount of insurance on the payment of a certain number of payments, none of which are material to the question at issue in this case. Prior to September 24, 1891, notices were sent by both the general agent at San Francisco and the local agent at Seattle to Phinney that his premium would be due on September 24, 1891. Twice between the time *of [329] the receipt of this notice and the 24th of September, 1891, Phinney met Stinson, and requested him to accept his notes for the payment of the premium. This proposition was declined by Stinson, who declared at the time that he was unable to advance the premium for Phinney. Some time after September 24, 1891 (the exact date being unknown, but, according to the testimony, from four to six weeks thereafter), Phinney again met Stinson, and stated that he was prepared to pay the premium, but was told that it could not be accepted unless a certificate

of health was furnished. No certificate of health was ever furnished. Phinney stated that he could not obtain it, as he had been rejected by another company a few days before, nor was there ever any formal tender of the premium. In December, 1891, or January, 1892, Stinson requested Phinney to allow him to have the policy to use for canvassing purposes, and Phinney thereupon surrendered the policy to the agent, with the statement that as the same had lapsed he had no further use for it. Stinson received the policy, and never returned it to Phinney. On September 24, 1892, the premium falling due on that day was neither paid nor tendered by Phinney, nor did he after the surrender of the policy in December, 1891, or January, 1892, ever take any action in regard thereto, or pay, or offer to pay, any premium thereon. On September 12, 1893, Phinney died, leaving his last will and testament, wherein he nominated the plaintiff as executrix. Nothing was done by her under this policy until July, 1894, although Phinney held policies in two other companies at the time of his death, proofs in respect to which were presented by the executrix within one month after his death. At that time she wrote to the insurance company a letter, in which she stated as follows:

Seattle, Wash., July 11, 1894.

The Mutual Life Insurance Co. of New York:

Gentlemen: On September 24, 1890, my husband, Guy C. Phinney, took out a policy, No. 422,198, in your company in the sum of one hundred thousand dollars. He died in this city last September 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he [330] held such *a policy until a few days ago, when the matter was brought to my attention.

In addition, it appears that on the 16th day of September, 1893, in her application for probate of her husband's will, she filed an affidavit, which contained these statements:

"Real estate, consisting of lands in said King county, of town lots in the city of Seattle, and of improved city property, the exact description of all which is at this time unknown to your petitioner, but which is entirely community estate, the value of which is about \$300,000; that there is personal property of various kinds, all of the same being community property of the value of about \$50,000; that the total estate of said deceased, including the community interest of your petitioner, who is the widow of the said deceased, does not exceed in value the sum of about \$350,000."

In July, 1894 (evidently at the suggestion of counsel), she presented her claim under the policy, which was rejected, and thereupon this suit to recover thereon was brought in the circuit court of the United States for the district of Washington.

At the time the application was made and the policy issued the following statute was in force in the state of New York:

"Section one of chapter 341 of the laws 178 U. S.

of eighteen hundred and seventy-six, entitled 'An Act Regulating the Forfeiture of Life Insurance Policies,' is hereby amended so as to read as follows:

"Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if *notice of the assignment has been given to the company, at his or her last-known postoffice address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"Sec. 2. The affidavit of anyone authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." Laws 1877, chap. 321.

In 1892, and after the first default in the payment of premium by Phinney and the surrender of his policy to the agent, Stinson, the following statute was substituted for the act of 1877:

"Sec. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or

[332] unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last-known postoffice address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, instalment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, chap. 690.

[333] The application made by Phinney for the policy contained this statement: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the state of New York." The policy stipulated that on its maturing the insurance company would "pay at its home office in the city of New York." It also stipulated that the annual premium should be payable

"to the company *at its home office in the city of New York." The policy also contained this provision:

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

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In its answer the company pleaded that the contract was to be taken as a contract made in the state of Washington, and not controlled by the laws of the state of New York, because the application stipulated that the contract "shall not take effect until the first premium shall have been paid and the policy shall have been delivered." In fact, the policy was delivered and the premium paid in the state of Washington. It also pleaded the other provisions in reference to the failure to pay the annual premium, and the waiver, abandonment, and rescission of the contract by the assured under the circumstances hereinbefore named.

The case came on for trial on these pleadings before the court and a jury, and resulted in a verdict and judgment for the plaintiff for the amount of the policy, less the unpaid premiums. The case was thereupon taken on error to the United States circuit court of appeals for the ninth circuit, which court dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ of error in the office of the clerk of the trial court. 48 U. S. App. 78, 76 Fed. Rep. 617, 22 C. C. A. 425. Thereupon application was made to this court, and the case brought here on certiorari.

Mr. Julien T. Davies argued the cause and, with Messrs. Edward Lyman Short, John B. Allen, and Frederic D. McKenney, filed a brief for petitioner:

The lodging of the writ of error with the clerk for the purpose of the return constitutes the filing contemplated by law.

Re Norton, 34 App. Div. 79, 53 N. Y. Supp. 1093; *Bailey v. Costello*, 94 Wis. 87, 68 N. W. 663; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Holman v. Chevallier*, 14 Tex. 339; *Gorham v. Summers*, 25 Minn. 81; *United States Nat. Bank v. First Nat. Bank*, 49 U. S. App. 67, 79 Fed. Rep. 302, 24 C. C. A. 597; *Ex parte Thorne*, L. R. 8 Ch. 722; *Irwin v. McGuire*, 44 Ala. 499; *Flinn v. Shackelford*, 42 Ala. 202; *King v. Wade*, 1 Barn. & Ad. 861; *Reed v. Acton*, 120 Mass. 130; *Adams v. Goodwin*, 99 Ga. 138, 25 S. E. 24; *First Nat. Bank v. Hatfield*, 20 Wash. 224, 54 Pac. 1135, 55 Pac. 932; *Watkins v. Bugge*, 56 Neb. 615, 77 N. W. 83; *Brooks v. Nevada Nickel Syndicate* (Nev.) 52 Pac. 575.

An indorsement of filing affords the usual and convenient proof of what has been done, but it does not constitute the filing, nor does it afford the only proof thereof.

Powers v. State, 87 Ind. 144; *Peterson v. Taylor*, 15 Ga. 483, 60 Am. Dec. 706; *Wheeling Pottery Co. v. Levi*, 48 La. Ann. 777, 19 So. 752.

The most solemn contract under seal, when the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties.

Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948.

The representation by the agent that the

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default of the insured worked a forfeiture did not constitute fraud and deception on the ground that it was a misrepresentation of foreign law, and therefore a misrepresentation of fact. That a foreign law is to be proved as a fact is a proposition not to be disputed; but that is another and quite a different thing from the construction of a foreign statute.

Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; *Kline v. Baker*, 99 Mass. 255.

Whether the statute of New York applied to work a forfeiture was merely a matter of opinion.

Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; *Latham v. Smith*, 45 Ill. 25.

Messrs. Robert Sewell, E. Lyman Short, and John B. Allen filed a brief in support of petition for certiorari.

Mr. Stanton Warburton argued the cause and, with *Mr. A. F. Burleigh*, filed a brief for respondent:

A writ of error, then, is not brought or sued out, in the legal meaning of the term, until filed in the court which rendered the judgment. It is the filing of the writ which removes the record from the inferior to the appellate court, and gives that court jurisdiction of the case.

Brooks v. Norris, 11 How. 204, 13 L. ed. 665; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Cummings v. Jones*, 104 U. S. 419, 26 L. ed. 824; *Scarborough v. Pargoud*, 103 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *United States v. Baxter*, 10 U. S. App. 241, 51 Fed. Rep. 624, 2 C. C. A. 410; *Union P. R. Co. v. Colorado Eastern R. Co.* 12 U. S. App. 110, 54 Fed. Rep. 22, 4 C. C. A. 161; *Warner v. Texas & P. R. Co.* 2 U. S. App. 647, 54 Fed. Rep. 920, 4 C. C. A. 670; *Stephens v. Clark*, 18 U. S. App. 584, 62 Fed. Rep. 321, 10 C. C. A. 379; *Threadgill v. Platt*, 71 Fed. Rep. 1; *Crippen v. Livingston*, 12 Fla. 638; *Wright v. Hughes*, 2 G. Greene, 142.

To file a paper on the part of a party is to place it in the official custody of the clerk. To file, on the part of the clerk, is to indorse upon the paper the act of its reception, and retain it in his office subject to inspection by whomsoever it may concern. The act of filing has these two branches, and a full and proper definition of filing embraces them both.

Burill, Law Dict.; *Black*, Law Dict.; *Webster*, Int. Dict.; *Standard Dict.*; 1 *Foster*, Fed. Prac. 598; *Amy v. Shelby County*, 1 Flipp. 104, Fed. Cas. No. 345; *Erwin v. United States*, 37 Fed. Rep. 470, 2 L. R. A. 229.

Filing signifies more than mere indorsement to that effect, and comprehends entries made by the clerk on the record.

Johnson v. Hodges, 65 Mo. 589.

Filing a paper is now understood to consist in placing it in the proper official custody.

today, on the part of the party charged with the duty of filing it, and in the making of the appropriate indorsement by the officer.

Phillips v. Beene, 38 Ala. 248.

Filing imports more than a mere reception into the custody of the clerk of the court; his indorsement is necessary.

Pinders v. Yager, 29 Iowa, 468; *Moyer v. Preston* (Wyo.) 44 Pac. 850.

The fact that neither clerk nor counsel deemed it necessary to file certain papers, or knew how to file them properly, would be no excuse for their not being properly filed.

Florida v. Charlotte Harbor Phosphate Co. 30 U. S. App. 535, 70 Fed. Rep. 883, 17 C. C. A. 472; *Warner v. Texas & P. R. Co.* 2 U. S. App. 647, 54 Fed. Rep. 920, 4 C. C. A. 670.

The only legitimate presumption that may be indulged in from the fact that the writ accompanied the record to the circuit court of appeals is that the writ was issued by the clerk of the lower court. The whole record bears out this presumption, and this alone.

Credit Co. v. Arkansas C. R. Co. 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

The affidavit of the clerk in the lower court, the recital in the citation that the writ had been filed, and the return of the clerk that the fees for transcribing the record had been paid, cannot supply the failure of the record to show that the writ had been filed.

Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511, 514; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. ed. 91; *Lonkey v. Keyes Silver Min. Co.* 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57; *The Lindrup*, 70 Fed. Rep. 718; 3 Enc. Pl. & Pr. pp. 292 et seq.

The statute of New York prescribes the condition on which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory and controls the contract. Its provisions are not liable to be set aside or waived by the company, or the assured, or by both together.

Equitable L. Assur. Soc. v. Clements, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Hicks v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 9 C. C. A. 215; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Warner v. National Life Asso.* 100 Mich. 157, 58 N. W. 667; *Equitable L. Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605; *Rowe v. Brooklyn L. Ins. Co.* 16 Misc. 323, 38 N. Y. Supp. 625; *Phelan v. Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 20 N. E. 827; *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 17 N. E. 396; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *McDougall v. Provident Sav. Life Assur. Soc.* 135 N. Y. 551, 32 N. E. 251; *De Frece v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680.

No party to a contract can rescind until he has returned, or offered to return, all

consideration he has received under the contract.

Blackburn v. Smith, 2 Exch. 783, 18 L. J. Exch. N. S. 187; *Beed v. Blandford*, 2 Younge & J. 278; *Pharr v. Bachlor*, 3 Ala. 245; *State v. McCauley*, 15 Cal. 458; *Christy v. Arnold* (Ariz.) 36 Pac. 918; *Shively v. Semi-Tropic Land & Water Co.* 99 Cal. 259, 33 Pac. 848; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280; *Moore v. Bare*, 11 Iowa, 198; *Murphy v. Lockwood*, 21 Ill. 611; *Gehr v. Hagerman*, 26 Ill. 441; *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 683; *Wolf v. Dietsch*, 75 Ill. 205; *Colson v. Smith*, 9 Ind. 12; *Chance v. Clay County Comrs.* 5 Blackf. 441, 35 Am. Dec. 131; *Hendrickson v. Hendrickson*, 51 Iowa, 68, 50 N. W. 287; *Johnson v. Jackson*, 27 Miss. 498, 61 Am. Dec. 522; *Randlet v. Herren*, 20 N. H. 102; *Getchell v. Chase*, 37 N. H. 110; *Ayer v. Hawkes*, 11 N. H. 148; *Doughten v. Camden Bldg. & L. Asso.* 41 N. J. Eq. 556, 7 Atl. 479; *Pittsburgh & N. A. Turnpk. Road Co. v. Com.* 2 Watts, 433.

The act of the company through its agent, in convincing the insured that his policy was forfeited, and in obtaining an admission of that fact from him, with the knowledge that it was false, clearly constitutes fraud.

Berry v. American Cent. Ins. Co. 132 N. Y. 58, 30 N. E. 254.

[334] *Mr. Justice **Brewer** delivered the opinion of the court:

The first question naturally is in respect to the jurisdiction of the circuit court of appeals. The transcript filed in that court, in addition to the record of the proceedings on the trial, which trial culminated in a judgment on October 17, 1895, contained: First, a petition for a writ of error filed by counsel for the insurance company, on December 14, 1895; then an order by the trial judge, allowing the writ of error and fixing the supersedeas bond at \$125,000; an assignment of errors; a supersedeas bond, approved by the trial judge; a citation signed by him, and service admitted by counsel for the plaintiff, all these on the same day. In addition, a return by the marshal, showing personal service on the plaintiff of the citation; the writ of error allowed by the trial judge, and an indorsement thereon by the clerk of the trial court (by deputy) in the following language:

"Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895. A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. By R. M. Hopkins, Deputy Clerk."

On the hearing in the court of appeals an affidavit of the deputy clerk of the trial court was filed, which, after averring that the petition and assignment of errors, the orders granting the writ of error, and fixing the amount of the bond, and the bond, were each on file in his office and all bore the following indorsement: "Filed December 14, 1895. In the U. S. Circuit Court.

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A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk,"—stated that upon the filing of these papers he prepared a writ of error, issued and delivered it to R. C. Strudwick, one of the attorneys of the insurance company, who took the same from his office, and added:

"That a few minutes thereafter the said Strudwick returned to my office, and delivered to and lodged and filed with me said writ of error, with the allowance thereof indorsed thereon by the before-mentioned judge, and at the same time delivered to *and lodged and filed with me a copy of [335] said writ for the use of defendant in error.

"That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this honorable court.

"That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the district of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this honorable court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the circuit court of appeals to be indorsed by the clerk of said court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated."

Upon these facts we are clearly of opinion that jurisdiction was vested in the court of appeals. The majority of that court, in sustaining the motion to dismiss, relied on the following decisions of this court: *Brooks v. Norris*, 11 How. 204-207, 13 L. ed. 665, 666; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Scarborough v. Pargoud*, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; in the first of which it was said by Chief Justice Taney: "It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In that case the question presented was one of limitations, and not what was necessary to constitute a filing. The statute requiring writs of error to be brought within a certain time, the *question determined [336] was whether the mere allowance or issue of the writ constituted a bringing of the writ

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of error within the meaning of the statute, or whether, as was held, it was not brought, had not performed its office, until it had been filed with the clerk of the trial court. In this case there is no question of time. All the proceedings, with a view of taking the case to the appellate court, were had within less than three months from the date of the judgment. The transcript filed in the court of appeals made it clear that everything which the trial judge was required to do was done, the writ of error was allowed, the citation signed and bond approved, and also that the citation was duly served upon the counsel for the plaintiff, and service accepted. It also showed that a copy of the writ of error was received and filed by the clerk of the trial court, and while it is true that it did not show that the original writ of error was filed in his office, yet the affidavit made by the deputy clerk (which is not disputed) disclosed that it was so filed, and on the same day with the other proceedings for perfecting the transfer of the case to the court of appeals. Now, while it may be technically true, as said by the majority of the court of appeals, that the indorsement on the copy of the writ of error of its receipt for the benefit of the defendant in error, plaintiff below, was under § 1007 of the Revised Statute, with a view to a supersedeas, and may not itself be sufficient evidence of the filing of the original writ, yet the affidavit of the deputy clerk, who had charge of the office, shows positively that it was left with him and filed. If it was left with him and he failed to indorse it as filed, can it be that his omission defeats the party's right to transfer the case to the appellate court? Is it within the power of a clerk to overrule the action of the judge, and prevent an appeal or writ of error which he has allowed? When the judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, can it be that the omission of a clerk (if there was such an omission) can prevent the jurisdiction attaching to the appellate court? Obviously not. "When deposited with the clerk of the court, to whose judges it is directed, it is served." **Mussina v. Cavazos*, 6 Wall. 355, 358, 18 L. ed. 810, 811. While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made the court of appeals had jurisdiction, and should have proceeded to dispose of the case upon its merits.

Coming now to the merits, many questions have been exhaustively discussed by counsel
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in brief and argument. One is, to what extent, if at all, the law of New York controls in respect to the policy sued on.

By the insurance company it is contended that it does not apply; that it operates only upon contracts of insurance consummated within the state of New York; that it commences, "No life insurance company doing business in the state of New York shall have power," etc.; that it thus includes foreign as well as local insurance companies, and, as it confessedly cannot control the operations or modify the contracts of foreign insurance companies made outside the state, the true construction is that it applies to both foreign and local companies only as to business done within the state; that as the application was signed by the insured in the state of Washington, and when received by the company in New York was there accepted only conditionally, and as the policy which was prepared and forwarded to an agent of the company in Washington contained an express stipulation that it should "not take effect until the first premium shall have been paid and the policy shall have been delivered," and as the premium was in fact paid and the policy delivered in the state of Washington, the contract was a Washington contract, and governed by the laws of that state, and not by the laws of New York (*Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, 232, 35 L. ed. 497, 498, 11 Sup. Ct. Rep. 822); that the statement in the application signed by Phinney that it was made "subject* to the charter of the company and the laws of New York," by its terms refers only to the application, and does not make the laws of New York controlling in reference to the terms of the contract, which was evidenced by the policy subsequently issued; and that being a Washington contract, and there being no legislation in that state in respect to matter of forfeiture, by its terms it became forfeited on the nonpayment of the second annual premium.

On the other hand, it is contended by the executrix that, whatever may be the effect of the statute upon foreign companies which may happen to be doing business within the limits of New York, it is as to local companies practically a modification of their charters and a statutory rule thereafter controlling all contracts made by them, whether within or without the state; that even if this be not true, yet, as the policy refers to the application and makes it a part of the contract, and as there is no law of New York which affects in any way an application as such, the statement therein, that it is made subject to the charter of the company and the laws of New York, must be understood as directly incorporating the laws of New York into the contract, or at least referring to them as containing the rules for its construction and enforcement; and also, inasmuch as, by its terms, final performance (that is, the payment of the policy) is to be made in New York, the law of the place of performance is the law which governs as to the validity and interpretation of the contract. *Central Nat. Bank v. Hume*, 128 U.

S. 195, 197, 206, 32 L. ed. 370, 375, 12 Sup. Ct. Rep. 150; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 109, 35 L. ed. 951, 954, 9 Sup. Ct. Rep. 41, and cases cited in the opinion.

We are not insensible of the importance, as well as the difficulty, of the question thus presented in these various aspects, but think that the case may properly be disposed of without any consideration or determination thereof.

[339] We shall assume, without deciding, that the law of New York does control in respect to this contract, and still are of the opinion that the judgment must be reversed for error occurring on the trial, and error of such a character as in view of the testimony may render it unnecessary ever to consider the question to which we have referred. Confessedly, the insured did not pay *the annual premium due September 24, 1891, nor that due September 24, 1892, although he lived until September 12, 1893. It appears from the undisputed testimony that the insured knew when the premium became due in September, 1891. Twice he spoke to the local agent seeking to arrange for the payment of the premium by a note, and some three or four months thereafter he surrendered the policy to such agent. It is true that at the time of the surrender the agent told the insured that the policy was forfeited, or words to that effect, and that the insured said to him that as the policy had lapsed it was no good to him, and the agent might take it if he wanted it. But never thereafter until the time of his death, more than a year and a half, was anything done or said by the insured in respect to the policy; no suggestion of payment of premium or anything of any kind in respect to it. He treated the matter as abandoned, and gave up to the agent of the company the instrument by which the contract was evidenced. Further, after his death his widow, the plaintiff, filed an affidavit that the personal property of her husband's estate amounted only to \$50,000, which, of course, was not true if she had a \$100,000 policy in the defendant company. Not only that, she ignored the policy altogether for nearly ten months, although she promptly presented claims under other policies. As she testified that she knew of the existence of this policy her conduct is explainable only on the theory that she understood that, which the evidence affirms, her husband had abandoned the policy and surrendered it to the company. Upon these facts the defendant asked this instruction, which the court declined to give:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the state of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the nonpayment of the said premium, this would constitute an abandon-

ment and rescission of this contract by both parties thereto, and would put an end to the *same; and if you find the facts so to be [340] you must find a verdict for the defendant."

In lieu thereof the court charged as follows:

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for nonpayment of premium by mailing the prescribed notice, still it would be competent, and it was competent, for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And if the evidence in the case shows that Mr. Phinney did voluntarily, without being induced by any false representations or deceit to give up the policy, rescind the contract and give up the policy rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due, and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding, expressed at the time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and they both treated it as an abrogated and annulled contract, and each relied upon that understanding, it would have the effect to terminate the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy, because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an *agreement and understand- [341] ing entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with an understanding, and whether, relying upon that understanding, the defendant company subsequently acted."

In view of the facts heretofore narrated, it is obvious, not only that there was error in the action of the court in declining to give the instruction requested by the insurance company, and giving that which it did, but also that the error was material. The instruction given suggested a matter in respect to which there was no testimony, yet which, in view of other language in the charge, was quite sure to mislead. In ref-

erence to this matter of abandonment and rescission, the court in effect declared that it was binding, unless induced by false representation or deceit. There is not the slightest syllable in the testimony to suggest that the agent deceived the insured, nor that he made a false representation in the sense in which a false representation may avoid a contract. And yet, as the court had already ruled that the law of New York controlled, that there was no forfeiture until the notice prescribed by the statute of that state had been given, the jury must have understood that when the agent said that the policy had lapsed, he made a false representation, and, therefore, that the action of the insured, based upon that false representation, did not amount to an abandonment. But whether that statement of the agent was correct in matter of law is doubtful; whether true or false, or, more accurately, whether correct or not, in its interpretation of the law applicable to this contract, is immaterial. It was merely a statement of what he supposed the law was, and the insured was under the same obligations to know the law that the company, or its agent, was. The jury evidently proceeded upon the supposition that the insurance company, located in New York, knew what the law of that state was; the insured, residing in Washington, did not, and when the agent stated what the condition of the contract was, he misrepresented the law of New York, of which the insured was ignorant, and, being ignorant, was not bound by any act based thereon in the way of abandonment or rescission. But surely no such

[342] rule as that obtains. When two parties *enter into a contract, and make it determinable by the law of another state, it is conclusively presumed that each of them knows the law in respect to which they make the contract. There is no presumption of ignorance on the one side and knowledge on the other. Reverse the situation. Suppose the insurance company had made this contract as a Washington contract, and there had been some peculiar provision of that state controlling all contracts made within the state: could the company, a corporation of New York, thereafter be permitted to say that it did not know what the law of Washington was; that the insured, as a resident of that state, must be presumed to have known it; that he did not communicate his information, and therefore it was not bound by that law, and that if he said anything in reference to it, it was a case of false representation or deceit? No one would contend this. And so when these two parties, the insurance company and the insured, dealing, as we are now supposing, in a contract which they mutually agreed should be determinable by the laws of New York, it is an absolute presumption that each knew those laws, and that neither one could be misled by any statement in respect thereto on the part of the other. Whatever opinion either might express in reference to those statutes was a mere matter of opinion. He was chargeable with knowledge, just exact-

ly as the insurance company was. *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99, is decisive of this question. In that case the statement of the insured as to a question of law was insisted upon as conclusive, but this court said (p. 336, L. ed. p. 1102, Sup. Ct. Rep. p. 107):

"Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, *such as would estop [343] him from subsequently taking a different position as to the true interpretation of the written instrument.

"In *Biant v. Virginia Coal & I. Co.* 93 U. S. 326, 337, 23 L. ed. 927, 929, it was said: 'Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'

"So, in *Brewster v. Striker*, 2 N. Y. 19, and *Norton v. Coons*, 6 N. Y. 33, and approved in *Chatfield v. Simonson*, 92 N. Y. 209, 218, where it was ruled 'that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such assertion.'

So, whatever the local agent may have said as to the condition of the contract was a mere expression of opinion as to a matter of law in respect to which both parties were equally chargeable with knowledge. It seems to us clear that only because of the inference to be drawn from the rejection of the instruction asked by the defendant, and the giving of the instruction with this suggestion of false representation or deceit, can the verdict of the jury be accounted for.

Nor can we think that the action of the defendant in requesting, after the jury had returned and asked certain questions, which were answered by the trial judge, that he repeat the instructions theretofore given in respect to waiver and abandonment, is to be taken as an indorsement of those instructions. After it had once excepted to the refusal of an instruction which it had asked, and excepted to those that were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to in connection with certain answers made to questions propounded by the jury. It meant simply that if the court answered, as it did, the questions propounded by the jury, it ought to supplement those answers with a restatement of the instructions theretofore given, and asking that restatement was not an admission that they were correct, but simply a request that they should be restated so as to qualify the answers given to the questions.

In this connection we may be permitted to suggest that no afterthought of ingenious and able counsel should be permitted to disturb the understanding and agreement of the parties based *upon their belief as to what the law is, or to enforce a contract which both parties concluded to abandon.

A single further matter requires notice, and we mention it simply to indicate that we have considered, although we do not decide, the question involved therein: The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for although in terms a contract with a corporation it is in substance a contract between the insured and all other members of that company. The character of this contract was fully considered and discussed by this court in *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789, and to that case we refer without quotation. Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case. We do not care to decide the question, and only mention it for fear that it should be assumed we had overlooked it. It is a question which may never arise in the future litigation of this case, and until it necessarily arises we do not feel called upon to decide it.

For these reasons the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court with instructions to award a new trial.

Mr. Justice **Peckham** did not sit at the hearing, and took no part in the decision of this case.

[345]*MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, *Petitioner*,
v.

BESSIE F. SEARS, as Executrix of Stephen
P. Sears, Deceased.

(See S. C. Reporter's ed. 345-347.)

*Insurance—abandonment of contract after
default—effect of statute to prevent for-
feiture.*

A termination of a life insurance policy by mutual agreement, after default in the payment of premiums and the refusal of the in-

sured to continue the policy, is conclusive against the insured, notwithstanding a statutory provision which precluded the forfeiture of the policy by reason of the default, because the notices required by the statute had not been given.

[No. 452.]

Argued March 14, 15, 1900. Decided May 28, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment for the plaintiff in an action on a life insurance policy. *Reversed.*

See same case below, 97 Fed. Rep. 986, 38 C. C. A. 696.

Statement by Mr. Justice **Brewer**:

*This, like the case of *Mutual L. Ins. Co.* [345] v. *Phinney*, just decided, 177 U. S. 327, ante, 1088, 20 Sup. Ct. Rep. 906, is an action on an insurance policy issued by the company, the premiums on which were unpaid for years before the death of the insured. The facts, as disclosed by the pleadings (and the case went off on the pleadings, without any testimony), are that on May 18, 1891, the insurance company issued a policy to Stephen P. Sears, he being the beneficiary named in the policy, as well as the insured. He paid the first annual premium and received the policy, but neglected to pay the premium due on May 18, 1892, and all subsequent premiums. He lived until March 30, 1898, and thereafter his widow, the plaintiff below, was appointed his executrix. The answer alleged nonpayment of the premiums from 1892 onward, and also "that subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and *void for nonpayment of [346] premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment, and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned, and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancelation and termination thereof."

A demurrer to this answer was sustained, and judgment entered for the plaintiff, which was affirmed by the court of appeals (97 Fed. Rep. 986, 38 C. C. A. 696), and the case was thereupon brought to this court on certiorari.

Messrs. Julien T. Davies and John B. Allen argued the cause and, with **Messrs. Edward Lyman Short and Frederic D. McKenney**, filed a brief for petitioner.

Messrs. Edward Lyman Short, Julien T. Davies, John B. Allen, Frederic D. McKenney, and **Robert C. Strudwick** filed a brief in support of petition for certiorari.

Messrs. Stanton Warburton and Harold Preston argued the cause and filed a brief for respondent.

[346] *Mr. Justice **Brewer** delivered the opinion of the court:

In view of what has been already decided in the case of *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, ante, 1088, 20 Sup. Ct. Rep. 906, it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1893, a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties [347] *to the contract treated it thereafter as abandoned. As we held in the prior case, there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract; and if they choose to abandon it, that action is conclusive.

The judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

Mr. Justice **Peckham** did not sit in the hearing, and took no part in the decision of this case.

MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, *Petitioner*,
v.

GEORGE E. HILL, Ellen Kellogg Hill, Eugene C. Hill, by their Guardian, Eben Smith, and Eliza Maude Hill, in her own behalf.

(See S. C. Reporter's ed. 347-350.)

Life insurance—abandonment of contract—refusal of beneficiaries to continue policy.

An abandonment of a life insurance contract by the insured after default in payment of premiums, together with a refusal by the beneficiaries to keep the policy in life, will be conclusive against any claim on the policy.

[No. 453.]

Argued March 14, 15, 1900. Decided May 28, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision sustaining 178 U. S. U. S., Book 44.

ing a demurrer to an answer in an action on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies and John B. Allen argued the cause and, with **Messrs. Edward Lyman Short and Frederic D. McKenney**, filed a brief for petitioner.

Messrs. Edward Lyman Short, Julien T. Davies, John B. Allen, Frederic D. McKenney, and **Robert C. Strudwick** filed a brief in support of petition for certiorari.

Messrs. Stanton Warburton and Harold Preston argued the cause, and **Messrs. Stanton Warburton and Eben Smith** filed a brief for respondents.

*Mr. Justice **Brewer** delivered the opinion of the court: [347]

This case resembles the last three decided, in that it was an *action against the insurance company on a policy whose premiums had not been paid for some years before the death of the insured. The policy was issued April 29, 1886, to George Dana Hill for the benefit of his wife, if living at the time of his death, and, if not, for the benefit of their children. The insured paid the first annual premium, but none thereafter. He died on December 4, 1890. His wife died before him, and this action was brought in behalf of the children. The answer alleged, among other things— [348]

"That, pursuant to the conditions of the said policy, there became and was due to the defendant, as a premium upon said policy of insurance, on the 29th day of April, A. D. 1887, the sum of eight hundred and fourteen (\$814) dollars and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein failed, neglected, and refused to pay to the defendant, at the time aforesaid, the said sum of eight hundred and fourteen (\$814) dollars or any part thereof, and ever since that time and up to the time of the death of the said George Dana Hill, on the 4th day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs, neglected and refused to pay to defendant the said sum or any part thereof, or any other sum or other thing of value whatever; by reason whereof the said policy of insurance became and was on the 29th day of April, A. D. 1887, according to the conditions aforesaid, void and of no effect.

"That, at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill mentioned in the complaint, it was mutually agreed between the defendant and the said George Dana Hill, that the said contract of insurance should be waived, abandoned, and rescinded, and the said George Dana Hill and the defendant then, by mutual consent, waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

"This defendant alleges that the said plaintiffs, and each of them, should be, and

are, estopped from, and should not be permitted *to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given, to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company or its agents, within thirty days after the mailing of such notice, the policy and all payments made thereon should become forfeited, or any other notice prescribed by any statute or statutes of the state of New York, or any other notice than that hereinafter in this paragraph mentioned, for that, shortly prior to and after, and on said 29th day of April, 1887, this defendant, in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of \$814, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and, at the same time and place, tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill, being fully so informed and advised in the premises, refused to make payment of said premium, or any part thereof, and then and there, intending, and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but, on the contrary, he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium or of any future premium accruing on said policy; and the said defendant, then and there, and ever since, relying upon the said representations and conduct on the part of the said George Dana Hill, was thereby induced to, and did, declare the said policy and contract of insurance forfeited and abandoned, and, in good faith, relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to, and did, fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, *to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon."

[350] Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life-insur-

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ance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, "failed, neglected, and refused" to pay the premium. So we have a case in which, not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is "neglected and refused," and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it.

Under those circumstances we think the case falls within the same rule as the preceding; and the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

Mr. Justice Peckham did not sit at the hearing, and took no part in the decision of this case.

*MUTUAL LIFE INSURANCE COMPANY [351]
OF NEW YORK, *Petitioner*,
v.

WALTER B. ALLEN, as Administrator of
Samuel B. Stewart, Deceased.

(See S. C. Reporter's ed. 351-353.)

Insurance—agreement to terminate.

An agreement to terminate a policy of life insurance, made by the insured, who is also the beneficiary, after default in the payment of premiums, will end the contract.

[No. 455.]

Argued March 14, 15, 1900. Decided May 28, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision sustaining a demurrer to an answer on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies and John B. Allen argued the cause and, with Messrs. Edward Lyman Short and Frederic D. McKenney, filed a brief for petitioner.

Messrs. Edward Lyman Short, Julien T. Davies, John B. Allen, Frederic D. McKen-

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ney, and Robert O. Strudwick filed a brief in support of petition for certiorari.

Messrs. Stanton Warburton and Harold Preston argued the cause, and Messrs. Frederick Bausman, John H. Allen and Jay C. Allen filed a brief, for respondents.

[351] *Mr. Justice Brewer delivered the opinion of the court:

This case is, in all material respects, similar to that of *Mutual L. Ins. Co. v. Sears*, just decided, 178 U. S. 345, ante 1096, 20 Sup. Ct. Rep. 912. The answer of the company, which was demurred to, and the demurrer sustained, contained these allegations:

"That neither the said Samuel B. Stewart, nor anyone on his behalf, ever paid, or offered to pay, any premium, or any part of any premium due, or to become due or payable on said policy, save and except the first premium, which was paid upon the delivery of said policy, and which covered the period from the date of said policy until the 18th day of February, 1894. That the said Samuel B. Stewart was at all times advised and informed that default had been made by him in payment of each and every premium, and the whole thereof, due on said policy, subsequent to the said first annual premium paid at the delivery of said policy; and that the said Samuel B. Stewart in his lifetime never

[352] paid or offered to pay any premium, *or any part of any premium, due upon said policy subsequent to that paid upon the delivery thereof as aforesaid. That it was expressly in said policy provided that the insurance thereon was payable to the insured, Samuel B. Stewart, or his assigns; that the said Samuel B. Stewart never made any transfer or assignment of said policy of insurance; that the said defendant entered and noted said policy of insurance upon its books as forfeited and lapsed for failure to pay the annual premium falling due on said policy on said 18th day of February, 1894. That the said Samuel B. Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and notwithstanding said notice, and notwithstanding the said Samuel B. Stewart was at all times advised he had not paid the premium due on said policy February 18, 1894, consented to the forfeiture and termination of said policy of insurance; and with a mutual knowledge and understanding on the part of defendant and said Samuel B. Stewart, the said policy was at all times by the said parties deemed terminated from and after the 18th day of February, 1894; and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice of the due date of premiums to or upon said Samuel B. Stewart during his lifetime; and the said Samuel B. Stewart, at all times knowing that the defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premium upon said policy subsequent to the first annual premium paid as aforesaid on the delivery of said policy, acquiesced in and 178 U. S.

agreed to the said mutual understanding that the said policy was lapsed and forfeited; and by mutual agreement and consent both the said defendant and said Samuel B. Stewart agreed and consented to the lapsing and forfeiture of said policy of insurance from and after the 18th day of February, 1894."

From this answer it distinctly appears that Stewart, who was both the insured and the beneficiary, knew when the second annual premium became due, was informed of his default in the matter of payment, and both he and the company agreed to the *ending [353] of the contract. Under these circumstances, and without considering any other question, the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court, with instructions to overrule the demurrer to the answer of the defendant.

Mr. Justice Peckham did not sit in the hearing, and took no part in the decision of this case.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Petitioner*,

v.

HEMAN CLARK.

(See S. C. Reporter's ed. 353-373.)

Appeal—review of referee's findings—conclusiveness of settlement—acceptance of part payment—effect of dispute as to items.

1. The question whether the judgment rendered was warranted by the facts found is open for consideration on appeal, where the cause was tried without a jury, after express waiver of jury trial, and a referee duly appointed by written consent, whose findings, rulings, and decisions were made those of the court.
2. The rule that payment of a less sum in satisfaction of a larger sum is not binding for want of consideration only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of a part of it, and the rule itself is considered so far with disfavor as to be confined strictly to cases within it.
3. The payment of a specified sum conceded to be due, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole sum, where the aggregate amount is in dispute.
4. A referee's finding that a statement of account showed a credit to a contractor of an item not included in the contract, for extra work, without any express finding that it was liquidated, except by such statement, cannot be construed to find that this item was liquidated, for the purpose of affecting the conclusiveness of a settlement of the account on a partial payment thereof, merely because one finding was that the statement of account

NOTE.—As to accord and satisfaction by part payment—see *Fuller v. Kemp* (N. Y.) 20 L. R. A. 705, and note; and note to *Oglesby v. Attrill*, 26 L. ed. U. S. 1186.

was "a correct, truthful, and undisputed account" of all dealings between the parties, except as to two other items named,—especially where the referee explicitly declares that no other account of the transactions was ever had or stated between the parties.

[No. 256.]

Argued April 20, 23, 1900. Decided May 28, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming a judgment on a report of a referee. *Reversed.*

See same case below, 92 Fed. Rep. 968, 35 C. C. A. 120.

Statement by Mr. Chief Justice **Fuller**:

[354] *Herman Clark constructed some 200 miles of railroad in the states of Iowa and Missouri, for the Chicago, Milwaukee, & St. Paul Railway Company, under a written contract dated March 6, 1886, which is set forth in the findings hereafter referred to. During the period of construction the company paid Clark large sums of money on account. After the road was completed the chief engineer of the company, as was his duty under the contract, certified to the total amount that Clark had earned under the contract. This amount was \$3,895,798.79. But Clark claimed also the further sum of \$34,598.90 for material sold by him to the company, and certain rebates and other matters of that description, which would make the aggregate \$3,930,397.69. As to the amount that should be credited to the company, the company claimed credits to the amount of \$3,716,865.20, while Clark contended that the total amount that should be credited was \$3,667,306.59, or \$49,558.63 less than the amount claimed by the company. This latter amount was made up of two items: One of \$40,000, for overtime forfeiture or penalty, and the other of \$9,558.63, the amount paid by the company for nut locks furnished to Clark, and used by him in the construction of the road. The company prepared an account stated, which allowed the \$34,598.50, on one side of the account, and included the \$40,000 and the \$9,558.63, on the other, and appended to it a release for Clark to sign, if he accepted the balance therein stated. The account [355] *stated and release were sent to him with notice that upon signing and returning the same to the vice president of the company, a check for the balance shown by the account to be due would be sent to him. Immediately thereupon, on March 9, 1888, the account and release were returned by Clark to the vice president, signed and witnessed, and a check for the full amount of such balance, \$173,532.29, was at once delivered to Clark, who indorsed, and deposited it in his bank, and received the proceeds thereof.

August 5, 1893, Clark commenced this action against the railroad company to recover amounts which he claimed to be due him on account of the construction of the road, and for extra work and other claims growing out of the contract. The complaint originally

contained three causes of action, but by amendment the number was increased to six. The second, third, fourth, and sixth causes of action, and part of the first cause, were eliminated from the case by the judgment, and Clark recovered on the two items of \$40,000 and \$9,558.63 under the first cause of action, and also under the fifth cause for \$2,425, a matter arising subsequent to the release, and not included within it.

The action was originally brought in the state court, but was removed on the application of the company to the circuit court of the United States for the southern district of New York. After issue was joined, the cause came on for trial at a regular term of the circuit court. Trial by jury was waived by written consent of the parties, filed with the clerk, and the cause was referred to a referee, who in due time made his report and findings. The court adopted the findings of the referee and ordered judgment thereon for the sum of \$80,479.35. This judgment was subsequently affirmed by the circuit court of appeals. 92 Fed. Rep. 968, 35 C. C. A. 120.

The findings of fact and conclusions of law of the referee were as follows:

"Findings of Fact.

"1. That in the month of March, 1886, the defendant, the Chicago, Milwaukee, & St. Paul Railway Company, made and entered into a contract in writing with the plaintiff, dated the 6th day of March, 1886, for the [356] construction of a line of railroad from a point in the city of Ottumwa, Iowa, to a place called Harlem Station, in the state of Missouri, a distance of about 202.8 miles, to be completed on the 1st day of August, 1887, a copy of which contract is hereto annexed, marked 'A.'

"2. That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first part of March, 1888.

"3. That on or about the 3d day of March, 1888, the chief engineer in charge of said work under said contract made a final certificate and estimate, which is copied in full in the twentieth and twenty-first findings of fact last asked by the defendant, and by this reference is made part hereof.

"4. That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any of his agents, and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

"5. That the consideration for the performance of said contract originally mentioned in said contract was \$3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the de-

fendant, the consideration was changed and made \$3,954,600.

"6. That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of \$40,000.

[357] "7. That the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but, on the contrary, *delayed the plaintiff in the performance of said contract at a point upon the said road, known as Minneville, until October 27, 1887, by reason of the neglect, failure, and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point.

"8. That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission, and fault of the defendant.

"9. That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut locks, for which the defendant paid \$9,558.63.

"10. That the said nut locks so furnished by the defendant were used by the plaintiff in the construction of the road.

"11. That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed that he, should use in the construction of the railroad under said contract, any patented nut locks.

"12. That the plaintiff was ordered by defendant to put such nut locks on the road at the beginning of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut locks should be adjusted after the completion of the contract.

"13. That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing, or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid by the said defendant the said sum named therein of \$213,532.49, less the sum of \$40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887, and the sum of \$3,626,865.20 included therein embraces said sum of \$9,558.63 claimed by defendant to be due for nut locks. Said \$40,000 was deducted, and the actual amount so paid was \$173,532.49.

[358] *Whereas, a final estimate has been made by D. J. Whittemore, chief engineer of the Chicago, Milwaukee, & St. Paul Railway
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Company, of all the work done and material furnished under the contract made between said railway company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri river, including all extra work performed and material furnished of every kind and description, which estimate, with prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to \$3,895,798.79;

"And whereas, the further sum of \$34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of \$3,930,397.69;

"And whereas, the said Chicago, Milwaukee & St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor, and transportation, the sum of \$3,626,865.20;

"And whereas, by the terms of § 4, article 13, of said contract, said Clark was to be charged in addition for transportation the sum of \$50,000;

"And by a supplemental contract was to allow the said railway company, by way of forfeiture in case said railway was not completed by the 1st day of June, 1887, the further sum of \$40,000;

"Making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of \$3,716,865.20;

"Leaving the amount still due said Clark on said contract the sum of \$213,532.49.

"And whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of subcontractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic *animals killed or injured, and from all dam- [359] ages suffered by said subcontractors and employees while engaged upon said work, of which said class of claims, about \$40,000 in amount, have been made upon and are now pending in courts by divers claimants against said railway company, and the sum of \$40,000 of the amount so due, as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said railway company, as indemnity or security for the payment of said claims and of such other claims of the same class as may hereafter be made, in case said claimants, or any of them, recover judgments against said railway company, and the said \$40,000, or the balance thereof, after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which \$40,000 deducted from the sum of \$213,532.49, so, as aforesaid, due said Clark,
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leaves due and owing by said railway company and now payable on said contract to said Heman Clark, the sum of \$173,532.49:

"Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee, & St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars (\$173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name, and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as hereinbefore provided. Heman Clark.

"Wm. C. Edwards."

[360] "14. That said receipt and paper contained an accurate, truthful, and undisputed account of all dealings between said parties except in the matter of the \$40,000 deducted for time forfeiture, the \$9,558.63 for nut locks embraced in the \$3,626,865.20, and the lumber hereinafter referred to, and herein valued at \$2,425. *Besides the above, the defendant has paid the \$40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of \$521.75.

"15. That at the time of the signing and delivery of said last-mentioned paper the final certificate or estimate of the chief engineer under the contract had not been delivered to the plaintiff or any of his agents by the defendant or the said engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

"16. That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered.

"17. That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract, and had been referred by the defendant to the chief engineer under the said contract; had not been passed upon by him; that the said chief engineer had referred the question for the opinion of the defendant's counsel, who had not at said time given his opinion in relation thereto.

"18. That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant.

"19. That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe and along the line of the railroad.

"20. That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate

of the chief engineer, under the contract in this section to the plaintiff.

"21. That, in and about the month of June, 1888, the defendant *took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff. [361]

"22. That the value of the said lumber at the time of the taking, in June, 1888, was \$2,425."

"Conclusions of Law.

"1. That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract the sum of \$40,000 as a forfeiture or liquidated damages for not completing the contract upon June 1, 1887.

"2. That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant and its omission to procure the necessary right of way, from completing the said work in such time.

"3. That the plaintiff is not liable to the defendant for the sum of \$9,558.63, the cost of patent nut locks furnished by the defendant to the plaintiff and used by him in the performance of the said contract.

"4. That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut locks to be used in the construction of the said road.

"5. That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut locks furnished by the defendant and used in the construction of the railroad under said contract.

"6. That the plaintiff is entitled to recover from the defendant the sum of \$2,425, with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

"7. That the signing and delivery by the plaintiff of the receipt on or about the 9th day of March, 1888, and the acceptance of the check of \$173,532.49, under the facts and circumstances proved in this case were, as to the two sums of \$9,558.63, charged for nut locks, and \$40,000 charged by way of forfeiture for nonperformance *in time, wholly [362] without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of \$9,558.63 and \$40,000 otherwise as due under the contract.

"8. That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of \$9,558.63 and \$40,000, or either of them, or any part or either of them.

"9. That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888.

"10. That the plaintiff is entitled to re-

cover the amount certified by the chief engineer of \$3,895,793.79 without the deduction claimed by the defendants for nut locks of \$9,558.63, and without allowance to the defendant by way of forfeiture for noncompletion of the railway on the 1st day of June, 1887, said sums together amounting to \$49,558.63 with interest from March 9, 1888, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of \$2,425 with interest from June 30, 1888, the whole amounting at the date of this report, *viz.*, the 4th day of December, 1897, to the sum of \$81,305.88, for which with interest from this date and disbursements the plaintiff is entitled to judgment, less amount paid by the defendant in excess of the reserved \$40,000, \$521.75, with interest from and to the same date, being in all this day \$826.53.

"There will be judgment, therefore, for the plaintiff for \$80,479.35 with interest and costs, interest to be computed from December 4, 1897."

[363] In addition to the foregoing findings of fact, twenty-seven additional findings of fact were made at the request of defendant. They related to, or set forth, the execution of the contract for the construction of the road; a supplemental agreement by which the sum of \$40,000 was to be deducted from the contract price if the road was not completed by June 1, 1887; the failure of Clark to complete the road in that time; the final estimate and certificate of the chief engineer of the company; *the sending of the statement of account and release to Clark, with the information that, on the same being signed and returned by him, a check for the balance due him, \$173,549, would be sent to him; the return of said statement and release signed by Clark, and the sending to him of a check for such balance, March 9, 1888; the deposit by Clark of said check and his retention of the amount paid him thereon; the expenditure of the \$40,000 (and the \$521.75 besides), reserved by the company, with Clark's consent, at the time of the settlement, to meet unpaid claims against Clark, incurred in the construction of the road; the furnishing of nut locks to Clark by the company for the construction of the road; and that the company did not require Clark to furnish any material or perform the work of furnishing or erecting any structures of a more expensive design than required of him by the contract for the construction of the road, otherwise than as set forth in the final estimate of the chief engineer.

Amendments to the complaint were allowed by the referee over defendant's objection and exception, and approved by the court under like objection and exception.

The errors assigned were that: (1) The court below erred in holding that the findings of fact supported the judgment as to the item of \$9,558.63 for nut locks, and the item of \$40,000 for time forfeiture: (2) The court below erred in holding that there was no consideration for the settlement made by the parties as to the items of \$9,558.63 for nut locks, and \$40,000 for time forfeiture:

(3) The court below erred in holding that the question whether there was any evidence in the record to sustain the finding that the defendant in June, 1888, wrongfully took possession of certain lumber and converted it to its own use was not reviewable: (4) The court below erred in holding that it was proper to allow plaintiff to amend his complaint on the trial against defendant's objection, by adding thereto an action sounding in tort and to recover thereon.

Mr. Burton Hanson argued the cause and, with Mr. George R. Peck, filed a brief for petitioner:

Clark's acceptance of the amount agreed upon in his settlement as the balance due on the account and in full settlement of all claims and demands embraced therein is as binding upon him, in the absence of fraud or mistake, as if such balance had been determined by judicial proceedings to which he was a party.

Kingsley v. Melcher, 56 Hun, 547, 10 N. Y. Supp. 63.

An account cannot be said to be liquidated when any item thereof is in dispute; and when such is the case a release in full, even though it is given upon the payment of the amount of the undisputed items of the account only, is conclusive as against the right of the creditor to recover all or any portion of the amount of the disputed items, unless such release was procured by fraud, or was the result of mutual mistake.

Fuller v. Kemp, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034; *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Komp v. Raymond*, 42 App. Div. 32, 58 N. Y. Supp. 909; *Goodrich v. Sanderson*, 35 App. Div. 546, 55 N. Y. Supp. 881; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Tanner v. Merrill*, 108 Mich. 58, 31 L. R. A. 171, 65 N. W. 664; *United States v. Child*, 12 Wall. 232, 20 L. ed. 360; *United States v. Justice*, 14 Wall. 535, 20 L. ed. 753; *United States v. Clyde*, 13 Wall. 35, 20 L. ed. 479; *Mason v. United States*, 17 Wall. 73, 21 L. ed. 565.

An account is not liquidated until the balance due is agreed upon by the parties, or is fixed by operation of law. To liquidate an account is to adjust it, to settle it; and until the exact balance due is agreed upon, there can be no liquidation of an account.

Century Dict.; 2 Abbott, Dict. Terms & Phrases, 50; 13 Am. & Eng. Enc. L. 845, 846.

The courts regard the rule preventing a creditor from making a valid contract to take a less sum of his debtor in discharge of a greater as technical and unreasonable, and they are eager to find some element in the transaction which can be held as a consideration.

Jaffray v. Davis, 124 N. Y. 168, 11 L. R. A. 710, 26 N. E. 351; *Henson v. Stever*, 69 Mo. App. 136; *Kellogg v. Richards*, 14 Wend. 119.

A finding without any evidence whatever to support it presents a question, and is an error, of law, and has always been regarded as a ruling upon a question of law.

Booth v. Boston & A. R. Co. 67 N. Y. 593; *Pollock v. Pollock*, 71 N. Y. 137; *Halpin v. Phenix Ins. Co.* 118 N. Y. 165, 23 N. E. 482.

A similar rule prevails in the courts of the United States, where it is held to be the duty of the court to direct a verdict, one way or the other, where there is no evidence to sustain a verdict to the contrary, or where such a verdict would be set aside, if rendered.

Schuylkill & D. Improv. Co. v. Munson, 14 Wall. 447, 20 L. ed. 871; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 358, 57 Am. Rep. 729, 8 N. E. 654; *Reynolds v. Great Northern R. Co.* 32 U. S. App. 577, 69 Fed. Rep. 810, 16 C. C. A. 435, 29 L. R. A. 695.

If the facts are found by the court they are conclusive only in case there is a conflict of evidence, or if there is any evidence to sustain them; and the appellate court will examine the evidence for the purpose of ascertaining whether there is any such evidence.

Lancaster v. Collins, 115 U. S. 222, 29 L. ed. 373, 6 Sup. Ct. Rep. 33; *Runkle v. Burnham*, 153 U. S. 217, 38 L. ed. 694, 14 Sup. Ct. Rep. 837; *Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; *Chrystie v. Foster*, 26 U. S. App. 67, 61 Fed. Rep. 551, 9 C. C. A. 606; *Fisher v. United States Nat. Bank*, 26 U. S. App. 448, 64 Fed. Rep. 710, 12 C. C. A. 413; *Merwin v. Magone*, 35 U. S. App. 741, 70 Fed. Rep. 776, 17 C. C. A. 361; *Magone v. Origet*, 35 U. S. App. 744, 70 Fed. Rep. 778, 17 C. C. A. 363; *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130; *Barrow S. S. Co. v. Mexican C. R. Co.* 134 N. Y. 20, 17 L. R. A. 359, 31 N. E. 261.

In an action in the circuit court submitted, by stipulation of the parties, in accordance with a practice prevailing in the state where the court is held, to the decision of the judge "as a referee," this court will, upon a writ of error, consider the question whether there was any error of law in the judgment rendered by the court upon the facts found by the referee.

Paine v. Central Vermont R. Co. 118 U. S. 152, 30 L. ed. 193, 6 Sup. Ct. Rep. 1019.

Where the findings of the referee have been ordered to stand as the findings of the court, as was done in the case at bar, this court will consider whether the facts found by the referee sustain the judgment.

Shipman v. Straitsville Cent. Min. Co. 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886; *Sicard v. Buffalo, N. Y. & P. R. Co.* 15 Blatchf. 525, Fed. Cas. No. 12,831; *Tyler v. Angevine*, 15 Blatchf. 536, Fed. Cas. No. 14,306; *Lyons v. Lyons Nat. Bank*, 8 Fed. Rep. 369; *Sayward v. Dexter, H. & Co.* 44 U. S. App. 376, 72 Fed. Rep. 758, 19 C. C. A. 176; *North American Loan & T. Co. v. Colonial & U. S. Mortg. Co.* 55 U. S. App. 157, 83 Fed. Rep. 796, 28 C. C. A. 88.

Messrs. Bangs, Stetson, Tracy, & Mc-
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Veagh, with *Messrs. George R. Peck, Charles W. Bangs*, and *Burton Hanson*, filed a brief in support of petition for certiorari.

Mr. L. Lafin Kellogg argued the cause and, with *Mr. Alfred Petté* and *Messrs. Kellogg, Rose, & Smith*, filed a brief for respondent:

The jurisdiction of the circuit court of appeals to review a judgment entered in a case tried in the Federal court otherwise than according to the strict course of the common law is limited to cases tried in accordance with U. S. Rev. Stat. §§ 649, 700.

Merrill v. Floyd, 5 U. S. App. 224, 53 Fed. Rep. 172, 3 C. C. A. 494.

The appellate court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested.

Shipman v. Straitsville Cent. Min. Co. 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886; *Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334, 8 Sup. Ct. Rep. 393; *Boogher v. New York L. Ins. Co.* 103 U. S. 90, 26 L. ed. 310; *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Paine v. Central Vermont R. Co.* 118 U. S. 152, 30 L. ed. 193, 6 Sup. Ct. Rep. 1019; *Andes v. Slauson*, 130 U. S. 435, 32 L. ed. 989, 9 Sup. Ct. Rep. 573.

To the same effect are the decisions of the circuit court of appeals in the various circuits.

Shipman v. Ohio Coal Exchange, 37 U. S. App. 471, 70 Fed. Rep. 652, 17 C. C. A. 313; *Hamilton County Comrs. v. Sherwood*, 27 U. S. App. 458, 64 Fed. Rep. 103, 11 C. C. A. 507; *Abraham v. Levy*, 30 U. S. App. 713, 72 Fed. Rep. 124, 18 C. C. A. 469; *Merrill v. Floyd*, 5 U. S. App. 224, 53 Fed. Rep. 172, 3 C. C. A. 494; *Wesson v. Saline County*, 34 U. S. App. 680, 73 Fed. Rep. 917, 20 C. C. A. 227; *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886.

A receipt is simply prima facie evidence of payment.

Fire Ins. Asso. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; *Harris v. Davis*, 44 Fed. Rep. 172; *Miller v. Coates*, 66 N. Y. 609; 19 Am. & Eng. Enc. L. p. 115; *Ryan v. Ward*, 48 N. Y. 207, 8 Am. Rep. 539.

Payment by a debtor of a part of his debt is not a satisfaction of the whole.

United States v. Bostwick, 94 U. S. 53, 24 L. ed. 65; *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Curran v. Rummell*, 118 Mass. 483; *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98; *Hodges v. Truax*, 19 Ind. App. 651, 49 N. E. 1079; *Meyer v. Green*, 21 Ind. App. 138, 51 N. E. 942; *Fletcher v. Wurgler*, 97 Ind. 223; *Marion v. Heimbach*, 62 Minn. 214, 64 N. W. 386; *McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522; *Cincinnati v. Cincinnati Street R. Co.* 6 Ohio N. P. 140; *Fitch v. Sutton*, 5 East, 230.

The authorities are uniform to the effect that the final certificate, in the absence of

fraud or mistake, is an absolute bar, and binding upon both parties.

Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; *Mundy v. Louisville & N. R. Co.* 31 U. S. App. 606, 67 Fed. Rep. 633, 14 C. C. A. 583; *Breyman v. Ann Arbor R. Co.* 85 Fed. Rep. 579; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276; *Smith v. New York*, 12 App. Div. 391, 42 N. Y. Supp. 522.

Payment by a debtor of a liquidated amount presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor.

Fire Ins. Asso. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65; *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98; *Curran v. Rummell*, 118 Mass. 483; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Hodges v. Truax*, 19 Ind. App. 651, 49 N. E. 1079; *Meyer v. Green*, 21 Ind. App. 138, 51 N. E. 942; *Marion v. Heimbach*, 62 Minn. 214, 64 N. W. 386; *Fletcher v. Wurgler*, 97 Ind. 223; *McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522.

The doctrine of accord and satisfaction was carried to the extreme limit in *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034, and *Nassoig v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, and the rule will not be further extended.

Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986.

[364] *Mr Chief Justice **Fuller** delivered the opinion of the court:

The record shows that the cause came on before the district judge, holding the circuit court, for trial, "without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed;" that a referee was appointed by written consent in accordance with the modes of procedure in such cases in the courts of record of New York, and with the rules of the circuit court; and that his findings, rulings, and decisions were made those of the court. Under these circumstances the question whether the judgment rendered was warranted by the facts found was open for consideration in the circuit court of appeals, and is so here, and that is sufficient for the disposition of the case. *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886.

By the writing executed and delivered by him March 9, 1888, Clark acknowledged the receipt of \$173, 532.49 "in full satisfaction of the amount due me on such estimates, and in full satisfaction of all claims and demands of every kind, name, and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting an item not material here. Five years and nearly five months after the receipt of the money and the execution and delivery of the discharge, this action was in-

stituted. There was no finding or contention that the settlement was procured by fraud or duress, or was the result of mutual mistake; nor was there any finding that Clark did not have full knowledge of all the facts at the time he signed and delivered the release, and the presumption was that he had such knowledge. But the proposition is that the release was given without consideration, and that Clark was entitled to recover so far as the items of \$40,000 and \$9,558.63 were concerned, on the principle that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. *Cumber v. Wane*, 1 Strange, 426. The rule therein laid down has been much questioned and qualified. *Goddard v. O'Brien*, L. R. 9 Q. B. Div. 37; **Sibree v. Tripp* 15 Mees. & W. 23; [365] *Couldery v. Bartrum*, L. R. 19 Ch. Div. 399; *Foakes v. Beer*, L. R. 9 App. Cas. 621; Notes to *Cumber v. Wane*, in Smith Lead. Cas. *146; 12 Harvard Law Review, 521.

The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

In *Johnson v. Brannan*, 5 Johns. 268, 271, it was referred to as "that rigid and rather unreasonable rule of the old law;" and in *Kellogg v. Richards*, 14 Wend. 116, where the acceptance of a promissory note of a third party for a less sum was held to be a good accord and satisfaction, Mr. Justice Nelson, then a member of the supreme court of New York, said: "It is true there does not seem to be much, if any, ground for distinction between such a case and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. . . . The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well supported by reason. Courts therefore have departed from it upon slight distinctions."

So, in *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95, the supreme judicial court of Massachusetts said that "the foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral

[366]benefit *received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due."

To same effect, Ranney, J., in *Harper v. Graham*, 20 Ohio, 115; *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351; *Smith v. Ballou*, 1 R. I. 496; *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24; *Seymour v. Goodrich*, 80 Va. 303.

In some of the states the contrary rule has been established by statute. Ala. Code, § 2774; Cal. Civ. Code, § 1524; Georgia Code, § 3735; Maine Rev. Stat. chap. 82, § 45; N. C. Code, § 574; Tenn. Code 1884, § 4539; Va. Code 1897, § 2858; *Weymouth v. Babcock*, 42 Me. 42; *Memphis v. Brown*, 1 Flipp. 188, Fed. Cas. No. 9,415; *McArthur v. Dane*, 61 Ala. 539.

The findings of fact bearing on the items of \$40,000 for forfeiture, and \$9,558.63 for nut locks, exclude any other inference than that there was a dispute between the parties in respect of those items as to the facts on which the claim for their allowance was based. This being so, it is insisted that the total balance of \$223,091.02 (as it would have been if \$9,558.63 had not been deducted) cannot be held to have been liquidated as a whole, that is, agreed upon by the parties or fixed by operation of law, and that the contention cannot be sustained that where there is a dispute as to an aggregate amount due, and the debtor offers to pay so much thereof as he concedes to be correct, and the creditor accepts, is paid, and releases, nevertheless the creditor can afterward assert the disputed part of his claim on the ground that he has only received what was undeniably due him.

In *United States v. Bostwick*, 94 U. S. 53, 67, 24 L. ed. 65, 66, it was said that "payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted upon some new consideration;" while in *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703, it was held that if the debt be unliquidated and the amount uncertain, this rule does not apply. "In such cases the question is whether the payment was in fact made and accepted in satisfaction."

In *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 577, 35 L. ed. 860, 866, 12 Sup. Ct. Rep. 84, 87, Mr. Justice Brown stated the doctrine thus: "The rule is *well established

[367]that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

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In this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute. The good faith of the company in claiming their allowance is not impugned, and as Judge Lacombe said: "Both items were legitimate matters of dispute, and, unless settled by agreement of the parties, might fairly be brought by either party into court."

And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole.

In *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034, where certain items of an account were disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain of the items made the account an unliquidated one, and that plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand.

Nassoiv v. Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 716, is to the same effect, and the court said: "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper *amount, the demand is [368] regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

In *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089, plaintiff had an account against defendant amounting to \$5,282.58, the items of which were not in dispute, but defendant claimed that he was entitled to be allowed the sum of \$1,210 for commissions, and accordingly he sent his check for the difference to plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by plaintiff, and he afterwards brought suit against defendant to recover the amount withheld, but the supreme court of Illinois held that there could be no recovery, and that an account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and the amount of the balance.

In *Tanner v. Merrill*, 108 Mich. 58, 31 L. R. A. 171, 65 N. W. 664, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterwards brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as

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to that which was disputed. The supreme court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of part payment to be effective in the discharge of the entire debt must be rested upon a valid consideration is limited to cases where the debt is liquidated by agreement or otherwise; that a claim any portion of which is in dispute cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress, or undue influence.

[369] Without analyzing the cases, it should be added that it has *been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. *De Arnaud v. United States*, 151 U. S. 483, 38 L. ed. 244, 14 Sup. Ct. Rep. 374; *United States v. Garlinger*, 169 U. S. 322, 42 L. ed. 764, 18 Sup. Ct. Rep. 364; *United States v. Adams*, 7 Wall. 463, 19 L. ed. 249; *United States v. Child*, 12 Wall. 232, 20 L. ed. 360; *United States v. Justice*, 14 Wall. 535, 20 L. ed. 753; *Baker v. Nachtrieb*, 19 How. 126, 15 L. ed. 528.

The general principle applicable to settlements was thus expressed by Mr. Justice Clifford, in *Hager v. Thomson*, 1 Black, 80, 93, 17 L. ed. 41, 44: "Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement and afterwards maintain a suit for that which he voluntarily surrendered."

But apart from the controversy over the two items of \$40,000 and \$9,558.63, which was composed by the release, there was an item of \$34,558.90 credited to Clark in the final account, the allowance of which, the company contends, furnished ample consideration therefor, although the adequacy of the consideration is not, in such cases, open to inquiry.

The referee found: "That no other final settlement of the accounts under said contracts had been had between the plaintiff and the defendant at the time the said last-mentioned paper was signed and delivered." "That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant;" and also as a conclusion: "That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated
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between the parties to this action, otherwise than by said receipt or paper of March 9, 1888." The release in question allowed to Clark, that is, debited the company with, the sum of \$34,598.90, "for materials sold by [370] him to said company, and certain rebates and matters of that description;" and charged Clark, that is, credited the company, with \$40,000 by way of forfeiture, and \$9,558.63 for nut locks. It was in this respect, in effect, a statement of cross-demands. The \$40,000 was specifically described and the \$9,558.63 was included in the total credits stated.

That this contractor, carrying on the work of building 200 miles of railroad, and receiving payments on vouchers from time to time, must have been aware from his own books and papers that the \$9,558.63 was thus included, can hardly be reasonably denied, especially as he had objected to being charged with it. Indeed we do not understand that there is any suggestion that Clark was ignorant of any part of the account.

As to the \$34,558.90, it appears from the contract and final certificate and estimate, which are set forth in the principal or additional findings, that this item represented no part of the work specified under the contract, nor extra work, nor materials ordered by the company, and that it was not included in the contract or in the certificate and final estimate.

As was said by Lacombe, J., who delivered the principal opinion below: "Indeed it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale." And the learned judge further said: "From what has been said before, it is plain that, if at the time of the transactions relied upon as showing accord and satisfaction, this sum of \$34,598.90 so allowed to Clark represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims." There was no finding that this amount had ever been agreed upon or liquidated by the parties in a manner that would have entitled Clark to have recovered the amount from the company as an independent item, otherwise than by the statement of it in the account preceding, and which formed a part of, the receipt and acknowledgment of satisfaction *which [371] Clark executed and delivered to the company March 9, 1888. Nor was there any finding showing, or tending to show, that the company would have placed that sum to Clark's credit except as an item in an account which credited the company with the two charges for nut locks and forfeiture.

But the circuit court of appeals held that because of the fourteenth finding of fact, it must be assumed that the referee was satisfied from the testimony, though he did not so find in terms, that the prior transactions between the parties were such that this sum

of \$34,558.90 was as much liquidated as was the sum of \$3,895,798.79, to which the chief engineer had certified. Judge Lacombe said, referring to this particular item and to the fourteenth finding of fact: "By what process it was so liquidated does not appear in the findings. . . . We must take his finding, therefore, as conclusive upon the question, and assume that either by agreeing for a price in advance, or subsequently by entering into some binding agreement as to the sum to be paid, the defendant had lost its right to throw the plaintiff into court as to that item."

The fourteenth finding of fact was "that said receipt and paper contain a correct, truthful, and undisputed account of all dealings between said parties except in the matter of the \$40,000 deducted for time forfeiture, the \$9,558.63 for nut locks embraced in the \$3,626,865.20, and the lumber hereinafter referred to, and herein valued at \$2,425." If this finding means that the statement of account was incorrect, untruthful, and disputed as to the two items, it does not affirmatively say so, and if construed as amounting to that, it was not found that Clark did not have full knowledge thereof at the time he received the money and made the settlement. If it means that the statement of account as to these items was disputed, then the contention is a reasonable one that such dispute was a sufficient consideration to support the settlement in its entirety. But we must decline to accept the view that because of this finding it should be assumed, without any finding to that effect, that there had been prior transactions between Clark and the company, by which the item of \$34,558.90, was liquidated, for it is explicitly declared by the referee that no account of the transactions *under the contract, and of the claims sued on in this action, was ever had or stated between the parties, otherwise than by the paper of March 9, 1888. The value of the materials, rebates, and other matters covered by this item may not have been disputed, but it did not follow that the company was obliged to purchase the materials or to allow the rebates, or that the amount thereof had been previously agreed to; nor that liability therefor might not have been contested if Clark had declined to sign the proposed acknowledgment of satisfaction. We must remember that Clark knew all about the account; he knew what the company claimed, and what he claimed, yet he accepted the check and signed the release without even a protest.

The word "liquidated" is used in different senses, and as applicable here means made certain as to what and how much is due; made certain by agreement of parties or by operation of law. We are of opinion that it would be going altogether too far to treat the fourteenth finding, segregated from the others, as equivalent to a determination that the \$34,558.90 had been liquidated independently of the whole account as stated.

And, on the face of the findings, we think the credit in Clark's favor, taken in connection with the credits in the company's favor, put this adjustment beyond the reach of this

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belated attempt to overhaul it, and that Clark was barred by his release from recovering in this action the \$40,000 and the \$9,558.63, as having been improperly deducted.

As to the sum of \$2,425, that was the amount of a claim arising after the release was signed, and not included within it. There was some evidence tending to sustain the findings of the referee in support of this item, and we agree with the circuit court of appeals that no error was committed in the matter of amending the complaint, and in holding that a recovery could be had for this amount under the complaint as amended.

The judgment of the Circuit Court of Appeals for the Second Circuit is reversed, with costs; the judgment of the Circuit Court for the Southern District of New York is also reversed, and the cause remanded to the latter court, with a direction to enter judgment in favor of plaintiff and against defendant, for \$2,425, *with interest from [373] June 30, 1888, less the sum of \$521.78, with interest from the same date; the costs of the Circuit Court of Appeals to be paid by defendant in error therein; and the costs in the Circuit Court to be adjusted as to that court may seem just under the circumstances.

Ordered accordingly.

MOFFETT, HODGKINS, & CLARKE COMPANY, *Petitioner*,

v.

CITY OF ROCHESTER, George W. Aldridge, William W. Barnard, and John W. Sehroth, Composing the Executive Board of the City of Rochester.

(See S. C. Reporter's ed. 373-388.)

Contract with city—mistake in bid—right to correct.

1. A mistake in the proposals by a bidder for a contract with a city, which is promptly declared by an agent of the bidder as soon as it is discovered and before the city has done anything to alter its condition, will not bind the bidder by reason of a provision in the city charter that a bid shall not be withdrawn or canceled until the board shall have let the contract.
2. A city cannot claim that a bidder who has made a mistake in his proposals did not intend to give the executive board of the city an opportunity to correct the mistake, where, before the time expressed in the resolutions of the board for the bidder to appear and execute a contract or be regarded as abandon-

NOTE.—As to reformation in equity of deeds, contracts, insurance policies, and other written instruments—see note to Wasatch Min. Co. v. Crescent Min. Co. 37 L. ed. U. S. 455.

As to equity jurisdiction to reform written instrument—see Rosenbaum Bros. v. Council Bluffs Ins. Co. (C. C. N. D. Iowa) 3 L. R. A. 189, and note.

As to relief obtainable in equity for mistake—see Page v. Higgins (Mass.) 5 L. R. A. 152, and note; Miller v. Powers (Ind.) 4 L. R. A. 483, and note; German Ins. Co. v. Gueck (Ill.) 6 L. R. A. 835, and note; Riegel v. American L. Ins. Co. (Pa.) 11 L. R. A. 857, and note; Butler v. Barnes (Conn.) 12 L. R. A. 273, and note.

ing any intention to do so, the bidder filed a bill in a court of equity to determine the rights of the parties, and the city made a reformation of the proposals impossible by letting the contract to another party.

[No. 217.]

Argued April 10, 11, 1900. Decided May 21, 1900.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decree of the Circuit Court for the cancelation of proposals for a contract with a city. *Reversed.*

See same case below, 62 U. S. App. 392, 91 Fed. Rep. 28, 33 C. C. A. 319.

Statement by Mr. Justice **McKenna**:

[374] *This suit grows out of alleged errors in the proposals of the complainant for the execution of certain improvements conducted by the city of Rochester, N. Y.

The proposals of the complainant were accepted, but it declined to enter into a contract in accordance therewith, on the grounds hereafter stated, and the city, it is claimed, threatened to enforce the bond given with the proposals.

The bill prays for a reformation of the proposals to conform to the asserted intention in making them and their execution as reformed, or their rescission. Also an injunction against the officers of the city declaring complainant in default, its bond forfeited or enforced.

The substance of the bill is that the city of Rochester, through its proper executive board, determined to make improvements and extensions in the city's waterworks, and, among other things, to construct a masonry conduit for a distance of 12,000 feet from Hemlock lake northward, and proposed to enter into a contract therefor. The contract was known as contract No. 1.

Also, to construct a riveted steel pipe conduit 38 inches or 40 inches in diameter, commencing at the north end of the masonry conduit, and terminating at Mount Hope reservoir, in the city; length, about 140,000 feet. The contract was known as contract No. 2.

[375] Voluminous specifications were prepared by the city, in printed form, aggregating about 300 printed pages, *elaborately specifying, with infinite detail, the requirements of the executive board, the method in which the work was to be performed, the character of the materials required to be furnished, and the tests to which the materials were to be subjected. A copy of the schedule, with other schedules, was attached to the bill.

On December 10, 1892, public notice was given to contractors that proposals would be received for such work until 12 o'clock noon of December 23, 1892, at which time the bids were to be publicly opened by the chairman of the executive board.

The complainant was a contractor having an office in New York, and employed engineers to prepare proposals of the character

contemplated by the city of Rochester, and complainant's officers were engaged in important and distracting occupations, and connected with other business which required them to delegate the duties ordinarily performed by them in connection with the work, such as described, to their subordinates. The agents of complainant, though they exercised due diligence, were unable to procure the forms of the proposals for such contracts until on or about the 15th of December, 1892, and its engineer proceeded to Rochester on the 20th of December, 1892, having attempted in the meantime to familiarize himself with the terms of such contracts, and there conferred with the engineers of the city, visited the line of the proposed conduit, and proceeded with the preparation of the proposals of the contracts Nos. 1 and 2.

The labor devolving upon him in the period of time allowed him for preparing the proposals made him nervous and confused, and in transcribing the figures prepared by him he accidentally made certain clerical errors.

Contract No. 2 submitted for consideration two routes, over 8,000 feet of the 140,000 of the proposed steel conduit. They were respectively designated in the proposals and specifications route "A" and route "B," and the city reserved the right of electing either of them, and further electing to require a 38-inch pipe or a 40-inch pipe to be furnished by contractors.

Route A was located in alluvial flats through which the creek meanders, and in- [376] volved several crossings of its existing and former channels. Route B was located wholly west of the creek, and required the construction of a tunnel with the necessary shafts, inlet and overflow chambers, manholes, and their appurtenances.

The specifications of route A involved sixty-one different items and quantities of work and materials, route B seventy-five. Among the items of route B was that known as "d," and described in the specifications as follows:

"For all earth excavations in open trenches or pits, for the masonry and pipe conduit, entrance and overflow chambers, gate vaults, blow offs, pipe overflows, bridges, railroad crossings, creek crossings, and culverts carried under said conduit, including bracing and sheeting, back filling of trenches, and masonry, making embankments, and other final disposal of the excavated material with haul of 1,000 feet or less, bailing and draining and all incidental work."

That item in route A was in precisely the same language, and the quantity of excavation contemplated by said items was 184,000 cubic feet of earth, and referred to precisely the same work. The complainant and its engineer intended to bid for said work the sum of 70 cents per cubic yard, and which sum was a fair and reasonable price for the work, and such sum was inserted in the proposal for route A, but by accident and mistake 50 cents was inserted in the proposal for route

B, and the price intended to be proposed therefor was some \$36,800. The sum of 50 cents per cubic yard was a wholly insufficient price for such work. The proposal in route B also contained an item in the following language, to wit: "h." For all earth excavation in tunnel, including all necessary bracing, timbering, lighting, ventilating, removal and back filling and other final disposal of the excavated material with haul of 1,000 feet or less, pumping, bailing, and draining and all incidental work."

[377] The defendants' engineer estimated the quantity of excavation under this item at 2,000 cubic yards, and it was intended to charge for such work \$15 per cubic yard, which was a fair and reasonable charge. In haste and confusion the engineer, *who is extremely nearsighted, in transcribing his figures, by accident and mistake inserted the sum of \$1.50 per cubic yard, which was grossly inadequate and far below what would be the actual cost of the work under the most favorable circumstances. The difference between the bid as inserted and that which was intended to be inserted was the sum of \$27,000.

A bond was required with proposals in the penal sum of \$90,000, conditioned upon the performance of the work if the bid should be accepted and the making of the contract with the city in accordance with the notice to contractors. Complainant executed the bond with Henry D. Lyman and the American Surety Company as sureties, but at the time of its execution the proposal annexed thereto was entirely in blank, and in the time which elapsed between the time the bond was taken to the city and the presentation of the proposals it was impossible to insert in the pamphlet containing the bond the proposals for the work contemplated by contracts Nos. 1 and 2, or either of them.

The prices were inserted in other and different pamphlets of the same general character, but were not signed or in any way executed by complainant or by any of its officers. The pamphlets containing the bond and the pamphlet containing the proposals were placed in a single package.

The complainant was led to believe by the defendants and their officers that, although the masonry conduit and the riveted steel conduit were separately described, they constituted a continuous piece of work, and any person bidding upon both sections whose bid was lower in the aggregate than any other for the same work should be awarded the contract. With this understanding and for the purpose of making a single proposition for the entire work, complainant deposited the package containing the proposals for the work upon both sections with the executive board. The notice to contractors provided that every bid for the masonry conduit should be indorsed "Proposal for performing contract No. 1, Rochester Waterworks Conduit," and that every bid for the riveted steel pipe conduit should be inclosed in a sealed envelope and indorsed "Proposal for performing of contract No. 2, Rochester Water-

[378]works Conduit." *Complainant did not com-

ply with the provisions, but addressed its proposals in one package to the executive board. The proposals were immediately opened by the chairman of the board and declared informal, and not in compliance with the requirements of the board, but they were nevertheless read, together with other proposals. That for line B, in contract No. 2, was read by the clerk in the presence of the members of the board before any other proposals for work on said line were read, and immediately upon reading item "d," relating to earth excavation in open trenches, the engineer of complainant, who prepared the proposals, informed the board that the price of 50 cents per cubic yard was a clerical error, and that it was the intention to charge 70 cents per cubic yard, the same price charged for the identical work on line A.

There were six bidders on contract No. 1, including complainant. Its bid was \$473,790. The lowest bidder was W. H. Jones & Son, whose bid was \$262,518.

The bids on contract No. 2, with items, were tabulated in a statement and annexed to the bill.

The complainant's bid on earth excavation, in open trench on route A, was 70 cents per cubic yard. The other bids ranged from 75 cents to 85 cents.

For the same work on route B complainant's bid was 50 cents per cubic yard. The other bids from 75 cents to 85 cents.

The complainant's bid for earth excavations in tunnel upon route B, contract No. 2, was \$1.50 per cubic yard. The other bids were, respectively, \$12 and \$15.

The complainant's aggregate bid for work on route B was \$857,552.50. The lowest was \$1,130,195, that of Whitmore, Rauber, & Co.

If complainant was allowed the amount of its error, *viz.*, \$63,800, its proposal for route B. would be \$921,354.50, which sum was \$208,842.50 less than the next lowest bid, which was that of Whitmore, Rauber, & Vicinus.

The aggregate bids of complainant as corrected were \$1,395,142.50, which were considerably less than the aggregate of any other contractor. For 38-inch pipe on line B *its [379] aggregate bid was \$1,331,342.50, which was largely below that of any other contractor.

In order to take an improper and unconscionable advantage of complainant and the clerical errors made by it, the executive board on the 10th of January, 1893, notified complainant that the defendants intended to enter into a contract for the work of contract No. 1 with W. H. Jones & Son, although complainant's proposals for the work on both contracts were the lowest in the aggregate for the entire work contemplated. Thereupon on the 11th of January, 1893, before any official action with respect to letting the contracts were taken, complainant protested against the division of the proposals and letting the work of contract No. 1 and No. 2 separately, and insisted that the defendants were bound to enter into a contract with it for the entire work described in both con-

tracts, or none at all, and informed the defendants of the clerical errors for the work on line B, and requested to correct them. And further demanded the contract for both sections at the corrected prices, or that it be permitted to withdraw its proposals.

On the 12th of January, 1893, the executive board, acting in bad faith and to take an unfair and unconscionable advantage of the clerical errors which had been committed, the commission of which the defendants conceded, adopted the resolution annexed to the bill and marked schedule B, and caused copies to be served on the complainant.

The defendants proposed, in conformity with the resolutions, to insist upon the execution of the contract for laying a 38-inch pipe on route B for the prices inserted in complainant's proposals, and intended, if complainant refused, to declare it in default, the bond executed by it forfeited, and to proceed to enforce the bond.

The said threatened action was contrary to good conscience, the contents of the proposals, and the rights of complainant, and, unless restrained, would cause it irreparable injury, for which there was no adequate remedy at law. The matter in dispute, exclusive of interest and cost, exceeded the sum or value of \$2,000.

The following are the resolutions marked "Schedule B:"

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*Office of the Executive Board,
Rochester, N. Y., January 12, 1893.

By Mr. Schroth:

Resolved, That the proposal of the Moffett, Hodgkins, & Clarke Company, of New York, N. Y., submitted on December 23, 1892, for the construction of a riveted steel pipe conduit 38 inches in diameter, and all the required appurtenances thereto, commencing at the north end of the contemplated masonry conduit near the village of Hemlock Lake, Livingston county, N. Y., and terminating at Mt. Hope reservoir, in the city of Rochester, N. Y., and by route B as described in the notice of letting for said work be, and the same is hereby, accepted, and that said work be and hereby is awarded to said Moffett, Hodgkins, & Clarke Company.

By Mr. Schroth:

Resolved, That the Moffett, Hodgkins, & Clarke Company, of New York, be and they are herewith required to attend at the office of this board, along with the sureties to be offered by said company, on or before Thursday, January 19, 1893, and to execute at that time the contract for the performance of the work of constructing a riveted steel pipe conduit 38 inches in diameter, and all the required appurtenances thereto, by route B from the north end of the contemplated masonry conduit near the village of Hemlock Lake, Livingston county, N. Y., to Mt. Hope reservoir in the city of Rochester, N. Y., and that the failure of such attendance and execution will be regarded as an abandonment of intention on the part of said Moffett, Hodgkins, & Clarke Company to perform said work.

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By Mr. Schroth:

Resolved, That the clerk be, and he is hereby, directed to cause immediate legal service of notice of award of contract to be made on the Moffett, Hodgkins, & Clarke Company, of New York, N. Y., in accordance with the foregoing resolutions.

The answer admitted the allegations of the bill in regard to the powers of the executive board, and that it determined to enter into a contract set forth in the bill; that it prepared specifications *and gave notice as [381] stated, and required bond to accompany proposals conditioned as alleged; that the complainant had such bond executed and annexed the same to its proposal of contract No. 2.

The answer alleged that the defendants did not know and could not set forth their belief or otherwise whether complainant was a corporation or employed engineers, or what their duties were, or that the officers of the complainant had to delegate important duties to subordinates, or whether its agents could procure firms to contract and make proposals before the 15th of December, 1892; or whether its engineer was nervous or made mistakes as alleged or in the way alleged, or the prices bid were inadequate, or that complainant was led to believe by the defendants that contracts Nos. 1 and 2 would be let jointly and not separately, or its bid declared informal and cannot be received, or that its engineer when the bids were opened notified the board that the prices which had been read for item "d" of route B in contract No. 2 of 50 cents per cubic yard was a clerical error.

The answer then proceeded in substance as follows:

The notice for bids required that all bids should state the prices for every separate item of work named in the proposals, should be plainly stated and distinctly written in ink, both in words and figures, in the proposed blanks left therefor; that the complainant's engineer received all communications requested by him from the executive board and its engineer, and all the plans and specifications and information were at the complainant's command before its submission of the proposals for the contract.

On account of the treacherous subsoil disclosed of borings along route B in contract No. 2, the latter route would be the least expensive, and the prices complained of by complainant were reasonable and fair values for the work set forth, and it was denied that clerical errors were entertained in the proposals, or that they were less than the average bids by competitive bidders, and averred that the amounts were knowingly and intentionally inserted to make complainant's bid what is known as an "unbalanced bid," to wit, in which the contractor will *give a "low price for one kind of work or [382] materials in the same contract with the hope that the quantity of work and materials for which a low price is bid will be reduced, while the quality of materials or work for which a high price is bid will be increased,

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thus making up on the high price bid sufficient to give the contractor a large profit upon the whole work."

The complainant bid upon some items in contract No. 2 in excess of a reasonable price, thus making its bid for route B, contract No. 2, an unbalanced bid, enabling complainant to realize upon the completion of the work far in excess of the amount based upon the estimates of defendants' engineer.

In pursuance of the notice to contractors the board awarded to W. H. Jones & Sons contract No. 1, they being the lowest bidders, and to complainant contract No. 2, it being the lowest bidder, but this was not done to take undue and unconscionable advantage of the manner in which the proposals were made under contracts Nos. 1 and 2, and presented to the board, nor did the board act in bad faith and award the contract for the purpose of taking advantage of the alleged clerical errors.

On the 12th of December, 1892, by the resolution marked schedule B, the board duly and legally awarded to the complainant the contract for the construction of the conduit of route B in contract No. 2, and the complainant was notified to attend at the office of the board with its sureties to execute the proposed contract, and the complainant "without sufficient reason or excuse, and with intent to defraud said defendants, did refuse and neglect to enter into said contract, and said defendants deny that said complainant is entitled to the relief, or any part thereof, in the said complaint demanded, and they respectfully submit that the injunction awarded against them by this honorable court on the 15th day of February, 1893, ought to be dissolved, and that the said bill ought to be dismissed, with costs."

Evidence was submitted on the issues, including the specifications, proposals, and bond.

A decree was entered adjudging the proposals of the complainant for the conduit on line or route B to be "rescinded, canceled, and declared null, void, and of no effect," [383] and ordering "an injunction to be issued restraining the city and its officers from declaring complainant in default with respect to its bids and proposals, "or from declaring forfeited the bond executed by and on behalf of said complainant, and accompanying the aforesaid bids and proposals, or from in any manner suing upon or attempting to enforce or collect the said bond."

Commenting on the facts the learned trial judge said:

"The question in this controversy is plain and simple: Shall the complainant be held to an erroneous bid by which it agreed to do certain work for the city of Rochester for \$63,800 less than was intended? The work related to a construction of a conduit to convey the water of Hemlock lake to the city. By a mistake of Mr. Burlingame, its engineer, the complainant bid 50 cents per cubic yard for earth excavation in open trenches when it intended to bid 70 cents, and \$1.50 for earth excavation in tunnel when it intended to bid \$15.

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"The proof of these mistakes is clear, explicit, and undisputed. As soon as the item proposing to do the work for 50 cents, as aforesaid, was read at the meeting of the executive board, and before any action was taken thereon, Mr. Burlingame stated that it was an error, and that complainant intended to bid for route B the same as for route A, viz., 70 cents.

"There is some testimony of a negative character that this prompt repudiation of the bid did not take place, but the great weight of testimony is in favor of the complainant. Had the errors been corrected the complainant's bid would still have been \$200,000 below the next lowest bid. On route A the complainant's bid was \$903,324. The mistakes all occurred on route B, and yet route A was selected, and the work awarded to other bidders for \$1,123,920, or \$220,596 more than the complainant's proposal.

"Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes, which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged.

"In order that no injustice may be done to the defendants, *their position in this regard is stated in the language of their brief, as follows: [384]

"We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures and numbers different from those which he intended to make, and that the defendants have no evidence to contradict his testimony." 82 Fed. Rep. 255.

On appeal to the circuit court of appeals the decree was reversed, with instructions to the circuit court to dismiss the bill. 62 U. S. App. 392, 91 Fed. Rep. 28, 33 C. C. A. 319. The case is here on writ of certiorari.

Other facts are stated in the opinion.

Mr. Louis Marshall argued the cause and, with Mr. Thomas H. Carter, filed a brief for petitioner:

A court of equity has the power to relieve a party against the consequences of a clerical error by the remedy of cancelation and rescission, although such error was unilateral and fraud cannot be predicated of any act of the other party.

2 Poin. Eq. Jur. § 870; 15 Am. & Eng. Enc. L. tit. *Mistake*, p. 647; Adam, Eq. § 171; *Rider v. Powell*, 28 N. Y. 310; *Smith v. Mackin*, 4 Lans. 41; *Jackson v. Andrews*, 59 N. Y. 244; *Crowe v. Lewin*, 95 N. Y. 423; *Dulany v. Rogers*, 50 Md. 533; *Diman v. Providence, W. & B. R. Co.* 5 R. I. 130; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Hearne v. Marine Ins. Co.* 20 Wall. 488, 22 L. ed. 395; *Mortimer v. Shortall*, 2 Dru. & W. 372.

It is well settled at common law that until the moment of acceptance an offer is revocable.

Schenectady Stove Co. v. Holbrook, 101 N. 178 U. S.

Y. 45, 4 N. E. 4; *Cooke v. Oxley*, 3 T. R. 653; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463.

The equitable jurisdiction to relieve a party from the consequences of accident, mistake, or fraud cannot be taken away by statute.

De Hart v. Hatch, 3 Hun, 375; *People ex rel. New York v. Nichols*, 79 N. Y. 590.

No contract may be entered into in fact, although all the forms of a contract exist, where the minds of the parties have not met.

Webster v. Cecil, 30 Beav. 62; *Wood v. Searth*, 2 Kay & J. 33; *Neap v. Abbott*, Cooper Pr. Cas. 333; 1 Story, Eq. Jur. § 7491; Pollock, Contr. § 427; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Garrard v. Frankel*, 50 Beav. 445; *Bloomer v. Spittle*, L. R. 13 Eq. 427; *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. E. 40; *Rupley v. Daggett*, 74 Ill. 351; *Cundy v. Lindsay*, L. R. 3 App. Cas. 465; *McCotter v. New York*, 37 N. Y. 325; *Saltus v. Pruyn*, 18 How. Pr. 512; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329; *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514; *Rowland v. New York, N. H. & H. R. Co.* 61 Conn. 103, 23 Atl. 755.

The respondents are not now in a position to enable the petitioner to perform its contract, if it should now be ready and willing to enter into such a contract. By the respondents' acts, therefore, performance by the petitioner of their requirements has been rendered impossible, and they should be enjoined from seeking to impose a forfeiture on the petitioner, and to enforce a penal bond, under such circumstances as those here disclosed.

United States v. Peck, 102 U. S. 64, 26 L. ed. 46; *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286; *Mansfield v. New York C. & H. R. R. Co.* 102 N. Y. 211, 6 N. E. 386; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Taylor v. Risley*, 28 Hun, 144.

To withhold relief under these circumstances, and to place the respondents in a position to insist upon the enforcement of the penal liability on the bond, would not only be unjust and inequitable, but would smack of confiscation.

2 Beach, Modern Eq. Jur. § 1013.

The assertion that the petitioner's error was due to Burlingame's negligence, even if true, would not debar it from relief under the circumstances disclosed by the record.

Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248; 2 Pom. Eq. Jur. § 856; *Onondaga County Sav. Bank v. United States*, 26 U. S. App. 377, 64 Fed. Rep. 704, 12 C. C. A. 407; *Mayer v. New York*, 63 N. Y. 455; *Kelly v. Solari*, 9 Mees. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477; *Bell v. Gardiner*, 4 Mann. & G. 11.

Mistakes in written instruments have been corrected in equity, although such mistakes were occasioned by the ignorance, mistake, or negligence of the draughtsman.

Drury v. Hayden, 111 U. S. 223, 28 L. ed. 408, 4 Sup. Ct. Rep. 405; *Elliot v. Sackett*, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 178 U. S. U. S., Book 44.

375; *Crippen v. Baumes*, 15 Hun, 136; *Wheeler v. Kirkland*, 23 N. J. Eq. 13; *Candey v. Marey*, 13 Gray, 373.

It does not matter whether the draughtsman who was guilty of negligence was the agent of the party seeking the correction, or of the other party.

Menomonee Locomotive Mfg. Co. v. Langworthy, 18 Wis. 444.

A mistake made by a clerk in computing the amount due on a promissory note may be corrected in a court of chancery.

Barthell v. Roderick, 34 Iowa, 517.

The petitioner did not have an adequate remedy at law, and had the right to resort to equity for relief.

Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. 181; *Martin v. Melville*, 11 N. J. Eq. 222; *Rowley v. Empire Ins. Co.* 36 N. Y. 550; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Fink v. Queens Ins. Co.* 24 Fed. Rep. 318; *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

Whatever may be the rule in the state courts, it is well settled that equitable defenses will not be permitted to be pleaded in an action at law brought in the Federal courts. There the distinction between law and equity has never been abolished, and there can be no mingling of equitable and legal remedies or causes of action.

Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859; *Foster v. Mora*, 98 U. S. 425, 25 L. ed. 191; *Northern P. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323; *Johnson v. Christian*, 128 U. S. 374, 32 L. ed. 412, 9 Sup. Ct. Rep. 87; *Montejo v. Owen*, 14 Blatchf. 324, Fed. Cas. No. 9,722; *Buller v. Sidell*, 43 Fed. Rep. 116; *Hartford F. Ins. Co. v. Bonner Mercantile Co.* 44 Fed. Rep. 155.

In this case the Federal court has jurisdiction of the parties and the subject-matter, and such jurisdiction cannot be limited, restrained, or affected by any state legislation by virtue of which respondents assert existence of an adequate remedy at law.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260.

Mr. Porter M. French argued the cause and filed a brief for respondent:

The alleged mistakes are of such a nature that petitioner ought not to be heard, on account of them, in a court of equity to ask for a rescission and the cancelation of its bid.

Dambmann v. Schulting, 75 N. Y. 64; *Cleveland v. Richardson*, 132 U. S. 318, sub nom. *Cleveland v. Smith*, 33 L. ed. 384, 10 Sup. Ct. Rep. 100; *Diman v. Providence, W. & B. R. Co.* 5 R. I. 130; *McCobb v. Richardson*, 24 Me. 86, 41 Am. Dec. 374; *Taylor v. Fleet*, 4 Barb. 95; *Wood v. Patterson*, 4 Md. Ch. 335; *Deeves v. Richardson & B. Co.* 27 Jones & S. 423, 14 N. Y. Supp. 633; *Langley v. Harmon*, 97 Mich. 353, 56 N. W. 761; *Reilly v. New York*, 111 N. Y. 473, 18 N. E. 623.

An agreement cannot be affected by a mistake of either party in expressing his intention, or in his motives, of which the other

party has no knowledge; and the party who has entered into an agreement under such mistake is bound by the agreement actually made, and cannot assert his mistake in avoidance of the agreement.

Chitty, Contr. 11th Am. ed. p. 1022.

Where the mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence.

Addison, Contr. § 1182.

Where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.

Story, Eq. Jur. § 151.

Mistakes, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have at least exercised the degree of diligence which may fairly be expected of a reasonable person.

Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798.

Petitioner was guilty of such negligence as to debar it from relief under the circumstances as disclosed by the record.

Pom. Eq. Jur. § 839; Beach, Modern Eq. Jur. § 54; *Capehart v. Mhoon*, 58 N. C. (5 Jones' Eq.) 178; *Kearney v. Sascor*, 37 Md. 276; *Glenn v. Statler*, 42 Iowa, 107; *Toops v. Snyder*, 70 Ind. 560; *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260; *Moran v. McLarty*, 75 N. Y. 28; *Brown v. Fagan*, 71 Mo. 563.

The negligence of petitioner's president and engineer will not excuse the petitioner. They were acting for it, and not for respondents. In this respect the case is to be distinguished from cases where a scrivener failed to reduce to writing an agreement actually made; such as the cases of *Drury v. Hayden*, 111 U. S. 223, 28 L. ed. 408, 4 Sup. Ct. Rep. 405; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Menomonee Locomotive Mfg. Co. v. Langworthy*, 18 Wis. 444.

Respondents cannot be restored to their position as it existed when the bid was presented, and therefore there should be no rescission. A water supply for the city of Rochester was necessary. Respondents could not be expected to await the results of this litigation before making the improvement.

Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 801.

Messrs. Guggenheimer, Untermyer, and Marshall, with Mr. Thomas H. Carter, filed the petition for certiorari.

Mr. John F. Kinney filed an answer to such petition.

[384] *Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

Both of the lower courts agree that there was a mistake. The circuit court said that the proof of it was "clear, explicit, and undisputed." The circuit court of appeals,

while expressing no dissent as to the fact, said "that one of the alleged mistakes, that in respect to the tunnel excavation, was not a mistake in any legal sense, but was a negligent omission arising from an inadequate calculation of the cost of the work."

We do not think the negligence was sufficient to preclude a claim for relief if the mistakes justified it.

This court said in *Hearne v. Marine Ins. Co.* 20 Wall. 488, 22 L. ed. 395, by Mr. Justice Swayne:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

*"The party alleging the mistake must[385] show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

The last two propositions may be claimed to be pertinent to the case at bar, even though the transactions between the parties be considered as a completed contract.

There was no doubt of the mistake, and there was a prompt declaration of it as soon as it was discovered and before the city had done anything to alter its condition. Indeed, according to the testimony of one witness, the clerk of the board, before the mistake was declared by complainant's engineer, expressed the thought that 50 cents per cubic yard for earth excavation was too low, "and there was some discussion about it at the time, but Mr. Aldridge (he was chairman of the board) said he (the clerk) might as well go on and read it, as the bid was informal." The reading proceeded, and subsequently the board let the work on contract No. 1 to Jones & Son, and accepted complainant's proposals containing the mistakes for the work on line B, contract No. 2, although complainant protested that there was a mistake in the price of earth excavation and also in tunnel excavation. This was inequitable, even though it was impelled by what was supposed to be the commands of the charter. It offered or forced complainant the alternative of taking the contract at an unremunerative price, or the payment of \$90,000 as liquidated damages. We do not think such course was the command of the statute or the board's duty.

The rule between individuals is that until a proposal be accepted it may be with-

[386] drawn, and if this principle cannot be applied in the pending case, on account of the charter of the city, there is *certainly nothing in the charter which forbids or excuses the existence of the necessary elements of a contract.

The charter of the city provides that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed." A perfectly proper provision, but, as was said by the learned circuit court:

"The complainant is not endeavoring 'to withdraw or cancel a bid or bond.' The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth \$1,000,000 for \$10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground." [82 Fed. Rep. 256.]

These remarks are so apposite and just it is difficult to add to them. The transactions had not reached the degree of a contract,—a proposal and acceptance. Nor was the bid withdrawn or canceled against the provision of the charter. A clerical error was discovered in it and declared, and no question of the error was then made or of the good faith of complainant.

It is true it is now urged by counsel that there was no mistake, but that the prices were deliberately and consciously inserted for the purpose of making an "unbalanced bid," in which low prices in some items are compensated by high prices in others. The circuit court and the circuit court of appeals [387] *found against this view, and this court usually accepts such concurrence as conclusive.

The circuit court of appeals, however, found that while there was a clerical error for the earth excavation in contract No. 2, route B, that the alleged mistake in tunnel excavation "was not a mistake in any legal sense, but was a negligent omission arising from an inadequate calculation of the cost of the work." Further, the court said:

"It is also manifest that the complainant did not intend to give the board an opportunity to correct the mistakes and award the contract on the corrected basis. There was no color of foundation for the assertion that

the proposals were to be treated as a single bid for contracts No. 1 and No. 2, and that both contracts must be awarded to the complainant or neither. The position thus taken by the complainant was well calculated to excite distrust on the part of the board and induce its members to believe that the alleged mistakes were an afterthought, conceived when the complainant had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed." [62 U. S. App. 397, 91 Fed. Rep. 31, 33 C. C. A. 322.]

We are unable to concur in either of these conclusions. The mistake in tunnel excavations arose from inadvertently making the cost of one item—mere earth digging and putting the dirt into cars—the total cost without making "any allowance for any work preparatory to it or connected with it," to quote the testimony of complainant's engineer. And it seems impossible for the error to have escaped the notice of the board. Other contractors charged for the same work \$12 and \$15.

The conclusion that the complainant did not intend to give the board an opportunity to correct the mistakes is based on a letter addressed to the board, in which it claimed unity in the contracts and bids, and demanding that "the contract in its entirety for both sections of the work be awarded to us at the corrected price, or that we may be allowed to withdraw our proposal and have our bid returned to us."

But before the time expressed in the resolutions of the executive board of the city for the complainant to appear and execute a contract, or it would be regarded as abandoning its intention *to do so, complainant filed [388] its bill in this case, and appealed to a court of equity to determine its rights and obligations.

On filing the bill and supporting affidavits, on the 18th of January, 1893, an order was issued temporarily restraining the officers of the city from declaring the complainant in default or from forfeiting or suing on its bond, until a motion for an injunction *pendente lite* could be heard. Subsequently, after hearing and argument, an injunction *pendente lite* was issued.

Prior to its issuing, but after the restraining order, the executive board accepted the bid of Whitmore, Rauber, & Vicinus, and entered into a contract with them for the construction for the riveted steel pipe conduit, 38 inches in diameter, for route A, for 8,000 feet. That is on a different route and claimed to be the subject of a different contract from that awarded to the complainant.

This action made a reformation of the proposals impossible—made any action of the circuit court impossible, except to annul the proposals or dismiss the bill and subject the complainant to a suit on its bond. If the decree was narrowed to this relief it was the fault of the city, not of the complainant. Whatever its prior claims and pretensions may have been, by submitting itself to a court of equity complainant submitted it—

self to abide by what that court should decree, and the alternative of a reformation of the proposals was certainly not their execution unreformed.

By letting the contract to Whitmore, Rauber, & Vicinus, the city, in effect, evaded the restraining order, forestalled the action of the circuit court, and prevented the reformation of the proposals; and by preventing that justified the decree which was entered.

The decree of the Circuit Court of Appeals is reversed, and that of the Circuit Court is affirmed.

[389]*NEW YORK LIFE INSURANCE COMPANY, Plff. in Err.,
v.
FANNIE CRAVENS.

(See S. C. Reporter's ed. 389-401.)

Courts—following construction of state statute—insurance—by foreign company—statute declaring policy nonforfeitable—stipulation that laws of other state shall govern—power of state to regulate contract.

1. The Interpretation of a state statute by the state courts with respect to its application to policies issued by a foreign insurance company is binding on the Supreme Court of the United States.
2. An exemption of policies of life insurance issued by corporations of other states, which stipulate that they shall be governed by the law of another state, from the operation of the Missouri statute (§ 5983) making policies nonforfeitable for default in payment of premiums, cannot be claimed by virtue of the Constitution of the United States, and on the ground that it interferes with the contractual liberty of the corporation, since the state has power to compel such corporations to be subject to such statute as a condition of the right to do business in the state.

NOTE.—That the United States Supreme Court will not review decisions of state courts construing state statutes, unless specially authorized—see note to *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

As to effect of decisions of state courts in Federal courts—see note to *Forepaugh v. Delaware, L. & W. R. Co. (Pa.)* 5 L. R. A. 508.

As to when United States courts do not follow state decisions—see note to *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490.

That foreign corporations are amenable to local law—see *Talbott v. Fidelity & Casualty Co. (Md.)* 13 L. R. A. 584, and note.

As to regulation of business of foreign corporation by state—see *Boulware v. Davis (Ala.)* 9 L. R. A. 601, and note.

As to recognition or exclusion of foreign corporation by state—see *Cone Export & Commission Co. v. Poole (S. C.)* 24 L. R. A. 289, and note.

As to exclusion and regulation of foreign corporations—see *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 11, and note.

As to exclusion of foreign corporation as regulation of interstate commerce—see note to *Kindel v. Beck & P. Lithographing Co. (Colo.)* 24 L. R. A. 311.

3. The Interstate character of a contract of life insurance made by a resident of one state with a corporation of another state does not give it immunity from the control of the state in which the insured resides and in which the corporation does business.
4. The business of life insurance is not commerce, and therefore a state statute regulating contracts of life insurance made between residents of the state and corporations of other states is not invalid as a regulation of interstate commerce.

[No. 262.]

Argued April 25, 1900. Decided May 28, 1900.

IN ERROR to the Supreme Court of the State of Missouri to review a decision reversing a judgment in an action upon a policy of life insurance. *Affirmed.*

See same case below, 148 Mo. 583, 50 N. W. 519.

Statement by Mr. Justice McKenna:

*The controversy in this case is as to the amount due upon a policy of insurance issued by the plaintiff in error, upon the life of John K. Cravens, husband of the defendant in error. [389]

The contention of the plaintiff in error is that there is only due on the policy, if anything, the sum of \$2,670; that of defendant in error is that she is entitled to the full amount of the policy, to wit, \$10,000, less unpaid premiums.

These contentions depend chiefly for solution on the statute of Missouri, inserted in the margin, † and *the issue arising is whether [390]

†Sec. 5983. Policies nonforfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one half per cent interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at end of the original term of endow-

[391] the defendant in error, as beneficiary in the policy, because of the payment of *four annual premiums, and notwithstanding the omission to pay the fifth and sixth annual premiums, is entitled to extended insurance as provided in § 5983, that is, to the full amount of the policy less unpaid premiums, or is entitled to the amount of commuted insurance tendered by plaintiff in error.

The case was submitted upon an agreed statement of facts substantially as follows:

That the defendant is a corporation organized and existing under the laws of the state of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question, and since has been, engaged in the business of insuring lives through branch offices in the different states and territories of this country and certain foreign countries; and that it maintains agents and examiners in the state of Missouri.

[392] On May 2, 1887, the local agent of the company solicited John K. Cravens, at his residence in Missouri, to insure his life in the *company, and thereupon Cravens signed and delivered to the local agent a written application for the policy in suit. The application was made a part of the policy, and contained the following provisions:

"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written

statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of said company, at the home office, in the application. . . .

"That the entire contract contained in said policy and in this application shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

The application was signed by the agent of the company and forwarded to the latter's home office in New York, and thereupon the policy in suit was issued and transmitted to Kansas City by the company to its agent, who there received the same, and there delivered it to Cravens on the 20th of May, 1887, and collected the first premium provided to be paid.

Four annual premiums of \$589.50 each were paid in Missouri. The fifth and sixth premiums were not paid. Cravens died November 2, 1892, in Missouri, and proof thereof was duly made.

The company had different forms of policies, and Cravens selected a nonforfeiting limited tontine policy, fifteen years endowment, with the limited premium return plan

ment, if the insured shall then be alive. [Mo. Rev. Stat. 1889, § 5856.]

Sec. 5984. A paid-up policy may be demanded, when.—At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: *Provided*, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and *provided further*, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company. [Mo. Rev. Stat. 1889, § 5857.]

Sec. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other

than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: *Provided*, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, *provided*, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid. [Mo. Rev. Stat. 1889, § 5858.]

Sec. 5986. The foregoing provisions not applicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to nonforfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, in any of the foregoing cases, this act shall not be applicable. [Mo. Rev. Stat. 1889, § 5859.]

of insurance. This plan is described in the policy as follows:

"This policy is issued on the nonforfeiting limited tontine policy plan, the particulars of which are as follows:

"That the tontine dividend period for this policy shall be completed on the 11th day of May, in the year nineteen hundred and two.

[393] "That no dividend shall be allowed or paid upon this policy *unless the person whose life is hereby insured shall survive until completion of its tontine dividend period, and unless this policy shall then be in force.

"That surplus or profits derived from such policies on the nonforfeiting limited tontine policy plan as shall not be in force at the date of the completion of their respective tontine dividend periods, shall be apportioned among such policies as shall complete their tontine dividend periods."

At the end of the tontine period certain benefits were to be allowed, which are stated in the policy, but which need not be repeated.

The policy also contained the following provision:

"That if the premiums are not paid, as hereafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium, paid-up policy will be issued on demand within six months after such lapse, with the surrender of this policy, under the same conditions as this policy, except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premium shall be made; and all right, claim, or interest arising, under statute or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance; whether required or provided for by the statutes of any state, or not, is hereby expressly waived and relinquished."

The total number of policies, of the plan of the policy in suit, issued in the year 1887 to the residents of all states and countries where the company was doing business was 5,172, covering an aggregate of insurance of \$20,154,981.

The amount of paid-up insurance to which the policy was entitled, at the date of lapsing, was \$2,670. No demand was made for it within six months after default, or at any time. Upon the death of Cravens the company offered to waive the failure to make such demand, and tendered defendant in error, *and still tenders her, the amount of such paid-up policy, which she declined, and still declines.

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On the 11th of May, 1891, Cravens was fifty-three years old, "and the term of temporary insurance procured at that date by three fourths of the net value of the policy, taken as a single premium for the amount written in the policy, was six years and forty-six days from the 11th day of May,

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1891, making said policy, if subject to said extended insurance, in force at the death of the said Cravens."

The defendant in error claims under the policy \$10,000, less the amount of unpaid premiums, with interest thereon, which left a balance of \$8,749.21, with interest at 6 per cent from November 30, 1892. The plaintiff in error admitted and offered to pay the sum of \$2,670, which plaintiff in error declined to receive.

The trial court rendered a judgment for the plaintiff (defendant in error) for the sum of \$2,670.

On appeal to the supreme court of the state the judgment was reversed, and the case was remanded with directions to enter judgment for plaintiff (defendant in error) for the sum of \$8,749.21, with interest at 6 per cent from November 30, 1892.

The case was then brought here.

It is urged as error against the judgment of the supreme court of the state that it makes the law of Missouri, and not the law of New York, the law of the contract, as provided in the application for the policy, thereby denying to the plaintiff in error a contractual liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; and that the statute of Missouri is an attempted regulation of interstate commerce.

Mr. Frederick N. Judson argued the cause and, with Mr. George W. Hubbell, filed a brief for plaintiff in error:

The statute of Missouri, as construed by the supreme court of that state, denying the contractual liberty of the parties to an interstate contract of mutual life insurance, in determining in good faith the applicatory law of that contract, was violative of the contractual liberty secured by the 14th Amendment of the Constitution of the United States, and a Federal question is thereby presented to this court.

Allgeyer v. Louisiana, 165 U. S. 585, 41 L. ed. 834, 17 Sup. Ct. Rep. 427.

The judgment of the supreme court of Missouri, directing judgment by the circuit court, was final within the meaning of the judiciary act.

Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799.

The applicatory law of an interstate contract is that with reference to which the parties contract, and in the case at bar the law of New York was made the applicatory law of the policy by the express agreement of the parties.

Wharton, Conf. Laws, §§ 12, 426; Story, Conf. Laws, § 272; Dicey, Conf. Laws, § 567; *Robinson v. Bland*, 2 Burr. 1077; 4 Phillimore, International Law 469; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359; *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed.

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104, 1 Sup. Ct. Rep. 102; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Coghlan v. South Carolina R. Co.* 142 U. S. 109, 35 L. ed. 954, 12 Sup. Ct. Rep. 150; *Shattuck v. Mutual L. Ins. Co.* 4 Cliff. 598, Fed. Cas. No. 12,715; *Desmazes v. Mutual Ben. L. Ins. Co.* 7 Ins. L. J. 928, Fed. Cas. No. 3,821; *Lamb v. Bowser*, 7 Biss. 315, Fed. Cas. No. 8,008; *Parkin v. Royal Exchange Co.* 8 Ct. Sess. 465; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Hyde v. Goodnow*, 3 N. Y. 269; *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109; *Thompson v. Ketchum*, 8 Johns. 189, 5 Am. Dec. 332; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 203, 38 Pac. 1031, 1034; *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 37 U. S. App. 692, 72 Fed. Rep. 413, 19 C. C. A. 286, 38 L. R. A. 33; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 95 Fed. Rep. 111, 36 C. C. A. 671.

This principle of universal law, that the applicatory law of an interstate contract is that with reference to which the parties have contracted, has been uniformly adopted and enforced by the courts of the different states, and also by the Federal courts, against life insurance companies doing business in such states, construing the provisions of the statutory law of the state of incorporation as entering into the policy contracts of the parties.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, ante, 1088, 20 Sup. Ct. Rep. 906; *Equitable L. Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Equitable L. Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404; *Mutual L. Ins. Co. v. Hill*, 97 Fed. Rep. 263, 38 C. C. A. 159; *New York L. Ins. Co. v. Dingley*, 93 Fed. Rep. 153, 35 C. C. A. 245; *McConnell v. Provident Sav. Life Assur. Soc.* 92 Fed. Rep. 769, 34 C. C. A. 663; *Rosenplanter v. Provident Sav. Life Assur. Soc.* 96 Fed. Rep. 721, 37 C. C. A. 568, 46 L. R. A. 473; *Hathaway v. Mutual L. Ins. Co.* 99 Fed. Rep. 534; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 261, 34 S. W. 605; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *Harrington v. Home L. Ins. Co.* (Cal.) 58 Pac. 180; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Osborne v. Home L. Ins. Co.* 123 Cal. 610, 56 Pac. 616; *Johnson v. New York L. Ins. Co.* (Iowa) — L. R. A. —, 78 N. W. 905; *Trimble v. New York L. Ins. Co.* 20 Wash. 386, 55 Pac. 429; *Warner v. National Life Assn.* 100 Mich. 157, 58 N. W. 667; *Banholzer v. New York L. Ins. Co.* 74 Minn. 387, 77 N. W. 295, 78 N. W. 244; *Nall v. Provident Sav. Life Assur. Soc.* (Tenn. Ch.) 54 S. W. 109; *Fidelity Mut. Life Assn. v. Picklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Equitable L. Assur. Soc. v. Frommhold*, 75 Ill. App. 43; *Seiders v. Merchants' Life Assn.* (Tex.) 54 S. W. 753, Reversing (Tex. Civ. App.) 51 S. W. 547; *Linn v. New York L. Ins. Co.* 78 Mo. App. 192; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 95 Fed. Rep. 111, 36 C. C. A. 178 U. S.

671; *Rorer, Interstate Law*, pp. 110, 111; *Wharton, Confl. Laws*, § 427.

Parties to an interstate contract may contract in good faith for the law of the state of either, and the law thus agreed upon will be enforced in the other state as the law of the contract, although the domestic law of such state, which, but for such agreement, would have been the law of the contract, may be incapable of waiver. This is clearly illustrated in the case of usury laws in interstate contracts.

Freeland v. Heron, 7 Cranch, 147, 3 L. ed. 297; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385; *Story, Confl. Laws*, § 304, a, b; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; 2 Kent, Com. 459; *Smith v. Parsons*, 55 Minn. 521, 57 N. W. 311; *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965; *Dygert v. Vermont Loan & T. Co.* 94 Fed. Rep. 913, 37 C. C. A. 389; 2 Parsons, Contr. 95; *United States Sav. & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Bank of Louisville v. Young*, 37 Mo. 407; *Phoenix Mut. L. Ins. Co. v. Simons*, 52 Mo. App. 357; *Hysinger v. Supreme Lodge, K. & L. of H.* 42 Mo. App. 627.

This analogy of cases involving usury laws in interstate contracts was applied to an interstate mutual life insurance contract in *Seiders v. Merchants' Life Assn.* (Tex.) 54 S. W. 753.

The selection of the law of New York as the applicatory law of the interstate contract, evidenced by the policy in suit, was reasonable and in furtherance of, and indeed necessitated by, the purposes of the contract, and was in no wise an attempted evasion of the laws of Missouri.

Wharton, Confl. Laws, 465; 2 May, Ins. § 568; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Relfe v. Rundle*, 103 U. S. 222, sub nom. *Life Assn. of America v. Rundle*, 26 L. ed. 337; *New York L. Ins. Co. v. Statham*, 93 U. S. 31, 23 L. ed. 791.

The selection of the New York law as the applicatory law of the contract was necessitated by the nature of the contract, and emphasized by the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein in consideration of the contingent interest enjoyed by the insured during his life in the policy contracts of his associates in the same class; and defendant in error, as his representative, is therefore now estopped from asserting any other or different claim from that fixed under the law thus selected.

Century Dict. title *Tontine*; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 329, 4 N. E. 522.

As the selection of the New York law was necessary to the contract made by the parties,—that is, to the tontine plan of insurance duly selected and adopted,—it follows that, even if there had been no express reference to the New York law, the parties would be presumed to have contracted with reference to that law.

4 Phillimore, International Law, 469; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Wharton, Conf. Laws, § 507; *Gibson v. Connecticut F. Ins. Co.* 77 Fed. Rep. 561.

The selection of the New York law as the applicatory law of the contract, being thus in furtherance of, and necessitated by, the contract and the plan of insurance embodied therein, was in no wise in violation of Missouri law, or prejudicial to the interests of the state.

Mo. Sess. Acts 1895, p. 97; *Kerwin v. Doran*, 29 Mo. App. 397.

Conceding that plaintiff in error, as a life insurance company of New York, was doing business in Missouri through the comity of the state, this did not disable the parties to this interstate contract from contracting in good faith, under the foregoing rules of universal law, in furtherance of the purposes of their contract, as to the applicatory law thereof. This admission by comity did not make plaintiff in error a domestic corporation, and its contracts with the citizens of Missouri are interstate contracts, governed by the foregoing rules of universal law.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

The right of choice of the applicatory law, subject to the foregoing qualifications is inherent in the conception of an interstate contract; and the statute of Missouri, as construed by the supreme court of that state, deprives the parties to an interstate mutual life insurance contract of this essential element of the right of interstate contract.

Dacey, Conf. Laws, p. 570; *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Horton v. New York L. Ins. Co.* 151 Mo. 604, 52 S. W. 356.

The statute of Missouri, as construed by the supreme court, not only denies to the contracting parties in making an interstate contract the right of choice of the applicatory law, but makes a new contract for the parties, which they would not have made, and contrary to their intent.

Ogden v. Saunders, 12 Wheat. 258, 6 L. ed. 621; *Keating v. Kansas*, 84 Mo. 415; *Ashbrook v. Dale*, 27 Mo. App. 649; *State use of Wolf v. Berning*, 74 Mo. 87; *Reed v. Painter*, 129 Mo. 680, 31 S. W. 919; *Straube v. Pacific Mut. L. Ins. Co.* 123 Cal. 677, 56 Pac. 546.

The selection in good faith of the applicatory law is an essential incident to the right of interstate contract, and the Missouri statute, construed by the supreme court as denying this liberty of contract in this essential incident of interstate contract, and making

a new contract for the parties, violative of their intent, is violative of the constitutional guaranty of liberty of contract in the 14th Amendment which includes the right thus denied, as essential to the right of interstate contract.

Algeyer v. Louisiana, 165 U. S. 585, 41 L. ed. 834, 17 Sup. Ct. Rep. 427; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ex parte Kubaek*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Johnson v. Goodyear Min. Co.* (Cal.) 47 L. R. A. 338, 59 Pac. 304; *Godcharles v. Wigman*, 113 Pa. 431, 6 Atl. 351; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *State v. Seougal*, 3 S. D. 55, 15 L. R. A. 477, 51 N. W. 858; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624.

There is no judicial precedent sustaining the contention of defendant in error.

Equitable L. Assur. Soc. v. Clements, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Maier v. Fidelity Mut. Life Asso.* 47 U. S. App. 322, 78 Fed. Rep. 566, 24 C. C. A. 239; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Seiders v. Merchants' Life Asso.* (Tex.) 54 S. W. 753.

The Missouri statute, as construed by the supreme court of that state, denying the right to select in good faith the applicatory law of a contract of a mutual interstate life insurance, and making a new official contract violative of the intent of the parties, thus essentially denying the right to make interstate contracts of life insurance,—was in effect an attempted regulation of commerce between the states.

Liverpool & L. L. & F. Ins. Co. v. Massachusetts, 10 Wall. 573, sub nom. *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 19 L. ed. 1031; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Story, Conf. Laws, § 242; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The assertion of the constitutional protection of the right of interstate contract in mutual life insurance, and of the right of choice therein, in good faith, of the proper law of such contract under the rules of universal law, in no wise impairs the just authority of the state in the exercise of its legitimate police power, or in its control over foreign corporations doing business, through comity, in the state.

Mr. William B. C. Brown argued the cause and, with Messrs. James H. Cravens and J. V. C. Karnes, filed a brief for defendant in error:

The contract is a Missouri contract.

Giddings v. Northwestern Mut. L. Ins. Co. 102 U. S. 108, 26 L. ed. 92; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 9 C. C. A. 215; *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 17, 5 Fed. Rep. 225; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 400; *Great Western Ins. Co. v. Thwing*, 111 Mass. 109; *Wood, Fire Ins.* 189, note 2; *Hardie v. St. Louis Mut. L. Ins. Co.* 26 La. Ann. 242; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450; *Equitable L. Assur. Soc. v. Hiatt*, 19 U. S. App. 173, 58 Fed. Rep. 541, 7 C. C. A. 359; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Equitable L. Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 440; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281; *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. Rep. 580; *Kendall v. Pacific Mut. L. Ins. Co.* 10 U. S. App. 256, 51 Fed. Rep. 689, 2 C. C. A. 459; *Weinfeld v. Mutual Reserve Fund Life Assn.* 53 Fed. Rep. 208; *Daggs v. Orient Ins. Co.* 136 Mo. 392, 35 L. R. A. 227, 38 S. W. 85; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Knights' Templar & Masons' Life Indemnity Co. v. Berry*, 4 U. S. App. 353, 50 Fed. Rep. 511, 1 C. C. A. 561.

A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies.

Wall v. Equitable L. Assur. Soc. 32 Fed. Rep. 273; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. Rep. 526.

The policy in suit was delivered in Missouri after the passage of the Missouri non-forfeiture law, and its provisions are to be treated as incorporated in the policy.

Missouri Non-Forfeiture Law (Rev. Stat. 1879, §§ 5983-5986); *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 182, Fed. Cas. No. 17,545; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 692, 9 C. C. A. 215; *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L. R. A. 107, 27 S. W. 718; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Christian v. Connecticut Mut. L. Ins. Co.* 143 Mo. 460, 45 S. W. 263; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85; *Reed v. Painter*, 129 Mo. 680, 31 S. W. 919; *Reilly v. Franklin Ins. Co.* 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45, 24 N. E. 1072; *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 17 N. E. 396; *Phelan v.* 178 U. S.

Northwestern Mut. L. Ins. Co. 113 N. Y. 147, 20 N. E. 827; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *McDougall v. Provident Sav. L. Assur. Soc.* 135 N. Y. 551, 32 N. E. 251.

The statute cannot be upset by direct waiver.

Wall v. Equitable L. Assur. Soc. 32 Fed. Rep. 273, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 294.

Resting, as they do, upon public policy, these statutes cannot be abrogated by the device of indirection.

New York L. Ins. Co. v. Russell, 40 U. S. App. 530, 77 Fed. Rep. 94, 23 C. C. A. 43; *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775, 21 C. C. A. 89; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 286; *Wall v. Equitable L. Assur. Soc.* 32 Fed. Rep. 273; *S. C.* 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. Rep. 580; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 441; *Keller v. Travelers' Ins. Co.* 58 Mo. App. 561; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

When the policy of the state in which a foreign corporation is doing business does not forbid, such corporation may make the law of the state of its creation the applicable law.

Equitable L. Assur. Soc. v. Nixon, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 37 U. S. App. 692, 72 Fed. Rep. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Mutual L. Ins. Co. v. Hill*, 97 Fed. Rep. 263, 38 C. C. A. 159.

Where the policy of the state in which a foreign insurance corporation is doing business subjects the contracts of such corporation to the control of a statute, such corporation cannot withdraw its contracts then made, from the control of such statute, by providing in such contracts that such contracts shall be controlled by the laws of a different state.

New York L. Ins. Co. v. Russell, 40 U. S. App. 530, 77 Fed. Rep. 94, 23 C. C. A. 43; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 286; *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775, 21 C. C. A. 89; *Wall v. Equitable L. Assur. Soc.* 32 Fed. Rep. 273; *S. C.* 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

A corporation is not a citizen within the meaning of the provision, and hence has not "privileges and immunities" secured to citizens against state legislation.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Bank of Augusta v. Earle*, 13 Pet. 586, 10 L. ed. 306; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Consequently, the right of a state to prescribe conditions upon which foreign corporations, not agencies of the general government and not engaged in interstate com-

merce, may be admitted to transact business within its borders, has been frequently asserted and uniformly sustained.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, and cases cited.

The business of life insurance is not commerce between the states, and hence cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, *sub nom. Liverpool & L. L. & F. Ins. Co. v. Oliver*, 19 L. ed. 1029; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

[395] *Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

The plaintiff in error presents its contentions in many forms, but they are all reducible to one, to wit, that the statute of Missouri has been decided to supersede the terms of the policy, and to be the rule and measure of the rights and obligations of the parties, notwithstanding the application for the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the state of New York, the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York."

What, then, is the meaning of the Missouri statute, or, rather, what meaning did the supreme court declare it to have?

It declared that the statute did not have the meaning the trial court decided it to have. In other words, it declared that the policy did not come within the exception of the statute providing for paid-up insurance, in lieu of temporary insurance, which was one of the contentions of the plaintiff in error, and on account of which it had tendered the sum of \$2,670, and sustaining which the trial court rendered its judgment.

With this part of the opinion, however, we have no concern. Our review is only invoked of that part of the opinion which decides that the Missouri statute is the law of the policy, and which annuls the provisions of the policy which contravene the statute. And even of this part our inquiry is limited. If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached. And we think we are bound by it.

The court said, though more by inference

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than by direct expression, that the statute was a condition upon the right of insurance companies to do business in the state.

This conclusion it fortified by the citation of cases, and said:

"Foreign insurance companies which do business in this state do so, not by right, but by grace, and must in so doing conform to its laws; they cannot avail themselves of its benefits without bearing its burdens; moreover, the state may prescribe conditions upon which it will permit foreign insurance companies to transact business within its borders or exclude them altogether, and in so doing violates no contractual rights of the company. *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243, 24 S. W. 164; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85; *S. C.* 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281."

And further:

"As the nonforfeiture clause in § 5983 does not come within the exceptions specified in § 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse after being in force three full years, by the nonpayment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

"It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if inclined. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243, 24 S. W. 164; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85. This case has recently been affirmed by the Supreme Court of the United States. [172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.]

"It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the state Constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States."

From the Missouri law as thus established, may the plaintiff in error claim exemption by virtue of the Constitution of the United States?

What the powers of a corporation are in relation to the state of its creation, what the powers of a corporation are in relation to a state where it is permitted to do business, was declared early in the existence of this court, and has been repeated many times since. What those powers are we took occasion to repeat in *Waters-Pierce Oil Co. v. Texas*, decided at the present term. 177 U. S. 28, ante, 657, 20 Sup. Ct. Rep. 518.

*The case arose from a liberty of contract asserted by the Waters-Pierce Oil Company against certain statutes of the state of Texas prohibiting contracts in restraint of competition in trade. The statute was not only assailed because it took away the liberty of

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contract, but because it discriminated between persons and classes of persons. The latter ground we declined to consider, because it did not arise on the record. Of the former we said:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the state over them. What those rights are and what that power is has often been declared by this court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

And as the state court had held that the statute was a condition imposed upon the oil company doing business within the state, we said of the statute that, "whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it."

We stated the exceptions of the rule to be "only cases where a corporation created by one state rests its right to enter another and engage in business therein upon the Federal nature of its business."

Is the plaintiff in error within the exception? If not, the pending controversy must be determined against it.

It is difficult to give counsel's contentions briefly and at the same time clearly, nor are we sure that we can distinguish by precise statement the arguments directed to the [398] invalidity of *the statute of Missouri as an unconstitutional interference with the contractual liberty of the plaintiff in error, from the arguments which assail the statute as an attempted regulation of commerce between the states. This, however, not on account of any want of clearness in counsel's argument, but on account of the many ways in which they have presented and illustrated the argument, and which cannot be noticed in detail without making this opinion too long. We realize the propositions are not the same and should not be confused, though made somewhat dependent upon a common reasoning.

(1) A policy of mutual life insurance, it is contended, is an interstate contract, and the parties may choose its "applicatory law." Instances under the law of usury, instances under private international law, are cited as examples of authority. But if such cases apply at all, they necessarily have limitation in the policy of the state. This is not denied, but it is contended that contracting for New York law to the exclusion of Missouri law was "in no wise prejudicial to the inter-

ests of the state of Missouri or violative of its public policy."

But the interests of the state must be deemed to be expressed in its laws. The public policy of the state must be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced.

In passing on the statute in controversy we said, by Mr. Justice Gray, in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822:

"The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command *and of prohibition above quoted, by [399] which, in § 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in this state 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon; but it shall be subject to the following rules of commutation;' and in § 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.'"

And after stating the cases in which the terms of the policy are permitted to differ from the plan of the statute, it was further said:

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

In *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, the insurance company contended it had the constitutional right to limit by contract its liability to actual damages caused by fire against the provision of the statute which made, in case of total loss, the amount for which the property was insured the measure of damages. We sustained the statute independently of the ground that it was a condition of the permission of the company to do business in the state. We sustained it on the ground of the clear right of the state to pass it, and to

accomplish its purpose by limiting the right of the insurer and insured to contract in opposition to its provisions.

Further comment on this head may not be necessary, and we only continue the discussion in deference to the insistence of counsel upon the interstate character of the policy in suit. It is the basis of every division of their argument, and an immunity from control is based upon it for plaintiff in error, [400] which, it *seems to be conceded, the state can exert over corporations of its own creation.

An interstate character is claimed for the policy, as we understand the argument, because plaintiff in error is a New York corporation and the insured was a citizen of Missouri, and because, further, the plaintiff in error did business in other states and countries. Does not the argument prove too much? Does it depend upon the residence of plaintiff in error in New York? If so, it would seem that every contract between citizens of different states becomes at once an interstate contract, and may be removed from the control of the laws of the state at the choice of parties. If the argument does not depend on the residence of the plaintiff in error, but on the other elements, a Missouri insurance corporation can have the same relation to them as plaintiff in error, and can be, as much as plaintiff in error claims to be, "the administrator of a fund collected from the policy holders in different states and countries for their benefit"—the condition which plaintiff in error claims demonstrates the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the state where the insurance company is doing business. And yet plaintiff in error seems to concede that such power of stipulation Missouri corporations do not have, while it, a foreign corporation, and because it is a foreign corporation, does have.

After stating the necessity of a uniform law and an equal necessity that parties may stipulate for it, counsel for plaintiff in error say:

"It necessarily follows, therefore, that the insurance policy contracts of foreign insurance companies, as contracts of other foreign corporations, made by them with the citizens of a state, when doing business in that state through the comity of the state, are like the contracts of natural persons, subject to the limitations of their own charters, and the situs of such contracts is to be determined by the fundamental rules of 'universal law.'

"As will be hereafter seen, this status as foreign corporations does not mean that they were not subject to the laws of the state enacted in the full plenitude of the police power of the state. The state doubtless could limit their contractual power by prohibiting the making of certain contracts. [401] But unless the *foreign corporation is reincorporated as a domestic corporation, it remains a foreign corporation, and its contracts with citizens of the state are interstate contracts, subject to the right of choice of

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law thereof, which is inherent in the law of interstate contracts."

A foreign corporation undoubtedly is not a domestic corporation, and the distinction must often be observed, but the deduction from it by plaintiff in error cannot be maintained.

The power of a state over foreign corporations is not less than the power of a state over domestic corporations. No case declares otherwise. We said in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281:

"That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. This seems to be denied; if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, and need not be repeated."

2. Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states?

That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108. That the business of marine insurance is not is decided in *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. In the latter case it is said that the contention that it is "involves an erroneous conception of what constitutes interstate commerce."

We omit the reasoning by which that is demonstrated, and will only repeat: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" And we add, or against the uncertainty of man's mortality.

Judgment affirmed.

*LOUISA BANHOLZER, Plff. in Err., [402]

NEW YORK LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 402-408.)

Error to state court—Federal question—denying credit to statute of other state.

NOTE.—As to jurisdiction of Federal over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what constitutes a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

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A decision by a court of another state that the premium notice required by N. Y. Laws 1892, chap. 690, § 92, in order to justify a forfeiture for nonpayment, is not required on the maturity of a note given for an instalment of the premium, when this decision is based on the authority of a New York decision, does not deny full faith and credit to the statute so as to give jurisdiction to the Supreme Court of the United States on writ of error.

[No. 277.]

Argued and Submitted April 27, 1900. Decided May 28, 1900.

IN ERROR to the Supreme Court of the State of Minnesota to review a decision affirming a judgment dismissing an action on a policy of life insurance. *Dismissed.*

See same case below, 74 Minn. 387, 77 N. W. 295, 78 N. W. 244.

Statement by Mr. Justice **McKenna**:

[402] *This action was brought in the district court of the second judicial district of the state of Minnesota upon a life insurance policy for \$20,000, issued by defendant in error to William Banholzer, husband of the plaintiff in error, dated the 16th of September, 1895, payable upon the death of Banholzer to plaintiff in error, or to Banholzer himself on the 16th of September, 1915, if he should be living then.

The premiums were to be paid annually in advance on the 16th day of September of every year, until twenty full years' premiums should be paid.

The first premium was paid, which continued the policy in force until the 16th of September, 1896.

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided.

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month."

[403] *On the 6th day of October, 1896, Banholzer paid the defendant the sum of \$286 in cash, and executed and delivered to the defendant the following note:

St. Paul, Minn., 9-16, 1896.

Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of 5 per cent per annum.

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This note is given in part payment of the premium due 9-16-'96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

(Signed) William Banholzer.

The following receipt was given for the note:

St. Paul, Minn., 10-6-'96.

Note six months, after date 9-16-'96, due 3-16-'97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, \$286 in cash, and his note at six months for \$860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by J. A. Campbell, Cashier.

The note matured March 16, 1897, when it was surrendered to Banholzer, and he paid to the defendant \$241.50 in cash, and executed and delivered to the defendant a new note in terms exactly similar to the first note, except that it was payable in sixty days from date. This note was never paid.

On May 28, 1897, Banholzer was taken sick, and died on July 5, 1897.

On June 18, 1897, Banholzer, through his attorney, sent a *draft to the defendant for [404] the sum of \$690, being the amount due on the note of March 16 of that year, in tender of its payment. The defendant returned the draft, writing by its comptroller that "as policy No. 692,465—Banholzer—stands lapsed on the books of the company for nonpayment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this inclosure. When writing please refer to this letter by file number."

By the application for the policy the latter was to be construed according to the laws of New York. The statute which is claimed to be applicable is inserted in the margin.†

†No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest, or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy. If notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage

The notice required by the statute was duly given more than fifteen and less than forty-five days prior to September 16, 1896, but no notice was given prior to the maturity of the notes, except the ordinary bank notice.

[405] *The insurance company has not returned the note of March 16, 1897, and the record does not show that it has ever been demanded.

By stipulation of the parties, the printed record in *Conway v. Phoenix Mut. L. Ins. Co.* 140 N. Y. 79, 35 N. E. 520, together with briefs of counsel, were made part of the record, as though they had been introduced in evidence, and it was also stipulated that they should be certified to this court.

At the close of the plaintiff's testimony the case was dismissed. Subsequently a motion for a new trial was made and denied, and an appeal was then taken to the supreme court of the state, which affirmed the decision of the trial court. A reargument was granted, and the court adhered to its opinion. 74 Minn. 387, 77 N. W. 295, 78 N. W. 244.

The case is here on writ of error, and defendant in error moves to dismiss for want of jurisdiction, or to affirm the judgment.

Mr. Christopher Dillon O'Brien submitted the cause for plaintiff in error.

Mr. George C. Squires argued the cause and, with Mr. F. W. M. Cutcheon, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[405] *Mr. Justice McKenna delivered the opinion of the court:

The case is here on a single question. The counsel for plaintiff in error says:

"While originally other questions were raised by the plaintiff they were determined adversely to her and her case made to stand or fall solely upon the interpretation of the New York statute, and the question now before this court is, Did the court below in the case at bar give to the statute such full faith and credit as is secured to it by the Constitution of the United States."

[406] That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and *moves to dismiss because the supreme court of Minnesota did not deny the validity of the New York statute, but only construed it, and, even granting the construction was erroneous, faith and credit were not denied to the statute. *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350, and *Lloyd v.*

Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70, are cited.

Those cases sustain the distinction which defendant in error makes, and the deduction from it, and our inquiry will therefore be: Did the supreme court of the state of Minnesota deny the validity of the New York statute or only consider its operation and effect? The claim of the defendant in error is that each of the notes was an "instalment or portion of the premium," and that therefore the supreme court of Minnesota, in holding that the notice prescribed by § 92 was not necessary to be given prior to the maturity of the notes, denied full faith and credit to the statute.

We dispute the conclusion without passing on the premises. The ruling was a construction of the statute, not a denial of its validity, and that the court meant no more, and meant to follow, not oppose, the decisions of the state, is evident from its opinions.

The first opinion was put on the authority of *Conway v. Phoenix Mut. L. Ins. Co.* 140 N. Y. 79, 35 N. E. 420, on the assumption that its facts were not different from those of the case at bar. In the second opinion the construction of the New York statute was considered as *res integra*, and it was held that "the notice required by it was not applicable to the notes given by Banholzer for part of the September premium."

In the first opinion, the contention that the "premium notice" required by the statute applied to the note, which fell due March 16, 1897, and that the policy could not be forfeited without such notice, the learned justice who spoke for the court said:

"Even if the question was *res nova*, I am clearly of the opinion that, upon the facts, this statutory provision has no application to this note. But as my brethren do not agree with me in this, it would be useless for me to enter into any discussion of the reasons for my opinion. The parties mutually agreed *that this should be deemed a New York contract and construed according to the laws of that state. The decisions of the highest court of that state as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties. In *Conway v. Phoenix Mut. L. Ins. Co.* 140 N. Y. 79, 35 N. E. 420, upon a state of facts and under a statute which, in our opinion, are in no way distinguishable from those involved in the present case, the court of appeals held that the notice required by statute did not apply to the notes; that the company having served that notice before the premium became due, no further notice was required.

paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, or instalment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void ex-

cept as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration or thirty days after the mailing of such notice. Laws 1892, chap. 690, § 92.

Counsel for the plaintiff do not claim that the facts of the two cases are in any respect distinguishable, but they seek to draw a distinction between the language of the statute considered in the *Conway Case* and the statute applicable to the present case. The statute under consideration in the former was Laws of N. Y. 1876, chap. 341, as amended by Laws 1877, chap. 321; the statute applicable to the present case is Laws of N. Y. 1892, chap. 690, § 92. This last act appears to be a compilation and revision of all the insurance laws of the state, and § 92 thereof is but an embodiment (with certain amendments) of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all affects the question now under consideration.

"Even if the 'one month's grace' allowed by the policy for the payment of the premium was applicable to the notes (which I do not think is so), that fact would not aid the plaintiff, for the insured did not offer to pay the last note until thirty-three days after it matured."

In the second opinion the court said that it had overlooked that counsel had claimed the case to be distinguishable on the facts from the *Conway Case*; but on re-examining the *Conway Case* it further said that the question of notice might have been disposed of on the ground of want of power of the agent of the insurance company to accept a note—

[408] "But we are now equally well satisfied that in what the court said on the subject of notice in the last part of the opinion it intended to and did decide the question upon the assumption* that the company was bound by the agent's acceptance of a time note for the premium. This is made quite clear to our minds from an examination of the record and briefs in the case, copies of which have been furnished us by counsel for the defendant.

"While this shows the views of the court of appeals upon the construction of the statute, the doubt in our minds is whether, under the circumstances, it is a decision of the question which is binding on us. See *Carroll v. Carroll*, 16 How. 275-286 and 287, 14 L. ed. 936-941.

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra* the notice required by it was not applicable to the notes given by Banholzer for part of the September premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that very often they were people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to; and while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice, and is no reason why any strained

or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers, or which was not within the legislative intent."

The plaintiff in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the *Conway Case*, and erred in its independent construction of the New York statute.

Granting, *arguendo*, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared and its meaning was first sought in a decision of the New York courts, and then confirmed by an independent care and construction.

We think, therefore, that the cases of *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350, and *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70, apply, and on their authority *the action should be dismissed* for want of jurisdiction.

And it is so ordered.

*JOSEPHINE DESERANT, Administratrix[409]
of the Estates of Henri Deserant, Jules Deserant, and Henri Deserant, Jr., *Plff.*
in Err.,

v.

CERILLOS COAL RAILROAD COMPANY.

(See S. C. Reporter's ed. 409-421.)

Question for jury—as to mine explosion—erroneous instructions—duty as to ventilation of mine and keeping it clear of standing gas—effect of act of Congress.

1. The place of an explosion in a mine, and its cause, and what, if any, negligence the owner is guilty of, are questions for the jury, when the evidence offered requires their submission to the jury.
2. Instructions as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas are erroneous, when they are so inconsistent with other instructions that they tend to confusion and

NOTE.—As to the statutory duty for the protection and safety of workmen in mines—see *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 848, and note.

Statutory duty to ventilate and keep mine clear from gas.

Where an old mine has the statutory outlets, and is then worked further several hundred feet along the seams, it becomes a new mine, and an outlet for ventilation and escape is required by the Pennsylvania act of 1870. *Com. v. Wilkesbarre Coal Co.* 15 Mining Rep. 31, 29 Phila. Leg. Int. 213.

The word "mine," in Ill. Sess. Laws 1883, p. 114, providing for examination for fire damp, with safety lamp, applies to a place where the miners are working in a mine, although not actually mining coal at the time. *Coal Run Coal Co. v. Jones*, 19 Ill. App. 365, Reversed in 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

The ventilation law of Pennsylvania of March 3, 1870, does not apply to an air shaft until a communication is formed between it and

misapprehension, and when they make his duty relative instead of absolute, as required by the act of Congress of March 3, 1891, making the test what a reasonable person would do, instead of the command of the statute.

3. The duty of a mine owner as to ventilation of his mine and keeping it clear of standing gas is made imperative by the act of Congress of March 3, 1891, and the consequence of neglecting it cannot be excused because some workmen may disregard instructions.

[No. 269.]

Argued April 27, 1900. Decided May 28, 1900.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment for defendant in an action for damages caused by the explosion of the mine. *Reversed.*

the mine, where such shaft is being constructed by an independent contractor, and the mine owner only supervises to see if it is according to contract. *Welsh v. Lehigh & W. Coal Co. (Pa.) 3 Cent. Rep. 386.*

Omission of a corporation operating a coal mine, to provide the means of ventilation and to adopt the precautions required by W. Va. Code 1891, p. 999, and Acts 1887, chap. 250, to keep the mine free of standing gas, is negligence which renders it liable to an employee for injury resulting from such omission of duty. *Graham v. Newburg Orrel Coal & Coke Co. 38 W. Va. 273, 18 S. E. 584.*

And the neglect of a mine owner, in the absence of any excuse, so to ventilate his mine "as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts," as required by Iowa Code, § 2488, is negligence entitling an employee to recover for injuries caused thereby, although no penalties are provided for its violation. *Mosgrove v. Zimbleman Coal Co. (Iowa) 81 N. W. 227.*

So, a mining company wilfully neglecting to prevent accumulation of gas, as required by the Illinois act of July 1, 1887, is liable for injuries to an employee caused thereby. *Muddy Valley Min. & Mfg. Co. v. Phillips, 39 Ill. App. 376.*

And that the ventilation required by 35 & 36 Vict. chap. 73, would have cost an outlay of £200, will not excuse the agent unless he pointed out the alterations required, to the owners, and demanded the same. *Hall v. Hopwood, 15 Mining Rep. 42, 49 L. J. M. C. N. S. 17, 41 L. T. N. S. 797.*

Under 18 & 19 Vict. chap. 108, § 4, requiring ventilation constantly if a colliery "be worked," the suspension of actual work from Saturday to Monday will not suspend the requirements as to ventilation during that time. *Knowles v. Dickinson, 2 El. & El. 705, 29 L. J. M. C. N. S. 135, 6 Jur. N. S. 678, 8 Week. Rep. 411.*

And under 23 & 24 Vict. chap. 151, an act for the regulation and inspection of mines, so much of the mine must be kept ventilated as to render the working places safe. *Brough v. Homfray, 15 Mining Rep. 6, L. R. 3 Q. B. 771, 37 L. J. M. C. N. S. 177, 16 Week. Rep. 1123, 9 Best & S. 492.*

The duty imposed on operators of coal mines by Wash. Laws 1891, chap. 81, to take the measures therein prescribed to secure proper ventilation, is a positive one, and cannot be delegated to a subordinate so as to relieve the

See same case below, 9 N. M. 495, 55 Pac. 290.

The facts are stated in the opinion.

Mr. Neill B. Field argued the cause, and, with *Mr. Frank W. Clancy*, filed a brief for plaintiff in error:

Instruction No. 1 utterly ignores the existence of the statutory duty to keep the mine free from standing gas, and, taken in connection with other instructions given at the request of the defendant, licensed the jury to substitute its judgment for that of Congress, and to decide that it would not be negligence on the part of the defendant to permit any quantity of standing gas to accumulate in the mine, provided it was marked with a fire mark.

Sommer v. Carbon Hill Coal Co. 59 U. S. App. 519, 89 Fed. Rep. 56, 32 C. C. A. 156.

The master owed to the deceased the positive duty to make reasonable efforts to supply a safe mine, with proper appliances for

master from liability for injuries to another servant caused by its omission. *Sommer v. Carbon Hill Coal Co. 59 U. S. App. 519, 89 Fed. Rep. 54, 32 C. C. A. 156.*

But a mining company providing a competent boss, as required by Pa. act March 3, 1870, is not liable for the death of a miner from an explosion caused by the negligence of such boss in failing to ventilate, as he was a fellow servant. *Delaware & H. Canal Co. v. Carroll, 89 Pa. 374.*

And the same was held under Pa. act April 28, 1877. *Redstone Coke Co. v. Roby, 115 Pa. 364, 8 Atl. 593.*

Under Pa. act 1870, for ventilation of mines, where a competent superintendent and proper machinery were provided, the company was held not liable for the death of one boss through the act of another boss in slowing down the ventilator, causing fire damp, as this was the act of a fellow servant. *Lehigh Valley Coal Co. v. Jones, 86 Pa. 432.*

An employee in a mine has the right to assume, in the absence of knowledge to the contrary, that his employer has complied with the provisions of Iowa Code, § 2488, requiring sufficient ventilation to render harmless all noxious gases, or to expel them from the mine. *Mosgrove v. Zimbleman Coal Co. (Iowa) 81 N. W. 227.*

But the failure of an employee to exercise ordinary care will preclude him from maintaining the cause of action given by Ohio Rev. Stat. § 301, for any direct damage occasioned by any violation of, or wilful failure to comply with, the statute making it the duty of the operator of a coal mine to keep the same free from standing gas, and requiring working places to be carefully examined every morning, with a safety lamp, before the workmen are allowed to enter. *Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886.*

Where the men had worked at the place some two or three hours with an open lamp before an accident occurred, this showed that the failure to examine the place with a safety lamp in the morning, as required by statute, in no manner contributed to the accident. *Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.*

Workmen stopping up an airway of a mine for their employer, who is contesting the right of property with another, were not guilty of felony under 7 & 8 Geo. IV. chap. 30, if they did not know that the act of their master was malicious. *Reg. v. James, 8 Car. & P. 131.*

ventilation, in which to do the work of the master, and to make like efforts to keep the mine and the ventilating appliances in a safe condition.

Hough v. Texas & P. R. Co. 100 U. S. 218, 25 L. ed. 615; *Northern P. R. Co. v. Herbert*, 116 U. S. 652, 29 L. ed. 760, 6 Sup. Ct. Rep. 590; *Mather v. Rillston*, 156 U. S. 398, 39 L. ed. 470, 15 Sup. Ct. Rep. 464; *Western Coal & Min. Co. v. Ingraham*, 36 U. S. App. 1, 70 Fed. Rep. 219, 17 C. C. A. 71; *Western Coal & Min. Co. v. Berberich*, 94 Fed. Rep. 333, 36 C. C. A. 364; *Gowen v. Bush*, 40 U. S. App. 349, 76 Fed. Rep. 349, 22 C. C. A. 196; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.

Where there is combined negligence of employer and fellow servant, the employer is liable for injury inflicted in the course of the employment.

Grand Trunk R. Co. v. Cummings, 106 U. S. 701, 27 L. ed. 267, 1 Sup. Ct. Rep. 493.

If there are increased perils in the business by reason of defective appliances, or otherwise, known to the master, or for which he is responsible, and unknown to the servant, if the latter is injured thereby and the latter is free from negligence, the master is liable.

Texas & P. R. Co. v. Archibald, 170 U. S. 672, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777; *Behn v. Armour*, 58 Wis. 1, 15 N. W. 806; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 701, 27 L. ed. 267, 1 Sup. Ct. Rep. 493; *Cerillos Coal R. Co. v. Deserant*, 9 N. M. 49, 49 Pac. 810; *The Joseph B. Thomas*, 81 Fed. Rep. 578; *Monsarrat v. Keegan*, 58 U. S. App. 377, 87 Fed. Rep. 849, 31 C. C. A. 255; *New York, N. H. & H. R. Co. v. O'Leary*, 93 Fed. Rep. 741.

Instruction No. 11 is clearly erroneous because it was based on a supposed or conjectural state of facts of which there is no evidence.

Merchants' Mut. Ins. Co. v. Baring, 20 Wall. 161, 22 L. ed. 251; *Michigan Insurance Bank v. Eldred*, 9 Wall. 553, 19 L. ed. 766; *Jones v. Van Benthuyssen*, 103 U. S. 87, 26 L. ed. 477; *St. Louis, I. M. & S. R. Co. v. Spencer*, 36 U. S. App. 229, 71 Fed. Rep. 93, 18 C. C. A. 114; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Northwestern Mut. L. Ins. Co. v. Stevens*, 36 U. S. App. 401, 71 Fed. Rep. 263, 18 C. C. A. 107; *New York, N. H. & H. R. Co. v. Blessing*, 35 U. S. App. 208, 67 Fed. Rep. 281, 14 C. C. A. 394; *Boston & M. R. Co. v. McDuffey*, 51 U. S. App. 111, 79 Fed. Rep. 942, 25 C. C. A. 247; *Chicago v. Robbins*, 2 Black, 429, 17 L. ed. 304; *Keyser v. Hitz*, 133 U. S. 147, 33 L. ed. 536, 10 Sup. Ct. Rep. 290; *Blackburn v. Crawford*, 3 Wall. 194, 18 L. ed. 194; *Northern P. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323.

Mr. Robert Dunlap argued the cause and, with *Messrs. E. D. Kenna* and *R. E. Twitchell*, filed a brief for defendant in error:

It is not proper to single out any one clause or paragraph, but the charge should be examined as a whole, and one instruction

or paragraph must be viewed in the light of others given.

Congress & E. Spring Co. v. Edgar, 99 U. S. 659, 25 L. ed. 491.

Instruction No. 1, set out in the 14th assignment, was proper in itself and is in accordance with the well-settled law. It is also to be read in connection with the other instructions given. It is correct as a general proposition.

Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548.

The 11th instruction is proper under plaintiff's theory and contentions. Examined in connection with the undisputed facts, it could not be held erroneous. It was established that gas was likely to accumulate in different places, and that the precaution adopted against danger was the fire signals, and this was well known to the deceased, and was the usual precaution.

Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304; *Perigo v. Chicago, R. I. & P. R. Co.* 52 Iowa, 276, 3 N. W. 43; *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 520, 9 N. W. 364; *Assop v. Yates*, 2 Hurlst. & N. 768.

*Mr. Justice **McKenna** delivered the[409] opinion of the court:

This action is consolidated of three, brought by plaintiff in error, who was plaintiff in the court below and may be so called *here, as administratrix of the estates re-[410] spectively of her husband, Henri Deserant, and her sons Jules Deserant and Henri Deserant, Jr.

The actions were for damages for the deaths of her said intestates by an explosion in a mine owned by defendant, and which explosion was alleged to have been caused by the negligence of plaintiff in error. The action was based upon a statute of New Mexico, which gives an action for damages to the personal representatives of a person whose death is caused by the wrongful act of another, if the person causing the injury would have been liable to an action for damages if death had not ensued.

There were two trials, both by jury, in the district court of the territory. The first resulted in a verdict and judgment for plaintiff. They were reversed by the supreme court of the territory. 9 N. M. 49, 49 Pac. 807. The second resulted in a verdict and judgment for defendant. They were affirmed by the supreme court of the territory. 9 N. M. 495, 55 Pac. 290. This writ of error was then sued out.

There is no dispute about the explosion or that the deaths of plaintiff's intestates were caused by it. The dispute is as to the cause of the explosion and the responsibility of defendant for it.

The evidence presents long and elaborate descriptions of the mine, with its "slopes, air shafts, entries, cross cuts, air courses, conduits, and break throughs."

We do not think that it is necessary to repeat the descriptions. There is no controversy about them. The issue between the

parties is as to the amount and sufficiency of ventilation, its obstruction, the accumulation of explosive gases, their negligent ignition, whether by a fellow servant of plaintiff's intestates or by a representative of the defendant, making it liable, or whether the explosion was of powder accidentally ignited.

The method of ventilation was by machinery causing a circulation of air through the mine and up to the face of the working places, for the purpose of rendering harmless or expelling the noxious gases.

It is contended by plaintiff that the machinery was insufficient for that purpose, the employees of the defendant inefficient [411] *and negligent, and that the air shafts had been permitted to become obstructed, whereby gases accumulated, and stood in the mine and exploded on the 27th of February, 1895, causing the deaths of plaintiff's intestates.

The means of ventilation was a fan at the entrance of the mine, which by its revolutions exhausted the air in the mine, and outside air rushed in and through the passages of the mine, and was directed where desired by means of curtains called "brattices."

It is claimed there were defects in those appliances, whereby there were leaks in the circulation of the air, and, besides that, water had been allowed to accumulate in the fourth left air course, which so interrupted the quantity of air which passed into room 8 of the fourth left entry that the air did not go to the face of that room, but feebly passed around the brattice at a distance of 12 or 14 feet, thus permitting the accumulation of a dangerous body of gas, until it passed beyond the danger signals, which may have been put into the room by the fire boss, and that Donahoe, the day foreman, and Flick and Kelly, all miners, entered the room on the day of the explosion, with naked lamps, and ignited the gas before they saw or had an opportunity to see the danger signal. The employees of the mine consisted of miners, rope riders, mule drivers, track men, and "company men." The latter were paid by the day, and worked under the order and immediate supervision of the foreman or pit boss, while the miners were paid by the ton, and were subject to general supervision by the foreman. Besides these, there was a mine superintendent, day foreman or pit boss, night foreman or pit boss, day fire boss and night boss. There was also a mine inspector, who lived in Kansas, and periodically visited the mine and other mines owned by defendant.

It is claimed that the mine foreman and fire bosses knew of the gas in room 8, and that the deceased miners did not know it, nor have means of knowing it.

The mine was inspected day and night respectively by the day and night fire bosses, and it was the duty of each to advise each miner as he came in of the condition of his working place, and no miner was permitted into the mine to work until so advised.

[412] *The gas is explosive when mixed with certain proportions of atmospheric air. It is lighter than air, and therefore dispelled by
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a current of air, and this was the means necessary to be employed to disperse the gas. The gas when it explodes moves against the opposing current of air. In other words, expends its force in the direction from which the air comes.

On Sunday night Kilpatrick, the foreman, discovered enough gas in room 8 to crack his safety lamp, but he did not regard it as sufficient to mark the place dangerous.

On Monday morning (the explosion was on Wednesday) the day fire boss found gas in room 8, and put a danger mark above the last cross cut, but did not go back to the room again, although he knew that it was one of the worst rooms in the mine for gas. He testified that he considered the danger mark sufficient.

On Monday night before the explosion, Ray, the night fire boss, was at the face of room 8, and found no fire marks, but found a little gas, and put fire marks in the room. He inspected the mine on Tuesday, but did not visit room 8.

Donahoe, mine foreman, Flick and Kelly, two "company men," were killed by the explosion, and their bodies were found in or near room 8.

The conclusion which plaintiff claimed to be established by the evidence is, that Flick and Kelly went with Donahoe, under whose direction they worked, into room 8 with naked lights, and that an explosion was caused by the gas in the room coming in contact with the lights.

The defendant, on the contrary, contended that the "explosion was of some kind or other at or in the neighborhood of room 16 in the fourth left entry of the mine, where the deceased were working as coal miners." It is claimed that the cause of the explosion is altogether of conjecture and surmise, and that the greatest evidence or effect of explosion and fire appeared in the neighborhood of rooms 16 and 17, in the entry way thereabout, and that some powder cans were found exploded, and coal dust was found coked on some of the pillars on the back of a car, and a car loaded with coal was moved several feet off the track. It is hence conjectured that the explosion *was caused by some negligent or accidental ignition of powder which instantly set fire to the coal dust, which more or less impregnated the air and the entry ways, and of particles of gas which might be found in the hollows and crevices; so that death would be caused by concussion, or by the after damp caused by the explosion. Or it is conjectured again that the explosion might have been caused by some miner, while working, suddenly striking a seam or body of gas, which was ignited by his light, and thus ignited powder near at hand.

At the close of the testimony the plaintiff and the defendant asked for peremptory instructions for their respective sides, which was refused.

The assignments of error are based on exceptions to evidence and on exceptions to instructions.

In passing on the case the supreme court of the territory said that it was "unneces-

sary for us to consider the objections urged to the instructions given by the court below. In our opinion they were all in favor of the plaintiff, as the court should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty."

In support of this conclusion it stated the theory of the plaintiff to be that the explosion was caused by an "accumulation of water previous to the explosion in a low place in the fourth left air course,—a sufficient quantity of pure air was not going to the face of the workings in the fourth left entry to remove and expel the noxious gases; that Kelly and Flick, who were company men, that is, men who were paid by the day and not according to what work they did, acting under instructions from Donahoe, the day pit-boss, went with him or by his direction into room 8 to remove a railroad track, carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air, and caused the explosion. This theory is purely speculative, and is not supported by the evidence. It cannot be positively proved what was the initial point of the explosion or what caused it. In fact, the evidence goes to show, from measurements taken at various times by the superintendent of the mine, the pit-boss, and the United States inspector, that sufficient [414] air was going through the fourth air course and mine to make it safe. Indeed, the evidence goes further, and shows that after the explosion and on the day of the investigation by the coroner's jury, and while much of the *débris* caused by the explosion was still in the fourth left air course, a sufficiency of air was passing through it over the water and *débris* through the low place, which is claimed by the plaintiff to have been obstructed by water, for the proper ventilation of the entry and its rooms and the expulsion of all harmful gases, and for the men and animals working there at the time of the explosion. There is no evidence that the condition of the fourth left air course was the direct or proximate cause of the explosion, and for the plaintiff to recover this must be proved by a preponderance of evidence."

The court also held that Flick, Kelly, and Donahoe were fellow servants of the deceased; therefore, if the contention of the plaintiff was true, that the gas was ignited by their negligence, the defendant had no cause of action.

We have read the evidence, and we cannot concur with the supreme court of the territory that the trial court "should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty." It was for the jury to determine from the evidence the place of the explosion and its cause, and what, if any, negligence the defendant was guilty of, and the evidence offered on the issues required the submission of those questions to the jury.

The effect of the act of Flick, Kelly, and Donahoe we will consider hereafter.

The trial court, in giving instructions to

the jury, read section 6 of the act of Congress of March 3, 1891, which is as follows:

"By section 6 of an act of Congress, approved March 3, 1891 [26 Stat. at L. 1104, chap. 564], it is provided as follows:

"Sec. 6. That the owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, for every fifty men at work in said mine and in like proportion for a greater number, which air shall by proper *appliances or machinery be forced through such mine to the face of each and every working place so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings shall be kept clear of standing gas."

The court then instructed the jury as follows:

"If, therefore, the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, was operating a coal mine at a depth of more than 100 feet below the surface of the earth, and that the plaintiff's intestates respectively were employed by the defendant in the operation of said coal mine, it was, by reason of said act of Congress, the duty of the defendant to provide an adequate amount of ventilation of not less than 35 cubic feet of pure air per second and 3,300 cubic feet per minute for every fifty men who worked in said mine, which air should have been, by proper appliances or machinery, forced through such mine to the face of each and every working place therein, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings of such mine should have been kept clear of standing gas in dangerous quantities; and if the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, failed or neglected to provide an adequate amount of ventilation so as to dilute and render harmless and expel from the said mine the noxious poisonous gases which were generated therein, or to keep the working places of said mine clear of standing gas, such failure on the part of the defendant may be considered by the jury as evidence of negligence on the part of the defendant.

"9. Negligence is defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attending circumstances. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit *or employers of laborers therein. All [416] occupations producing articles or works of necessity, utility, or convenience may un-

doubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life or limb, it is incumbent on the promoters thereof, and the employers or others thereon, to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from which injury follows to the persons engaged, such promoters and employers may be held responsible and mulcted to the extent of the injury inflicted, if any. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition of their pursuit without such safeguards. Indeed, it may be laid down as a legal principle that in all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that a neglect to provide such readily attainable appliances, and to keep the same in fit and suitable condition, will be regarded as proof of culpable negligence.

"10. I charge you, gentlemen, that it is the duty of the master to use reasonable care and diligence to provide a reasonably safe place in which his servants shall perform their respective duties, and also to use reasonable care and diligence to provide reasonably safe appliances for the protection of his servants, and to use reasonable care and diligence to keep such appliances in a reasonably safe condition for the protection of his servants; and the master cannot, by the delegation of any part of his duty to an agent or servant, relieve himself of responsibility for injuries to his servants arising from the neglect of this duty. Any agent or servant of the master, appointed by him for the purpose of looking to the safety of such appliances without regard to the rank or station of such agent or servant, is the representative of the master for such purpose, and the negligence of any such agent or servant in such matters is, in contemplation of the law, the negligence of the master, and the master is liable for any damage occasioned thereby.

"11. Although you may believe from the evidence that the fellow servants of the deceased by their negligence contributed to the bringing about of the explosion in which deceased were killed, yet, if you also believe from the evidence that the negligence of defendant also contributed to the same result, you must find a verdict in favor of the plaintiff, unless you believe from the evidence that plaintiff's intestates, or one of them, knew, or had means of knowledge, of such negligence of defendant, and, notwithstanding such knowledge or means of knowledge, continued to work in the mine of defendant.

"12. The law requires that the defendant

shall keep the workings in its mine clear of standing gas, and if you believe from the evidence the defendant failed to keep the workings in its mine clear of standing gas, and that such failure contributed to the deaths of the deceased, then you are justified in believing defendant guilty of negligence, and you must find a verdict in favor of the plaintiff, unless you believe from the evidence that the plaintiff's intestates or one of them knew of the existence of such gas and continued to work in the mine of defendant with such knowledge.

"13. If the jury believe from the evidence that the plaintiff's intestates knew or had reason to know that dangerous bodies of gas were permitted to accumulate in the open places of defendant's mine and to remain for a period of thirty-six hours or more, without any effort on the part of the agents and the servants of defendant to move the same, and that no precautions against the explosion of such gases were accustomed to be taken except to mark the open place where such gas might be with a danger mark, and plaintiff's intestates, notwithstanding such knowledge or means of knowledge, continued to work in said mine, the plaintiff's intestates thereby assumed the risk incident to such method, and cannot recover if their fellow servants ignited such gas by going over or disregarding such fire mark.

"14. If you believe from the evidence that [418] the explosion originated in room 8 of the fourth left entry of the mine in consequence of the accumulation in said room of a body of dangerous gas, merely guarded by a fire mark or danger signal for thirty-six or forty-eight hours before the explosion, and that plaintiff's intestates did not consent or agree to work in said mine with places dangerous because of gas merely guarded by fire marks or danger signals for thirty-six or forty-eight hours, then plaintiff is entitled to recover in each case, although you may also believe that said body of dangerous gas was ignited by the negligence of fellow servants of plaintiff's intestates."

The main charge of the court was not objected to. The objections were to certain instructions given at the request of the defendant.

They were as follows:

"1. The jury are instructed that what was required of the defendant in the conduct of its mining business, in caring for the miners employed by and engaged in working its mine, was the adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine that were obvious or might with reasonable diligence have become known; and, in the absence of evidence to the contrary, it is presumed that the defendant performed its entire duty towards the miners in that respect."

"6. Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room 8 for the time stated in the evidence, and believe from the

evidence that the explosion testified to originated in room 8, and further believe from the evidence that signals of the kind described in the evidence warning against entry into said room were placed in such a manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them, and such signal was known to be in use by the miners engaged in working in said mine, and that the use of such signal was understood by such miners to inform them of the presence of gas in dangerous quantity; then, if the jury believe from the evidence that such explosion was caused by Flick and Kelly [419] *entering said room with a naked light, the defendant is entitled to, and you should render, a verdict in its favor."

"10. The burden of showing negligence on the part of the defendant, that caused the death of the persons for which this action is brought, is upon the plaintiffs, and evidence has been introduced for the purpose of showing an obstruction of the air course through which that portion of the mine where the deceased persons worked was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find, not only a partial obstruction of the air course, but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air; and if, upon the whole testimony, the jury believe that, notwithstanding the partial obstruction existed, there still was space enough in the air course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendant, unless you find from the evidence that the negligence of the defendant in some other way caused or contributed to the death of such persons.

"11. If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room 8 of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick and Kelly, or either of them, by going into the said room with a naked light (contrary to the rules and orders of the defendant), and by such naked light the fire gas was ignited and exploded, causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow servants of plaintiff's intestates, and not by the negligence of defendant, and defendant is not liable therefor; and a verdict should be rendered for the defendant."

The act of Congress makes three requirements—

(1) Ventilation of not less than 55 feet of pure air per second, or 3,300 cubic feet per minute, for every fifty men at work, and in like proportions for a greater number;

[120] (2) proper appliances and machinery to force the air through the mine *to the face of working places; (3) keeping all workings
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free from standing gas. If either of these three requirements was neglected, to the injury of plaintiff's intestates, the defendant was liable.

We think the instructions numbered 1, 6, and 11, given at the request of the defendant, ignored the obligations of the act of Congress, and are so far inconsistent with the other instructions that they tended to confusion and misapprehension—making the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of making the test and measure of duty the command of the statute. The act of Congress does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. It prescribes the amount of ventilation to be not less than 55 cubic feet per second; it prescribes the machinery to be adequate to force that amount of air through the mine to the face of every working place. Nor does it allow standing gas. It prescribes, on the contrary, that the mine shall be kept clear of standing gas. This is an imperative duty, and the consequence of neglecting it cannot be excused because some workman may disregard instructions. Congress has prescribed that duty, and it cannot be omitted and the lives of the miners committed to the chance that the care or duty of someone else will counteract the neglect and disregard of the legislative mandate.

But, aside from the statute, it is very disputable if the instructions were correct. It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master has been held to be liable. *Clark v. Soule*, 137 Mass. 380; *Cowan v. Chicago, M. & St. P. R. Co.* 80 Wis. 284, 50 N. W. 180; *Sherman v. Menominee River Lumber Co.* 72 Wis. 122, 1 L. R. A. 173, 39 N. W. 365. See also *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Atchison, T. & S. F. R. Co. v. Reesman*, 19 U. S. App. 596, 60 Fed. Rep. 370, 9 C. C. A. 20, 23 L. R. A. 768; *Sommer v. Carbon Hill Coal Co.* 59 U. S. App. 519, 89 Fed. Rep. 54, 32 C. C. A. 156; *Flike v. Boston & A. R. Co.* 53 N. Y. 550, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; **Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493. [421]

This principle was stated in the general charge of the court, but it was materially modified in the application, and not at all considered in giving the instructions requested by the defendant.

No exceptions, however, were taken to any portion of the general charge of the court, and no question arising thereon is open to our review on this writ of error. But as we remand the case for a new trial on account of the errors which we have pointed out irrespective of the general charge, we deem it best to say that we must not be understood as affirming anything contained in instruc-

tions numbered 11 and 12, or any other instruction which conflicts with the principles announced in *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777.

We do not intend to express an opinion as to the facts of the case, or of any fact, or of any of the theories of the explosion. We only mean to decide that on the issues made and on the evidence, and regarding the provisions of the act of Congress, the instructions given by the trial court to the jury were erroneous.

The judgment of the Supreme Court of the Territory is reversed, and the case remanded, with instructions to reverse the judgment of the District Court and direct a new trial.

Ex parte: In the Matter of W. P. CONNAWAY, Receiver of the Moscow National Bank of Moscow, Idaho, *Petitioner*.

(See S. C. Reporter's ed. 421-435.)

Mandamus—directing court to bring in a party—death of defendant before service of process—bringing in executor under U. S. Rev. Stat. § 955.

1. Mandamus is the proper remedy to compel a court to bring in a party to an action, when it has erroneously declined to make him a party on the ground that it has no jurisdiction to do so.
2. An executor or administrator of a defendant who dies after the filing of a complaint, which is declared by statute to constitute the commencement of the action, may be made a party by scire facias under U. S. Rev. Stat. § 955, although such defendant dies before summons is served upon him,—especially if there is another defendant in the case, against whom the cause of action survives.

[No. 9, Original.]

Submitted April 9, 1900. Decided May 28, 1900.

PETITION for writ of Mandamus to compel the Circuit Court of the United States for the Ninth Circuit and District of California to take jurisdiction and proceed against a certain party as executor. *Rule for mandamus made absolute.*

The facts are stated in the opinion.

Mr. W. L. Hillyer submitted the cause for petitioner. Messrs. Curtis Hillyer and S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493.

The order setting aside the order of substitution and service of the summons not being a final judgment, no writ of error could be taken thereon, and plaintiff in the action below is compelled to seek his remedy by application to this court for a writ of mandamus.

NOTE.—As to mandamus to inferior tribunal—see State *ex rel.* Bayha v. Kansas City Ct. of Appeals (Mo.) 3 L. R. A. 476, and note.

As to when mandamus is the proper remedy, and when not—see notes to United States *ex rel.* International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263.

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Davis & R. Bldg. & Mfg. Co. v. Barber, 18 U. S. App. 476, 60 Fed. Rep. 465, 9 C. C. A. 79; *Baltimore & O. R. Co. v. Myers*, 18 U. S. App. 569, 62 Fed. Rep. 367, 10 C. C. A. 485; *Re Mudsill Min. Co.* 31 U. S. App. 112, 65 Fed. Rep. 647, 13 C. C. A. 77; *Re Iron County*, 37 U. S. App. 622, 71 Fed. Rep. 768, 18 C. C. A. 314; *Cabot v. McMaster*, 24 U. S. App. 571, 65 Fed. Rep. 533, 13 C. C. A. 39; *The Alliance*, 44 U. S. App. 52, 70 Fed. Rep. 273, 17 C. C. A. 124; *Carson v. Powers*, 52 U. S. App. 622, 86 Fed. Rep. 202, 29 C. C. A. 660; *Chicago, St. P. M. & O. R. Co. v. Roberts*, 141 U. S. 690, 35 L. ed. 905, 12 Sup. Ct. Rep. 123.

Mandamus is the proper proceeding to compel a tribunal to take jurisdiction of a matter when, believing that it has no jurisdiction, it has refused to do so.

Ex parte Russell, 13 Wall. 664, 20 L. ed. 632; *Chicago & A. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Harrington v. Holler*, 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *Parker, Petitioner*, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Beguhl v. Swan*, 39 Cal. 411; *Temple v. Los Angeles County Super. Ct.* 70 Cal. 211, 11 Pac. 699; *Stanquist v. Hebbard*, 122 Cal. 268, 54 Pac. 841; *People ex rel. Miller v. Bay County Circuit Ct. Judge*, 41 Mich. 327, 2 N. W. 26; *People ex rel. Robison v. Swift*, 59 Mich. 529, 26 N. W. 694; *Queen v. Goodrich*, 19 L. J. Q. B. N. S. 414.

It is regular and proper to suggest the death of a party in any court, at any stage of the proceedings.

Judson v. Love, 35 Cal. 463; *Taylor v. Western P. R. Co.* 45 Cal. 323; *Campbell v. West*, 93 Cal. 653, 29 Pac. 219.

Service of process need not be made on a person in his lifetime, in order that the action may be revived against his representatives.

Lavell v. Frost, 16 Mont. 93, 40 Pac. 146; *Gordon v. Tyler*, 53 Mich. 630, 19 N. W. 560, 20 N. W. 70; *Stevenson v. Kurtz*, 98 Mich. 493, 57 N. W. 580; *Lyle v. Bradford*, 7 T. B. Mon. 112; *Hubbard v. Johnson*, 77 Me. 139; *Heard v. March*, 12 Cush. 580.

Mr. William H. Anderson submitted the cause for respondent. Mr. Jesse W. Lienthal was with him on the brief.

Mandamus is not the proper remedy for every order of an inferior court in the progress of a cause pending before it, which rightly or erroneously retards the progress of that cause to the inconvenience or detriment of the plaintiff.

American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758; *Bank of Columbia v. Sweeney*, 1 Pet. 567, 7 L. ed. 265; *Life & F. Ins. Co. v. Adams*, 9 Pet. 573, 9 L. ed. 234; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221.

As the cause is still retained by the circuit court (never having been dismissed), it may go to final judgment or decree, and

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the reason assigned for mandamus in the case of dismissal does not exist.

Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176.

This court might, by mandamus, have compelled the circuit court to pass upon the motion in question, had it refused to do so, but not to decide the motion in a particular way.

Ex parte Burtis, 103 U. S. 238, 26 L. ed. 392; *Ex parte Many*, 14 How. 24, 14 L. ed. 311.

The death of a party against whom an action is pending, before jurisdiction of him is acquired, does not open a short cut to acquire jurisdiction of his representative by process other and less than that required to bring him into court in the first instance.

Hyde v. Leavitt, 2 Tyler (Vt.) 170.

The circuit court was without jurisdiction to make the order of substitution which was subsequently set aside.

White v. Johnson, 27 Or. 282, 40 Pac. 511; *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816; *United States v. Fields*, 4 Blatchf. 326, Fed. Cas. No. 15,089, and authorities cited.

[422] *Mr. Justice McKenna delivered the opinion of the court:

This is a petition for a writ of mandamus to the judges of the circuit court of the United States for the ninth circuit and district of California, which substantially shows as follows:

The Moscow National Bank of Moscow, Idaho, was a corporation organized under the national banking laws of the United States, with its place of business at Moscow, Idaho.

The bank, becoming insolvent, was closed by order of the Comptroller of the Currency of the United States, and taken control of by that officer.

On January 3, 1898, he appointed petitioner receiver of the bank's assets.

[423] *On June 14, 1897, the Comptroller made an assessment of \$100 on each share of the capital stock of the bank, and ordered the stockholders to pay the same on or before July 14, 1897. O. P. Overton and C. A. Hoffer were owners of one hundred shares, and by the assessment became indebted to petitioner in the sum of \$10,000, with interest from June 14, 1897.

On March 28, 1898, petitioner commenced an action in that court against said Overton and Hoffer for the said sum of \$10,000, and caused a summons to be issued, directed to them as defendants, and placed it in the hands of the marshal for service.

Service was made in the usual form by the marshal on Hoffer personally, in Santa Rosa, in said district.

As to Overton, the marshal made the following return on the 5th of April, 1898: "I hereby certify that I was unable to make personal service on O. P. Overton, as he was very sick, and was not permitted to see anyone, under instructions of his physicians."

On April 13, 1898, O. P. Overton died without service having been made upon him. 178 U. S.

He made a last will and testament, appointing John P. Overton executor thereof, which was duly probated, and letters testamentary were duly issued.

On March 15, 1899, these facts were brought to the notice of the circuit court, and petitioner moved for and obtained an order directing that a writ of scire facias issue to said John P. Overton, which concluded as follows: "You are hereby commanded within twenty days after the service upon you of this writ to appear and become a party to this suit, according to the provisions of § 955 of the Revised Statutes of the United States, or show cause why you should not, otherwise judgment may be taken against the estate of said deceased in like manner as if you had voluntarily made yourself a party."

The writ was duly served and a motion was noticed for April 17, 1899, for an order setting aside the scire facias "and the attempted service thereof."

The ground of the motion was that "Overton died before the *service upon him of any[424] process, that no process was ever served upon him herein, and that this action was never pending against him; and upon such other grounds as to the court may seem proper."

The motion was granted, and the petitioner allowed an exception.

On June 12, 1899, upon the suggestion of the death of defendant O. P. Overton, the court made an order substituting John P. Overton as executor of the last will and testament of O. P. Overton, deceased, as defendant, and ordered an alias summons to issue to him as executor.

The summons was duly served, and on August 11, 1899, he, by his attorneys, filed and served a notice of motion to set aside the order of substitution and quash the alias summons, on the ground "that said O. P. Overton died before the service upon him of any process herein; that said alleged alias summons is not in the form required by law, and upon such other grounds as to the court may seem proper."

The matter coming on to be heard on November 20, 1899, and having been submitted, it was granted on December 4, 1899, and petitioner was allowed an exception.

The petition for a writ of mandamus alleges that the ground upon which said court set aside the service of summons was that the action had abated by the death of O. P. Overton before the service of process upon him; and prays that a writ of mandamus be issued to the judges of the circuit court of the United States aforesaid to take jurisdiction and proceed against John P. Overton as executor as aforesaid.

A rule to show cause was granted. The return thereto by the learned judge of the circuit court admits that the allegations of the petition as to the proceedings had in the circuit court are true, except that the court "has not refused to take jurisdiction of the action therein referred to, but only of the person of John P. Overton, executor of the last will and testament of O. P. Overton, the de-

ceased defendant in said action." And the return alleged that the grounds upon which the court set aside the service of the alias summons were stated in the opinion of the court. 98 Fed. Rep. 574.

[425] *The basis of the opinion is that the court had acquired no jurisdiction over the deceased defendant O. P. Overton, and could acquire none over his executor, John P. Overton.

1. It is objected that mandamus is not the proper remedy. Counsel say: "This is not a case in which the court refuses to entertain jurisdiction. The action has not been dismissed. It is still pending in the circuit court, and may, and doubtless will, proceed to final judgment." But final judgment against whom? Not against O. P. Overton, for he is deceased. Not against John P. Overton or the estate he represents, because he has not been made a party to the action, and judgment against Hoffer alone may not be all of petitioners' remedy. If the court's ruling is erroneous, how can it be redressed by an appeal from the judgment, Overton not being a party to the action? The court declined to make him a party on the ground that it had no jurisdiction to do so. If it has jurisdiction, mandamus is the proper remedy. *Re Grossmayer*, 177 U. S. 48, ante, 665, 20 Sup. Ct. Rep. 535. Whether the court had jurisdiction we will proceed to consider.

2. The return of the rule to show cause is confined to the action of the circuit court on the alias summons. But its action for setting aside the writ of scire facias is also here for review.

Section 955 of the Revised Statutes of the United States provides as follows:

"When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause, and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is pending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if [426] *the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court."

It is preliminarily urged against this section that it "applies only where an action is 'brought in a Federal court, and is based upon some act of Congress, or arises under some rule of general law recognized in the courts of the Union;' that in such an action 'the question of revival will depend upon the

statutes of the United States relating to the subject;' but that otherwise it depends upon the laws of the state in which it is commenced." *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387, are cited.

In those cases the controversy was over the survival of the action; in the pending case that is not the controversy. It is not contended that the action does not survive. It is only contended that personal jurisdiction was not obtained of O. P. Overton before his death, and that, therefore, his executor, John P. Overton, could not be brought into the action, either by scire facias, under § 955, Rev. Stat., or by motion suggesting the death of his testate and by alias summons.

In *Schreiber v. Sharpless* [110 U. S. 76, 28 L. ed. 65, 3 Sup. Ct. Rep. 423], cited in *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533, it was decided that "whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." And that a cause of action on a penal statute of the United States did not survive, even though causes of action on state penal statutes could be prosecuted after the death of the offender.

In *Martin v. Baltimore & O. R. Co.*, however, the action was for personal injuries, and it was said: "Whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator was appointed. Rev. Stat. § 721; *Henshaw v. Miller*, 17 How. 212, 15 L. ed. 222. The mode of bringing in the representative, if the cause of action survived, would also be governed by the law of the state, except so far as Congress has regulated the subject." It was determined upon consideration that the cause of action did not survive.

*In *Baltimore & O. R. Co. v. Joy*, the question [427] was presented in an unique aspect. The action was for personal injuries, which occurred in Indiana, and suit was brought in Ohio. By the laws of the former state the action did not survive; by the laws of the latter, the cause of action did survive. If suit had not been brought before the death of the person injured, the cause of action abated in both states.

The cause was removed to the circuit court of the United States, and it was held that the cause of action survived the death of the person injured, and could be revived in the name of his personal representative. We said: "We think that the right to revive attached, under the local law, when Hervey [the person injured] brought his action in the state court. It was a right of substantial value, and became inseparably connected with the cause of action, so far as the laws of Ohio were concerned." And it was denied that the right to revive was lost by the removal of the case to the circuit court of the United States, or affected by § 955, Rev. Stat. We said further: "Whether a pending action may be revived upon the

death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a Federal court, and is based upon some act of Congress, or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject. But if at the time an action is brought in a state court the statutes of that state allow a revivor of it on the death of the plaintiff before final judgment,—even where the right to sue is lost when death occurs before any suit is brought,—then we have a case not distinctly or necessarily covered by § 955."

By § 955 an executor or administrator of "plaintiff or petitioner or defendant in any suit in any court of the United States," may be made a party by "scire facias served from the office of the clerk of the court where the suit is pending."

[428] When can a suit be said to be "in any court of the United States," or said to be "pending" therein? Is not the answer inevitable, from the time the suit is commenced? It cannot be *pending until it is commenced, and if it continue until the death of the "plaintiff or petitioner or defendant," the requirements of the section seem to be satisfied.

Another inquiry becomes necessary—When is a suit commenced? For an answer we must go to the California statutes. By § 405 of the Code of Civil Procedure, it is provided: "Civil actions in the courts of this state are commenced by filing a complaint." By § 406 summons may be issued at any time within a year, and if necessary to different counties. The defendant may appear, however, at any time within a year. The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case. The jurisdiction would undoubtedly continue for a year, and probably afterwards, and a motion to dismiss would probably be necessary to get rid of the case. *Dupuy v. Shear*, 29 Cal. 242; *Reynolds v. Page*, 35 Cal. 300.

3. It is said, however, that jurisdiction of the person of O. P. Overton had not been obtained prior to his death, and this is undoubtedly true. Service of summons was necessary for that. It was so decided in *Dupuy v. Shear*, 29 Cal. 242; and § 416 of the Code of Civil Procedure provides: "From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

It is claimed that this section precludes jurisdiction of "the subsequent proceedings" in the action, unless the summons was
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served, or, to quote counsel, "the circuit court in this instance lacked 'jurisdiction' and 'control' of the 'proceedings,' so far as the defendant Overton was concerned. It was therefore absolutely powerless to lay its hands upon the deceased defendant's representative." The contention is claimed to be supported by the construction of similar statutes in Oregon and Minnesota made by their courts. *White v. Johnson*, 27 Or. 282, 40 Pac. 511; *and *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816. The latter case sustains the contention, and proceeds to the extent of denying the court any jurisdiction to proceed further in the action. *White v. Johnson* does not go so far. It cites and follows the Minnesota case to the extent of holding "that the court is without power or authority to take any action looking to the rendition of a personal judgment merely without first obtaining jurisdiction through the service of a summons upon the defendant." But the court did not decide that it had no control of subsequent proceedings, but reduced the question to one of procedure and the necessity of service of the summons before a personal judgment could be taken. The court admitted that the statute provided that no action abated upon the death of the party, and provided that the court might allow the action to be continued on motion, and that such was the practice in New York and in California under similar statutes, and then said: "The statute provides that the court may, at any time within one year after the death of a party, on motion, allow the action to be continued against the personal representative, but no provision is made in a case of this kind as to the manner of bringing in the substituted party. The court could, therefore, adopt any reasonable procedure that might seem proper, but the service of a valid summons could not be dispensed with. Probably the better practice would have been for the lower court to have required the plaintiff to file a supplemental complaint in the action, showing the death of defendant and the appointment of an executrix, and thereupon to issue an alias summons containing the title of the action after substitution made, and have the same directed to the said Cordelia Johnson. A service of such a summons, together with a copy of the complaint, would undoubtedly suffice to require her appearance, in default of which judgment might have been entered against her. Such a practice and procedure seems reasonable, and well calculated to effect the desired result in an orderly manner." The case was reversed, and sent back for such other proceedings as might be deemed advisable.

It is certain that this case is not authority for the contention that the court had no jurisdiction or control over subsequent *proceedings. It asserted such jurisdiction, and held that in its exercise "the court could therefore adopt any reasonable procedure that might seem proper," provided a summons was served.

But even if *White v. Johnson* and *Auerbach v. Maynard* concurred in holding that

upon the death of a defendant the court could not proceed further in the action, we should, nevertheless, be unable to assent to the doctrine. At common law all actions abated by the death of parties before judgment, and to prevent the application and effect of that principle, § 955, preceded by § 31 of the judiciary act of 1789, was enacted, and provisions like that of § 385 of the Code of Civil Procedure of California were also enacted. The section is as follows:

"Sec. 385. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

This section does not make distinctions dependent upon the stages of the action or proceeding. The action or proceeding only needs to exist, and to distinguish its degrees of progress is certainly to add to the letter of the section.

We are therefore disposed to the construction of a similar provision in the Code of Montana, made by the supreme court of Montana in *Lavell v. Frost*, 16 Mont. 93, 40 Pac. 146, not only because the construction is in consonance with the purpose of the statute, but accurate as to its letter.

The action was upon a bill of exchange. Frost, the defendant's intestate, died after the complaint was filed, and the defendant, his administratrix, was substituted in his stead.

[431] The court said: "It does not appear whether Frost was served with summons before his death, but the action was commenced before his death. An action is commenced by filing a *complaint. (Code Civ. Proc. § 66.) 'An action or defense shall not abate by the death of a party, but shall survive and be maintained by his representatives.' (Id. § 22.) . . . So far as we are of opinion, there was no error in the case."

The procedure in California in case of the death of the defendant before service has not been ruled upon, but in case death occur after service, it was said in *Taylor v. Western P. R. Co.* 45 Cal. at page 337: "It has been the uniform practice in this state from its organization, so far as we are advised, to permit the substitution to be made, or a suggestion of the death of the former party and satisfactory proof, on an *ex parte* motion, of the appointment and qualification of the administrator."

The same ruling was made in *Campbell v. West*, 93 Cal. 653, 29 Pac. 219. And the practice was emphasized by contrast with that in case of a transfer of interest otherwise than by death. In such case the court said when the proceedings were set in mo-

tion by the plaintiff or the person to whom the transfer is made, or by the defendant if for any reason he desires to avail himself of such transfer for any purpose, it must be made by supplemental complaint or answer.

We see no reason why the representative of a deceased party should not be brought in by the same procedure, whether the death of a party occur before or after service, and the language of the statute so expresses. The court would undoubtedly take care that ample notice was given, and nothing more can be necessary.

The cases in equity cited by petitioner contain some pertinent remarks as to when a suit may be considered as having been commenced, and in what stage of the suit it can be revived against the representatives of a deceased party. The cases cannot be said to be inapplicable to the statutes of states which, like California, have abolished the difference between legal and equitable forms of action, and which, under one form of action and the method of procedure of the state, intend to give, not less, but greater, remedial facilities, and, while accommodating the relief to the circumstances of the case, expedite the relief by freeing it from the delays and expense of the old procedure, *both in common law and equity, and to ob-[432]tain the good in both by a simpler practice.

In *Gordon v. Tyler*, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70, the original defendants not having been served before their deaths, the court said, in passing on a motion to set aside the service and dismiss the bill: "The basis of this objection is that until a defendant has appeared the suit cannot be treated as having actually been commenced against him; so that if he dies before appearance it is as if he had never been in the case, and an original bill is necessary to reach his representatives. The citation from Daniell's Chancery Practice seems to favor that idea. But the authorities and practice have uniformly held that the filing of a bill is the commencement of suit for most purposes, and we can see no reason for adopting any exceptional rule in such cases as the present. An affidavit can always be made in a cause as soon as the bill is filed, and sometimes becomes necessary to support an order for the appearance of an absentee. A notice of *lis pendens* may always be filed at once, and it would lead to very serious mischief if a failure to serve process at once on a defendant could nullify the effect of such filing. For many purposes it is not always important whether a bill is a bill of revivor or an original bill in the nature of one. But for some purposes the difference is very material, and rights may be seriously jeopardized by holding a failure to get a defendant in before his death equivalent to a failure to implead him. The evident object of our statute is to hasten the proceedings by allowing a petition to stand in lieu of a bill of revivor, and we do not see any good reason for holding that a suit, if regarded as commenced for any substantial purpose, should not be regarded as commenced, so as to save all rights as against the estates of

a deceased defendant, appearing or not appearing. No one's rights are injured by so holding, and important rights may be jeopardized by holding otherwise."

This ruling was reaffirmed in *Stevenson v. Kurtz*, 98 Mich. 493, 57 N. W. 580.

[433] In Maine, an executor of the deceased defendant may be brought in by bill of revivor. In declaring the practice the court said, in *Hubbard v. Johnson*, 77 Me. 139: "The general *rule in equity is that, strictly speaking, there is no cause in court as against a defendant until his appearance. 2 Dan. Ch. 5th ed. 1523. But in this state, since a bill may be inserted in a writ of attachment (Rev. Stat. chap. 77, § 11), as this was, and a suit is commenced when the writ is actually made with intention of service (Rev. Stat. chap. 81, § 95), an executor may be brought in by a revivor, although no service has been made on the testator. *Heard v. March*, 12 Cush. 580."

The same ruling was made in Massachusetts in *Heard v. March*, and, while there was no opinion of the court, from the argument of counsel the ruling was apparently based on the same grounds as in *Hubbard v. Johnson*, 77 Me. 139, to wit, that an action was commenced on the day of the date of the writ, that being the process in chancery.

It was said in *Lyle v. Bradford*, 7 T. B. Mon. 116: "That the suing out process has at all times been held the commencement of an action or suit, and that as to the person against whom process has been issued there must necessarily be a pending suit from the date of the process, so as to abate and require a revival upon his death."

There is nothing in *Lewis v. Outlaw*, 1 Overt. 140, which opposes these views. Indeed, it affirms them. The court said: "Agreeably to the practice in the courts of law in England, all suits abated by the death of either party; nor could they be revived by scire facias." The court then proceeded to say that the practice of chancery in England was upon the death of either plaintiff or defendant to file a bill of revivor against the representatives of the deceased, and, applying this practice to Kentucky under a statute which provided no abatement should occur by the death of either the plaintiff or defendant, but might be "proceeded upon by application of the heirs, executors, administrators, or assigns of either party," said: "It seems clear that all revivals, to comport with the principles of reason and the English practice, should be made by causing appropriate process to issue so as to make the representatives of the deceased parties in a legal manner. To revive a dormant judgment a scire facias is necessary. To revive in chancery the authorities show that a bill must be filed, and process issued thereon, to [434] *which the representatives may make such answer as the nature of the case may require."

Hyde v. Leavitt, 2 Tyler (Vt.) 170, cited by respondent's counsel, must be considered as peculiar to the practice in Vermont.

The statute of the state was very similar to § 955 of the Revised Statutes of the United States.

ed States, supra, and it was held, reversing the lower court, that notwithstanding Griffin, the deceased, had been personally served with the writ, as it was made returnable June term, 1801, and as Griffin died before essoin day, his administrator could not be made a party under the statute. The ground of the decision seemed to be that the suit could not be considered as *pending* until it was entered in court. The contrary was held in *Clindenin v. Allen*, 4 N. H. 385. The same contention was made which was made in *Hyde v. Leavitt*. The court decided that, "as the term '*pending*' means nothing more than '*remaining undecided*,' an action may, without doubt, be considered as pending from the commencement." And we may say that *Hyde v. Leavitt* did not long remain law in Vermont. At their October sessions, 1804, the general assembly amended the statute to make the commencement of the suit, in case of the death of either party, the same as to rights for and against executors as existed in a suit which was "*pending*," using this word, no doubt, to meet the ruling of the court.

However, the discussion to the extent we have carried it may not be necessary. Section 955, Rev. Stat., determines when the representative of a deceased party may be brought into an action, and that scire facias is the procedure whereby he may be brought in. And it is not confined to a case where a judgment has been obtained. It is a process of notice to the executor or administrator to come in, and, if he should not come in, gives jurisdiction to the court to "render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party." This is the language of the section. If doubt there can be of its construction, it is removed by the case of *Green v. Watkins*, 6 Wheat. 260, 5 L. ed. 256, and *Macker v. Thomas*, 7 Wheat. 530, 5 L. ed. 515.

*In *Green v. Watkins*, the court, passing on [435] § 31 of the judiciary act of 1789, of which §§ 955 and 956, Rev. Stat., are reproductions, pointed out the distinction between the death of parties before judgment and after judgment, and said: "In the former case all personal actions by the common law abate; and it required the aid of some statute like that of the 31st section of the judiciary act of 1789, chap. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived."

The enactment of the section was to provide against the abatement of actions which would otherwise abate at common law, and we cannot confine its remedy to the cases where death occurs after judgment. In other words, confine its remedy to the cases where the common law already afforded a remedy. See also *M'Coul v. Lekamp*, 2 Wheat. 111, 4 L. ed. 197, and *Hyde v. Leavitt*, 2 Tyler (Vt.) 170.

Except when considering the objection made here to the remedy by mandamus, we have treated the case as if O. P. Overton, the

deceased party, was the sole defendant, and that the action necessarily abated unless there was a saving statute. But he was not the sole defendant, and the action did not abate at common law if the cause of action survived against the other defendant. We assume (the record does not enable us to determine absolutely) that it did, and the reason for bringing in the representatives of the deceased defendant is the stronger.

We think, therefore, that the Circuit Court erred in setting aside the scire facias and the rule for mandamus is made absolute.

[436]*C. W. SMITH, as Receiver of the Atlantic & Pacific Railway Company, *Plff. in Err.*,
v.

TRUMAN REEVES, as Treasurer of the State of California.

(See S. C. Reporter's ed. 436-449.)

Action against state—consent of state to be sued in its own courts—suit by Federal corporation.

1. An action against a state treasurer in his official capacity, which is in effect to compel the state, through him, to perform its promise to return to taxpayers money that may be adjudged to have been taken under an illegal assessment, is in substance an action against the state itself, within the meaning of U. S. Const. 11th Amend.
2. The consent of the state to be sued, which is given by Cal. Pol. Code, § 3669, providing that the state treasurer may demand trial in the superior court of Sacramento county, must be deemed to be limited to actions in the state court, and not to authorize such action in a Federal court.
3. A state has a right to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments a condition that the suit be brought in one of its own courts.
4. An action against a state by a corporation created by Congress is not authorized by U. S. Const. art. 3, § 2, as a case arising under the Constitution and laws of the United States, although the 11th Amendment in terms prohibits actions against a state "by citizens of another state, or by citizens or subjects of any foreign state."

[No. 242.]

Argued April 16, 1900. Decided May 14, 1900.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment of dismissal in an action against a state treasurer. *Affirmed.*

See same case below, *Smith v. Rackliffe*,

NOTE.—As to suits against states—see note to *Hans v. Louisiana*, 33 L. ed. U. S. 842.

As to state immunity from suit—see *Murdock Parlor Grate Co. v. Com.* (Mass.) 8 L. R. A. 399, and note; *Carr v. State ex rel. Jean Baptiste Maurice Du Coetlosquet* (Ind.) 11 L. R. A. 370, and note.

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59 U. S. App. 428, 87 Fed. Rep. 964, 31 C. C. A. 328.

The facts are stated in the opinion.

Mr. C. N. Stern argued the cause and filed a brief for plaintiff in error:

A corporation created by act of Congress has the right to assert any cause of action, where the amount in value exceeds \$2,000, in any circuit court of the United States, against any party, regardless of citizenship of the parties to such action.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; *Pacific Railroad Removal Cases*, 115 U. S. 1, sub nom. *Union P. R. Co. v. Myers*, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Southern Kansas R. Co. v. Briscoe*, 144 U. S. 133, 36 L. ed. 377, 12 Sup. Ct. Rep. 538.

The Atlantic & Pacific Railroad Company having the right to invoke the jurisdiction of the Federal courts, the receivers appointed to take possession of its property and rights in action were invested with the right to invoke the same jurisdiction.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

These receivers, having been appointed by the circuit court of the United States for the northern district of California to take possession of all the property and rights in action within that district, had the right to bring any suit for the collection of the assets of the Atlantic & Pacific Railroad Company in that court which appointed them, regardless of citizenship, amount, or anything else.

Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018.

The grant to the Federal courts of a jurisdiction "concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity," prevents any state from confining the right, created by statute or otherwise, to bring a suit of a civil nature, at common law or in equity, in the state courts alone, where a party having the right to bring such suit can invoke the aid of a Federal court.

Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; *Union Bank v. Vaiden*, 18 How. 503, 15 L. ed. 472; *Hyde v. Stone*, 20 How. 170, 15 L. ed. 874; *Cowles v. Mercer County*, 7 Wall. 118, sub nom. *Mercer County Supers. v. Cowles*, 19 L. ed. 86; *Re Broderick*, 21 Wall. 503, 22 L. ed. 599; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Cowley v. Northern P. R. Co.*, 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep.

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418; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Thompson v. Searey County*, 12 U. S. App. 618, 57 Fed. Rep. 1030, 6 C. C. A. 674; *Edwards v. Hill*, 19 U. S. App. 493, 59 Fed. Rep. 723, 8 C. C. A. 233.

A suit against the state treasurer in his official capacity is in fact a suit against a statutory trustee of funds, and in such capacity he does not represent the state in an action like the present,—one to recover a sum of money which he, as state treasurer, had neither the right to collect, nor to hold after collection for anyone but the owner.

Ex parte Tyler, 149 U. S. 165, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Immunity from suit, belonging to a state, which is protected by the Constitution, is a personal privilege which it may waive at pleasure.

Beers v. Arkansas, 20 How. 527, 15 L. ed. 991; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

While it is true that a state when consenting to be sued may base such consent upon such conditions as it may choose to make, and such conditions must be observed, yet it cannot make, as one of such conditions, a condition that it can be sued only in its own courts upon a right of action given to all.

Chicago & N. W. R. Co. v. Whitton, 13 Wall. 271, 20 L. ed. 571; *Smyth v. Ames*, 169 U. S. 476, 42 L. ed. 837, 18 Sup. Ct. Rep. 418.

Messrs. William M. Abbott and Tirey L. Ford argued the cause and, with *Mr. George A. Sturtevant*, filed a brief for defendant in error:

Where the record discloses the fact that the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the state, the state is the real party in interest and the party against whom the relief is sought.

Georgia v. Madrazo, 1 Pet. 110, 7 L. ed. 73; *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele*, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; *North Carolina v. Temple*, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; *United States v. Beebe*, 127 U. S. 344, 32 L. ed. 124, 8 Sup. Ct. Rep. 1083; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 388, 38 L. ed. 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

It has been uniformly held that where an officer of a state has been sued, in his representative capacity, to enforce an obligation alleged to be due from the state, the courts of the United States, under the 11th Amendment, have no jurisdiction to hear or

determine the cause without the consent of the state.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele*, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 388, 38 L. ed. 1020, 14 Sup. Ct. Rep. 1047; *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

The state cannot, without its consent, be sued in a circuit court of the United States, even though the case is one which arises under the Constitution and laws of the United States.

Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *North Carolina v. Temple*, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; *United States v. Texas*, 143 U. S. 644, 36 L. ed. 292, 12 Sup. Ct. Rep. 488.

The state has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued, after an action has been commenced.

South & North Ala. R. Co. v. Alabama, 101 U. S. 832, 25 L. ed. 973; *Re Ayers*, 123 U. S. 505, 31 L. ed. 229, 8 Sup. Ct. Rep. 164; *Hans v. Louisiana*, 134 U. S. 18, 33 L. ed. 848, 10 Sup. Ct. Rep. 504; *Ball v. Halsell*, 161 U. S. 83, 40 L. ed. 625, 16 Sup. Ct. Rep. 554.

The conditions imposed by Cal. Pol. Code, § 3669, are wholly incompatible with a consent to be sued in the United States courts, and could have no application in such court.

Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 133, 35 L. ed. 963, 12 Sup. Ct. Rep. 181; *Fishburn v. Chicago, M. & St. P. R. Co.* 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8; *Missouri P. R. Co. v. Chicago & A. R. Co.* 132 U. S. 191, 33 L. ed. 309, 10 Sup. Ct. Rep. 65; *Hudson v. Parker*, 156 U. S. 281, 39 L. ed. 425, 15 Sup. Ct. Rep. 450; *Deland v. Platte County*, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82; *Chatcaugay Ore & Iron Co., Petitioner*, 128 U. S. 545, 32 L. ed. 509, 9 Sup. Ct. Rep. 150.

*Mr. Justice **Harlan** delivered the opinion of the court: [436]

This action was brought in the circuit court of the United States for the northern district of California by the receivers of the Atlantic & Pacific Railroad Company, a corporation created under an act of Congress approved July 27, 1866, *with authority to [437] construct and maintain a railroad and telegraph line beginning at or near Springfield, Missouri, thence by a specified route to the Pacific Ocean. 14 Stat. at L. 292, chap. 278.

The original defendant was **J. R. McDonald**, as treasurer of the state of California. He was succeeded in office by **Levi Rackliffe**,

W. S. Green, and Truman Reeves in the order named.

The relief sought was a judgment against the defendant "*as treasurer* of the state of California," for the sum of \$2,272.80 with interest thereon from the date of the payment of that sum or any portion thereof to the state treasurer, together with the costs of the action.

Before bringing suit the receivers of the railroad company gave written notice to the comptroller of the state that they intended to bring an action against the state treasurer to recover from him the amount of the "taxes paid by the Atlantic & Pacific Railroad Company, and by the receiver for it, to the state treasurer as and for taxes assessed against the Atlantic & Pacific Railroad Company in the state of California for the year 1893, by the state board of equalization."

The action was brought under § 3669 of the Political Code of California, which is as follows:

"Each corporation, person, or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the Comptroller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent added, if to be added, on or before the first Monday in June, and the filing of notice with the Comptroller of an intention to begin an action, may, not later than the first Monday in June, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint [438] and of the summons *must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers, he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the Comptroller, he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected; and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the Comptroller may demand and receive from the county, or city and county inter-

ested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in June of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

The state treasurer, represented by the attorney general of the state, demurred to the complaint upon various grounds affecting the merits of the case, and also moved to dismiss the case upon the ground that the circuit court had no jurisdiction of the defendant or of the action.

The demurrer was sustained with leave to amend, and the motion to dismiss was denied. *Reinhart v. McDonald*, 76 Fed. Rep. 403.

An amended complaint was filed, but a demurrer to it was sustained, with leave to amend. No further amendment having been filed, the action was dismissed by the circuit court. *Smith v. Rackliffe*, 83 Fed. Rep. 983. That judgment was affirmed in the circuit court of appeals. 59 U. S. App. 428, 87 Fed. Rep. 964, 31 C. C. A. 328.

Is this suit to be regarded as one against the state of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, *the suit is against one of [439] its officers *as treasurer*; the relief sought is a judgment against that officer *in his official capacity*; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770, and authorities there cited. In the present case the action is not to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the state, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case, in some material aspects, is like that of *Louisiana v. Jumel*, 107 U. S. 711, 726-728, 27 L. ed. 448, 453, 454, 2 Sup. Ct. Rep. 128, 140-142. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations, and directed its officers not to pay. This court said: "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting [440] apart of this fund any more than *others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands. . . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself. *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699.

But it is contended that by the section of the Political Code of California above quoted the state has consented that its treasurer may be sued in respect of the matters specified in that section, and it is argued that this case comes within the decision in *Beers v. Arkansas*, 20 How. 527, 529, 15 L. ed. 991, 992, in which it was said to be an established principle of jurisprudence in all civilized nations that while the sovereign cannot be sued in its own courts or in any other without its consent and permission, a state "may, if 178 U. S.

it thinks proper, waive this privilege, and permit itself to be *made a defendant in a [441] suit by individuals or by another state." So, in *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. ed. 780, 785, 2 Sup. Ct. Rep. 878, 883: "The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states."

It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the state board of equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the comptroller, and the provision that the treasurer may at the time he demurs or answers "demand that the action be tried in the superior court of the county of Sacramento," indicates that the state contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a circuit court of the United States can take cognizance of an action of this character, the right given to the treasurer by the local statute to have the case tried in the superior court of Sacramento county would be of no value; for, as the jurisdiction and authority of a circuit court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it, and to proceed to final decree, nor could it, merely in obedience to the laws of the state, transfer it to a state court upon the demand of the state treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

In *Beers v. Arkansas*, above cited, it was further said: "As this permission [to be sued] is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms *and conditions on which it [442] consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its general assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would

have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the state consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the state violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the state consented to be a party defendant."

In support of the broad proposition that the state could not restrict its consent to be sued to actions brought in its own courts, counsel refer to *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 286, 20 L. ed. 571, 576; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 391, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, 1052; and *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418, 422.

Chicago & N. W. R. Co. v. Whitton related to a statute of Wisconsin, giving a right of action, in certain circumstances, where the death of a person was caused by [443] the wrongful act, neglect or default of another person or of a corporation, and which statute provided that the action should be brought in some court established under the Constitution and laws of the state. This court held that in all cases where a general right was thus conferred, "it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. . . . Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation."

Reagan v. Farmers' Loan & T. Co. was an action by a New York corporation against the railroad commissioners of Texas and others to enjoin the enforcement of certain railroad rates established by the statutes of Texas. This court said: "Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that,

whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts, to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts."

Smyth v. Ames was a suit in the circuit court of the United States against the members of the state board of transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that state for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the supreme court of Nebraska, such being the remedy provided by the statute there in question. That provision, it was contended, took from the circuit court of the United States its *equity [444] jurisdiction in respect of the rates prescribed, and required the dismissal of the bills. This court said: "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. *Broderick's Will*, 21 Wall. 503, 520, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599, 606; *Holland v. Challen*, 110 U. S. 15, 24, 28 L. ed. 52, 55, 3 Sup. Ct. Rep. 495; *Dick v. Foraker*, 155 U. S. 404, 415, 39 L. ed. 201, 205, 15 Sup. Ct. Rep. 124; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 330, 39 L. ed. 719, 720, 15 Sup. Ct. Rep. 650; *Rich v. Braxton*, 158 U. S. 375, 405, 39 L. ed. 1022, 1032, 15 Sup. Ct. Rep. 1006. But if the case in its essence be one cognizable in equity, the plaintiff,—the required value being in dispute,—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne v. Hook*, 7 Wall. 425, 430, 19 L. ed. 260, 261; *McConihay v. Wright*, 121 U. S. 201, 205, 30 L. ed. 932, 933, 7 Sup. Ct. Rep. 940. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state

courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 452; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127." In *Smyth v. Ames* the court distinctly reaffirmed what was said upon this point in *Reagan v. Farmers' Loan & T. Co.*

[445] These cases do not control the determination of the present question. The Whitton suit was wholly between private parties, and involved no question as to the state or the powers or acts of state officers. In the *Reagan* and *Smyth Cases* the relief sought was against the proposed action of state officers or *agents, and they were not in any sense suits against the state—the relief asked being protection against affirmative action about to be taken by state officers in hostility to the rights of the respective plaintiffs.

In the present case the suit is one to compel an officer of the state, by affirmative action on his part, to perform or comply with the promise of the state as defined in its Political Code, and therefore, as we have said, it is a suit against the state. Nothing heretofore said by this court justifies the contention that a state may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the state in any action brought against it with its consent may be reviewed or re-examined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege, or immunity secured to him and specially claimed under the Constitution or laws of the United States.

In our judgment it was competent for the state to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the state, and cannot be regarded as hostile to the general government, or as trenching upon any right granted or secured by the Constitution of the United States. If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege, or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the state.

[446] Again, it is contended that a state cannot claim exemption from suit by a corporation created by Congress—as was the *Atlantic & Pacific Railroad Company—for purposes authorized by the Constitution and laws of 178 U. S. U. S., Book 44.

the United States. This contention rests upon the ground that the Eleventh Amendment—which was passed because of the decision in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440—only declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States "by citizens of another state, or by citizens or subjects of any foreign state," and does not forbid an action against a state by a corporation created by Congress. It is further said that although the present case may not be embraced by the clause of § 2, article 3, of the Constitution, extending the judicial power of the United States to controversies "between a state and citizens of another state" and to controversies "between a state, or the citizens thereof, and foreign states, citizens, or subjects," this suit having been brought by a Federal corporation created for national purposes (*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 750, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740), is embraced by the clause of the same article extending the judicial power of the United States, in express words, "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a state in a circuit court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation.

This question is controlled by the principles announced in *Hans v. Louisiana*, 134 U. S. 1, 10, 14, 16-21, 33 L. ed. 842, 845, 846, 848, 849, 10 Sup. Ct. Rep. 504, 505, 507-509. That was an action brought in the circuit court of the United States by a citizen of Louisiana against that state. It was a case that could be said to have arisen under the Constitution of the United States; and the contention was that the Eleventh Amendment did not exclude from the jurisdiction of the circuit court a suit brought against a state by one of its own citizens, provided it was one arising under the Constitution or laws of the United States.

*In the opinion in that case, delivered by [447] Mr. Justice Bradley, reference was made to the question involved in *Chisholm v. Georgia*, and to what had been said by leading statesmen, prior to the adoption of the Constitution, in support of the general proposition that sovereignty could not, without its consent, be brought to the bar of any court at the suit of private parties or corporations. This court said: "That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this

court in several recent cases. *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the states themselves, and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the Amendment referred to."

Referring to certain observations made by Hamilton, Madison, and Marshall, in refutation of the doctrine that states were liable to suits, the court also said: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the Federal courts, whilst [448] the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face."

Again: "The suability of a state without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

... 'It may be accepted as a point of departure unquestioned,' said Mr. Justice Miller, in *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609, 'that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.' Undoubtedly a state may be sued by its own consent, as was the case in *Curran v. Ar-*

kansas, 15 How. 304, 309, 14 L. ed. 705, 708, and in *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. ed. 780, 784, 2 Sup. Ct. Rep. 878. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the Constitution of that state. But this court decided, in *Beers v. Arkansas*, 20 How. 527, 529, 15 L. ed. 991, 992, that the state could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of state laws impairing the obligation of a contract. . . . It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence."

The present plaintiffs, as did the plaintiffs in *Hans v. Louisiana*, base the argument in support of their right to sue the state in the circuit court of the United States upon a mere letter of the Constitution. We deem it unnecessary to repeat *or enlarge upon the [449] reasons given in *Hans v. Louisiana* why a suit brought against a state by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the state by a corporation created by Congress. Such a suit cannot, consistently with the Constitution, be brought within the cognizance of a circuit court of the United States without the consent of the state. It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a state by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a state without its consent.

The Circuit Court entertained jurisdiction of the cause and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction, but affirmed the order of dismissal upon the ground of want of jurisdiction in the latter court to take cognizance of such a case as is here presented. We approve the action of the Circuit Court of Appeals, and *its judgment is affirmed.*

GEORGE H. EARLE, Jr., Receiver of the Chestnut Street National Bank, *Plff. in Err.*,

v.

COMMONWEALTH OF PENNSYLVANIA, at the Suggestion and to the Use of the COMMONWEALTH TITLE, INSURANCE, & TRUST COMPANY, Trustee for Mary Rodgers under the Will of Benjamin Milnes, Deceased.

(See S. C. Reporter's ed. 449-456.)

National banks—attachment of, as guar-
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nishce, in state court—appointment of receiver—order for execution.

1. An attachment against a national bank as garnishee is not an attachment against the bank or its property nor a suit against it, within the meaning of U. S. Rev. Stat. § 5242, prohibiting suit against such bank in a state court, with a view to acquiring a preference over other creditors, after insolvency or in contemplation thereof.
2. The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the Comptroller of the Currency.
3. A state court has no authority to order execution against a national bank in the hands of a receiver, for the enforcement of a lien obtained before the receiver's appointment by an attachment against the bank as garnishee, although the rights thus acquired must be recognized by the Comptroller of the Currency.

[No. 218.]

Argued April 11, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a decision affirming a judgment against a national bank in the hands of a receiver. *Reversed.*

The facts are stated in the opinion.

Mr. Asa W. Waters argued the cause and, with *Mr. W. H. Addicks*, filed a brief for plaintiff in error.

Mr. John G. Johnson argued the cause and filed a supplemental brief for plaintiff in error.

Mr. Alfred Day Wiler argued the cause and, with *Messrs. Crawford, Laughlin, & Dallas*, filed a brief for defendant in error.

[450] **Mr. Justice Harlan* delivered the opinion of the court:

On the 29th day of September, 1897, the commonwealth of Pennsylvania, at the suggestion and to the use of the Commonwealth Title, Insurance, & Trust Company, trustee for *Mary Rodgers*, obtained judgment upon a bond in the court of common pleas for the county of Philadelphia against one *James Long* for the sum of \$31,499. A writ of attachment issued upon that judgment, and on the 5th day of October, 1897, an alias writ was issued against the Chestnut Street National Bank of Philadelphia, as garnishee. The writ was served on October 28, 1897, and commanded the bank to show cause in that court on a day named why the judgment against *Long*, with costs of writ, should not be levied of the effects of the defendant in the hands of the bank. Afterwards, on November 6, 1897, special interrogatories were filed by the plaintiff, and a rule was entered requiring the bank, as garnishee, to answer the same within a named time. Subsequently the bank filed its answer in the attachment proceedings, and November 24, 1897, it filed an answer to the special interroga-

tories; and, on December 15, 1897, a rule was entered by plaintiff for judgment against the bank, as garnishee, on its answers.

A few days later, on the 23d day of December, 1897, the bank suspended payment of its obligations, and by order of the Comptroller of the Currency of the United States closed its *doors to business; and, January 29, 1898, the present plaintiff in error, *Earle*, was appointed by that officer as receiver of the bank and duly qualified as such. [451]

Subsequently, May 5, 1898, *Earle*, as receiver, entered his appearance in the above action, and filed a suggestion of record setting forth his appointment and qualification, and on the following day filed an affidavit stating his appointment as receiver. On the succeeding day a motion was made and filed (entered as a rule) by the receiver to vacate and dismiss the attachment served upon the bank, garnishee, for want of jurisdiction in the court of common pleas under § 5242 of the Revised Statutes of the United States, the receiver insisting that all the proceedings in attachment against the bank were null and void.

The rule entered December 15, 1897, for judgment against the bank, and the rule to vacate and dismiss the attachment for want of jurisdiction in the court of common pleas, were heard, and that court, on May 21, 1898, made absolute the rule for judgment, and entered the following: "And now, to wit, May 21, 1898, upon the hearing of the attachment in the above case and the interrogatories of the plaintiff and the answer of the garnishee thereto, it is adjudged that the above-named garnishee has a deposit in money belonging to the above-named defendant of \$2,900, with interest from October 28, 1897; and also that the said garnishee has 77 shares of 'National Gas Trust stock' and 33 shares of the capital stock of the Eighth National Bank of Philadelphia belonging to the said defendant and pledged by him with the said garnishee for payment by him to it of the sum of \$17,831, with interest thereon from April 22, 1897, and that the plaintiff have execution of any dividends on the said deposit of \$2,900, with interest, in common with the other creditors of said garnishee, less \$35 counsel fee for the said garnishee's counsel, and that if the said garnishee refuse or neglect, on demand by the sheriff, to pay the same, then the same to be levied of the said garnishee according to law, as in the case of a judgment against it for its proper debt, and also that the plaintiff have leave to issue a writ of fieri facias against the above-named defendant for the sale of the said 77 shares of 'National Gas Trust Stock' and 33 shares of the capital *stock of the Eighth National Bank of Phila- [452]

delphia, pledged by the defendant with the garnishee, subject to the garnishee's claim under said pledge of the sum of \$17,831, with interest thereon from April 22, 1897, or so much thereof as shall be necessary to satisfy the plaintiff's judgment against the defendant in this case, with costs."

The rule to vacate and dismiss the pro-

ceedings in attachment for want of jurisdiction in the court of common pleas was discharged.

The cause was carried to the supreme court of Pennsylvania, where the judgment of the court of common pleas was affirmed.

By the Revised Statutes of the United States it is provided:

"§ 5234. On becoming satisfied, as specified in §§ 5226 and 5227, that any [national banking] association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

"§ 5235. The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct for three consecutive months, calling on all persons who may have claims against such association to present the same and make legal proof thereof.

[453] "§ 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in *redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"§ 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to

another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."

Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in § 5242, "no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court," are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank "of an act of insolvency, or in contemplation thereof," with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view to the preference by the *bank of one [454] creditor to another. Whatever may be the scope of § 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. After the Chestnut Street National Bank had been served as garnishee with the attachment sued out in the Long suit, but before it went into the hands of a receiver, it admitted in its answers to special interrogations in the suit against Long that it was indebted to Long on a clearing-house due bill, and also that it held as collateral security for his debt to it certain shares of the stock of the National Gas Trust, as well as certain shares of the stock of the Eighth National Bank of Philadelphia. By the service of the attachment upon the bank, the plaintiff in the attachment acquired a right to have the money and property belonging to Long in the hands of the bank applied in satisfaction of its judgment against him, subject, of course, to the bank's lien for any debt due to it at that time from him. The bank therefore became bound to account to the plaintiff in the attachment for whatever property or money it held for the benefit or to the use of Long at the time the attachment was served upon it. And the right thus acquired by the service of the attachment was not lost by the suspension of the bank and the appointment of the receiver. The assets of the bank passed to the receiver burdened, as to the interest that Long had in them, with a lien in favor of the plaintiff in the attachment which could not be disregarded or displaced by the Comptroller of the Currency.

We must not, however, be understood as holding that the distribution of the bank's assets in the hands of the receiver could have been in any wise directly controlled by the state court or seized under an attachment or execution in the hands of any state officer.

On the contrary, the direction in the statute that the receiver pay over all moneys realized by him from the assets of the bank to the Treasurer of the United States, subject to the order of the Comptroller, furnished a rule of conduct for him which neither an order of nor any proceedings in the state court could affect, modify, or [455] change. The *scheme of the statute relating to suspended national banks is that from the time of a bank's suspension all its assets, of whatever kind, as they are at the time of suspension, pass, in the first instance, to the receiver, the proceeds thereof to be distributed by the Comptroller among those whose claims are proved to his satisfaction or are adjudicated by some court of competent jurisdiction. So, when the Chestnut Street National Bank suspended and went into the hands of a receiver the entire control and administration of its assets were committed to the receiver and the Comptroller, subject, however, to any rights or priority previously acquired by the plaintiff through the proceedings in the suit against Long.

It results that the state court did not err in overruling the motion of the receiver to vacate and dismiss the attachment issued in the suit brought against Long and served upon the bank as garnishee prior to its suspension. The proceedings in the state court prior to the appointment of a receiver were all in due course of law. We do not understand that to be controverted. But we are of opinion that the order of judgment of May 21, 1898, was erroneous in some particulars. As the bank did not cease to exist as a corporation upon its suspension and the appointment of a receiver, it was competent for the state court to determine, as between the plaintiff in the attachment and the bank, what rights were acquired by the former as against the latter by the service of the attachment; and its judgment, thus restricted, could have been brought to the attention of the Comptroller for his guidance in distributing the assets of the bank. To this extent the judgment below is affirmed. But, for the reasons already stated, we hold that the state court had no authority to order execution in favor of the plaintiff of any dividends upon the money on deposit in the bank to Long's credit at the time the bank was served with the attachment, and direct the sale of the shares of stock originally held by the bank as collateral security, but which passed upon the suspension of the bank to the custody of the receiver. This part of the judgment should be set aside. It is proper to say that the rights acquired by the defendant in error under the garnishee proceedings can be made effective upon application [456] *to the Comptroller, to whom Congress has intrusted the power to distribute the assets of a suspended bank among those entitled thereto.

The decree is reversed to the extent indicated, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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GEORGE H. EARLE, Jr., Receiver of the Chestnut Street National Bank, *Plff. in Err.*,

v.

WILLIAM CONWAY.

(See S. C. Reporter's ed. 456-458.)

National banks—garnishment of receiver.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank.

[No. 219.]

Argued April 11, 1900. Decided May 14, 1900.

IN ERROR to the Supreme Court of the Commonwealth of Pennsylvania to review a decision affirming an order sustaining the jurisdiction of a state court in garnishment of a national bank and its receiver. *Affirmed.*

See same case below, 189 Pa. 610, 42 Atl. 303.

The facts are stated in the opinion.

Mr. Asa W. Waters argued the cause and, with *Mr. W. H. Addicks*, filed a brief for plaintiff in error.

Mr. John G. Johnson argued the cause and filed a supplemental brief for plaintiff in error.

Mr. James C. Stillwell argued the cause and filed a brief for defendant in error.

**Mr. Justice Harlan* delivered the opinion of the court: [456]

This case differs somewhat in its facts from those in *Earle v. Pennsylvania*, just decided, 178 U. S. 449, ante, 1146, 20 Sup. Ct. Rep. 915. It appears that on February 24, 1898, the appellee Conway, in an action of assumpsit in the court of common pleas of the county of Philadelphia, obtained *a judgment [457] against one John G. Schall for \$1,012.43. Upon that judgment a writ of attachment was issued and served May 24 and 25, 1898, upon the Chestnut Street National Bank of Philadelphia and upon Earle, receiver, as garnishees,—the receiver having been appointed January 29, 1898,—commanding them to show cause on a day named why the judgment against Schall, with costs of writ, should not be levied of his effects in their hands.

The bank and the receiver entered their appearance as defendants and garnishees "for the purpose only of moving said court to set aside the writ of summons in attach-

NOTE.—As to conflict of jurisdiction between Federal and state courts—see *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, and note.

As to garnishment of receivers—see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.

ment sur judgment against him and them, and to dismiss and vacate all proceedings in attachment therein against him or them." That motion was made upon the ground that the court of common pleas was without jurisdiction under § 5242 of the Revised Statutes of the United States. The motion was denied, and the order of the court of common pleas was affirmed by the supreme court of Pennsylvania.

We are of opinion that it was not error to deny the motion to set aside the service of the writ of attachment on the bank and the receiver. No sound reason can be given why the receiver of a national bank may not be notified by service upon him of an attachment issued from a state court of the nature and extent of the interest asserted or sought to be acquired by the plaintiff in the attachment in the assets in his custody. But for the reasons stated in *Earle v. Pennsylvania*, such an attachment cannot create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. After the service of the attachment upon the receiver it became his duty to report the facts to the Comptroller, and it then became the duty of the latter to hold any funds coming to his hands through the Treasurer of the United States as the proceeds of the sale of the bank's assets subject to any interest which the plaintiff may have legally acquired therein as against *his debtor under the attachment issued on the judgment in his favor in the state court.

As the judgment of the Supreme Court of Pennsylvania goes no further than to sustain the right of the plaintiff to have the attachment served upon the receiver as garnishee, it is affirmed.

Mr. Justice **White** dissents.

COLUMBUS WINCHESTER MOTES, alias
Chess Motes, et al., Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 458-476.)

Criminal law—conspiracy accompanied by murder—sentence to imprisonment for life—failure of jury to fix punishment—error to circuit court—on constitutional question—constitutional right to meet witnesses—admission in evidence of statement on preliminary trial.

1. A sentence to imprisonment for life for conspiracy accompanied with murder, in violation of U. S. Rev. Stat. §§ 5508, 5509, providing for such punishment as the laws

NOTE.—As to right of accused to be confronted with witnesses—see note to *Gore v. State* (Ark.) 5 L. R. A. 833.

of the state in which the offense is committed may impose, is not in excess of the authority of a circuit court of the United States, although the verdict of the jury has not indicated the punishment, as required by the state statutes in case of murder, since the act of Congress of January 15, 1897, chap. 29, abolishes the death penalty in such cases, and provides for a sentence to imprisonment for life.

2. A criminal case may be taken directly from a circuit court to the Supreme Court of the United States, under the act of Congress of March 3, 1891 (26 Stat. at L. 826, chap. 517), although it is not a case of conviction of a capital crime, where it involves the construction or application of the Constitution of the United States.
3. The right of an accused under U. S. Const. 6th Amend., to be confronted with witnesses against him, is violated by permitting a deposition or statement of an absent witness, taken at an examining trial, to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused, but it does appear that his absence was due to the negligence of the prosecution.
4. Error in the admission of evidence for the prosecution will not require a reversal of a conviction against one who has in fact said under oath that he is guilty of the charge preferred against him.

[No. 257.]

Submitted April 23, 1900. Decided May 21, 1900.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama to review a conviction for conspiracy accompanied by murder. Affirmed as to one defendant and reversed as to others. The facts are stated in the opinion.

Mr. Lee Cowart submitted the cause for plaintiff in error.

Assistant Attorney General Boyd submitted the cause for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Harlan** delivered the opinion—[459] ion of the court:

Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, William Robert Taylor, Jasper Robinson, John Littlejohn, *and Mark Grant Blankenship, were indicted [460] in the circuit court of the United States for the southern division of the northern district of Alabama under §§ 5508 and 5509 of the Revised Statutes of the United States.

Those sections are as follows:

"§ 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall,

moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"§ 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."

The first count of the indictment charged in substance that on the 14th day of March, 1898, and within the jurisdiction of the court, the persons above named conspired to injure, oppress, threaten, and intimidate one W. A. Thompson, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having exercised the same, in that he had about the 2d day of October, 1897, informed one Robert A. Moseley, United States commissioner for the northern district of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes had, about the months of July, August, September, October, November, and December 1895, violated the internal revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond, as required by law, and having [461] their control *a still and distilling apparatus set up without having the same registered. It was also charged that in furtherance of the conspiracy so formed, and to effect the object thereof, the accused "did on, to wit, about the 14th day of March eighteen hundred and ninety-eight, go upon the highway and did then and there, in the county of Talladega, in the state of Alabama, in the southern division of the northern district of Alabama, and within the jurisdiction of said court, unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun or guns, because he, the said W. A. Thompson, had reported to the said Robert A. Moseley, United States commissioner as aforesaid, said violation of the internal revenue laws of the United States by the said Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson, and Walter Motes, as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The third count differed from the first one only in charging a conspiracy, formed by the same persons, to injure, oppress, threaten, and intimidate Thompson because of his having, about March 8th, 1898, informed a deputy collector of internal revenue that Mark Grant Blankenship had, about the abovedate, carried on the business of distiller in violation of law; also, that to effect the object of that conspiracy, and because of Thompson having given such information to the deputy collector of internal revenue, the accused had unlawfully, wilfully, premeditatedly, de-

liberately, and with malice aforethought, killed and murdered him.

There are seven counts in the indictment, but the first and third are sufficient to show the nature of the charges against the accused, and to bring out the questions disposed of by this opinion.

It is recited in the bill of exceptions that Taylor pleaded guilty, but the transcript does not contain any entry of record showing such to be the fact.

The jury found the "defendants Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship guilty as charged in the indictment," and *in their verdict asked "the mercy of the [462] court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Blankenship, and especially for John Littlejohn and Jasper Robinson."

Motions in arrest of judgment and for new trial were overruled, and judgment was entered upon the verdict, sentencing the defendants other than Taylor to imprisonment in the penitentiary for life.

We have seen that by § 5508 of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,—the punishment prescribed being a fine of not more than \$5,000, imprisonment not more than ten years, and ineligibility to any office or place of honor, profit, or trust created by the Constitution or laws of the United States. And by § 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed.

No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35. Referring to those provisions and to the clause of the Constitution giving Congress authority to pass all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested in the government of the United States, or in any department or officer thereof, this court has said: "In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." *Logan v. United States*, 144 U. S. 263, 283, 36 L. ed. 429, 435, 12 Sup. Ct. Rep. 617, and authorities there cited. It was the right and privilege of Thompson, in return for the protection he enjoyed under the Constitution and laws of the United States, to *aid in the execution of [463] the laws of his country by giving information to the proper authorities of violations

of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten, or intimidate a citizen because of the exercise by him of such right or privilege to be an offense against the United States.

The reference in the above sections to the laws of the state in which the offense was committed makes it necessary to ascertain from the laws of Alabama what punishment could be inflicted for the crime that was committed while the conspiracy referred to in § 5508 was being carried into execution.

By the Code of Alabama it is provided: "§ 4854. Every homicide, perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life,—is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree." "§ 4857. When the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. § 4858. Any person who is guilty of murder in the first degree must, on conviction, suffer death or imprisonment in the penitentiary for life, at the discretion of the jury; and any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the "penitentiary for not less than ten years, at the discretion of the jury." Ala. Code 1896, vol. 2, Criminal.

Taking these statutory provisions together, the question arises whether the court below had authority, in view of the verdict of the jury,—“guilty as charged in the indictment,”—to sentence the accused to imprisonment in the penitentiary for life. The contention of the accused is that it was for the jury to indicate by their verdict the punishment to be imposed by the court, and that the court was without power to act until the jury indicated the degree of the crime committed.

It is true that the crime charged against the accused was what is made by the laws of Alabama murder in the first degree, such offense being punishable with death or imprisonment in the penitentiary for life. And in that state it is the duty of the jury to ascertain by their verdict whether the offense charged was murder in the first or second degree. As therefore, under the laws

of Alabama, it was in the discretion of the jury, and not for the court, to say whether murder in the first degree should be punished by death or by imprisonment for life, and as the verdict of the jury did not indicate the mode of punishment, there would have been some difficulty in giving effect to that clause of § 5509 of the Revised Statutes of the United States, subjecting the accused to such punishment as is attached by the laws of the state in which the offense is committed, but for recent legislation by Congress.

The legislation to which we refer is found in §§ 1, 2, and 3 of the act of January 15th, 1897, chap. 29, which provides: “§ 1. That in all cases where the accused is found guilty of the crime of murder or of rape under § 5339 or § 5345, Revised Statutes, the jury may qualify their verdict by adding thereto ‘without capital punishment;’ and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life. § 2. That except offenses mentioned in §§ 5332, 1342, 1624, 5339, and 5345, Revised Statutes, when a person is *convicted of any[465] offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of an offense to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life. § 3. That the punishment of death prescribed for any offense specified by the statutes of the United States, except in §§ 5332, 1342, 1624, 5339, and 5345, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act are hereby repealed.” 29 Stat. at L. 487.

It will be observed that by § 3 of this act (which is the latest statute on the subject) the death penalty is abolished in all cases of offenses against the United States except those referred to in certain sections, which do not embrace the present case. It was not, therefore, in the power of the court below to have sentenced the plaintiffs in error to suffer death for the crime of murder committed in the prosecution of the conspiracy which is made by § 5508 an offense against the United States. But we are to determine the scope of § 5509 in connection with the act of 1897. Under that act the punishment of death could not be inflicted except in the cases specified. So that § 5509 is to be enforced as if it declared that the offense therein prescribed should be punished in such mode as was consistent with the laws of Alabama, provided—such is the effect of the act of Congress of January 15th, 1897—the accused should not for any offense covered by that section be subjected to the penalty of death. The provision in the Code of Alabama giving the jury discretion to affix the punishment of death or imprisonment for life in cases of murder in the first degree can have no application here, because the act of 1897 forbade the former mode of punishment in such a case as the present one. When, therefore, the jury found the defendants guilty as

charged in the indictment, they found them guilty of what, under the laws of Alabama, was murder in the first degree, and they were sentenced by the circuit court of the United States to suffer imprisonment for life, which those laws authorized in cases of that character. This was a substantial compliance with the provisions of §§ 5508 and 5509 of the Revised Statutes.

[466] It results that the circuit court imposed the only punishment *authorized by the laws of the United States for the crime of which the defendants were found guilty.

To avoid misapprehension it should be said in this connection that the circuit court had no jurisdiction of this case simply as one of murder committed within the limits of the state, but only as one of conspiracy, under the act of Congress, accompanied by murder.

The Assistant Attorney General suggests as worthy of consideration whether, under this interpretation of the statutes, the present case can be brought here directly from the circuit court. This suggestion is based upon the provision in the act of January 20th, 1897, chap. 68, which withdraws from the consideration of this court, upon appeal or writ of error direct from the circuit court, cases of conviction of infamous crimes not capital, and gives jurisdiction in such cases, upon appeal or writ of error, only to the proper circuit court of appeals; and it is assumed that no criminal case can, upon any ground, be brought here directly from a circuit court of the United States, unless it be a case of conviction of a capital crime. 29 Stat. at L. 492. But such is not the law. Among other cases, this court, under the act of March 3d, 1891 (26 Stat. at L. 826, chap. 517), establishing circuit courts of appeals, can take cognizance of a criminal case upon writ of error to review the judgment of a circuit court, when the case really "involves the construction or application of the Constitution of the United States." That act does not make a distinction between civil and criminal causes, such as is implied by the above suggestion of the government. At the present term of this court we have taken cognizance of a criminal case involving a misdemeanor, brought here directly from a circuit court of the United States. *Rider v. United States*, 178 U. S. 251, ante, 1057, 20 Sup. Ct. Rep. 838. And we had previously in *United States v. Rider*, 163 U. S. 132, 139, 41 L. ed. 101, 103, 16 Sup. Ct. Rep. 983, 985, said: "By § 6 [of the circuit court of appeals act] the judgments or decrees of the circuit courts of appeals were made final 'in all cases arising under the criminal laws,' and in certain other classes of cases, unless questions were certified to this court or the whole case ordered up by writ of certiorari as therein provided. *American Constr. Co. v. Jacksonville T. & K. W. R. Co.* 148 U. S. 372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758.

[467] *Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals, and in all civil cases by appeal or error without regard to the amount in controversy, except as to appeals or writs of error to or

from the circuit courts of appeals in cases not made final as specified in § 6." We further said in that case, that the object of the act of March 3d, 1891, chap. 517, was to distribute between this court and the circuit courts of appeals the entire appellate jurisdiction over the circuit courts of the United States.

The present case does involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the 6th Amendment of the Constitution, declaring that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

It appears from the bill of exceptions that the government offered to read to the jury the written statement of William Robert Taylor, taken in a preliminary examination before United States Commissioner Wilson of the case of the *United States against Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship*. For the purpose of "laying a predicate" for offering that statement in evidence, Captain B. W. Bell was examined. He testified "that he was a special officer of the Department of Justice; that he had been engaged in working up the cases against these defendants and preparing them for trial; that in August, 1898, he caused the arrest of said William Robert Taylor and also Columbus W. Motes, John Littlejohn, and Dodge Blankenship on a charge of conspiracy and murder of W. A. Thompson, and that on the 19th day of August, 1898, during and on the second day of their preliminary trial, one of the defendants, William Robert Taylor, voluntarily became a witness for the prosecution, and made a statement implicating in said murder Columbus W. Motes, John Littlejohn, and Dodge Blankenship, who were at that time having their preliminary hearing before said commissioner, and also implicating in said murder Walter W. Motes and Jasper Robinson, *who had been brought to said preliminary trial as witnesses for the government, and that on the second day of said preliminary trial he (Bell) caused the arrest of the said Walter W. Motes and Jasper Robinson; that Taylor and the other three defendants on trial with him were held for trial by the commissioner and committed to jail without bail to await trial, and that since that time the said Taylor has been confined in the Jefferson County, Alabama, jail under commitment issued by said commissioner; that after the beginning of the present trial, on the 20th of September, 1898, he went to the jail, took said Taylor into his custody more than two days before said Taylor escaped, and that said Taylor had not been in jail since, but that he had placed him in charge of one Ed. May, a witness for the government in this case, and instructed May to let Taylor stay at the hotel at night with his family, and that in pursuance of said instruction Taylor remained at the hotel Tuesday night and Wednesday

day night before he absconded on Thursday; that he saw Taylor in the corridors of the courtroom about 10 o'clock A. M. Thursday, before he was called as a witness, about 11 o'clock the same day, and that when Taylor failed to respond he made a search for him in the city of Birmingham, and telegraphed to several places, and could not find him or learn anything at all as to his whereabouts." Bell further testified on the preliminary trial before H. A. Wilson, United States commissioner: "Walter W. Motes and Jasper Robinson were arrested during the trial of the other defendants, Columbus W. Motes, John Littlejohn, and Dodge Blankenship, said Taylor having implicated them in his testimony upon said trial. The defendants were all represented upon said preliminary trial by Mr. Lee Cowart. Mr. Cowart cross-examined the witness, as shown in the testimony; that all of the defendants, including the said Walter W. Motes and Jasper Robinson, had an opportunity to cross-examine the said witness Taylor, and he, in fact, was cross-examined by Mr. Cowart, acting either as attorney for Columbus W. Motes, John Littlejohn, and Dodge Blankenship, or for all defendants; that said cross-examination was reduced to writing; that he (said Bell) had never made or offered the said Taylor any [469] inducements, promises, reward, or *hope to induce him to make said statement; that before said Taylor was examined as a witness on the said preliminary trial he was taken to the office of the United States attorney, who cautioned him to make no statement unless it was purely voluntary, and told him emphatically that he could make no promise and offer him no hope whatever, and that said Taylor stated that he made the statement voluntarily and to relieve his own mind."

The United States marshal testified on behalf of United States that he had instructed his deputies that Taylor had escaped; that he had offered a reward of \$200 for his arrest; that he had made diligent search in the city of Birmingham for Taylor, and could not learn anything as to his whereabouts. The chief of police of the city of Birmingham testified that he had not been officially notified that Taylor had escaped, but that he had seen something concerning it in the newspapers, and that he had made no special effort to arrest him and had no information as to his whereabouts. The United States then offered as a witness a deputy sheriff, who testified that the sheriff of Jefferson county and his deputies had been on the lookout for Taylor ever since his absence was known; that they had had photographs taken of him and sent them to various places, and that the deputies had been on the lookout for him all over Birmingham and other parts of Jefferson county, and that they had been unable to find him anywhere.

The government introduced as a witness H. A. Wilson, who testified as follows: "I am a United States commissioner, and held the preliminary trial in the case against these defendants on the 18th and 19th days of August, 1898. The defendants Colum-

bus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship were brought before me upon a warrant issued on affidavit before United States Commissioner R. A. Moseley, Jr., by special officer Bell. Jasper Robinson and Walter W. Motes were present in court while the case was being heard. William Robert Taylor, one of the defendants, during the trial proposed to make a statement in the nature of a confession. I cautioned him, and told him that he could not be made to testify unless he chose to do so, and asked him if *any inducement or promise had been made or [470] offered to him. He said there had not; that the statement was voluntary, and he made it to relieve his mind. Walter W. Motes and Jasper Robinson were present in court as defendants at the time, as well as the other defendants who were on trial. I swore William Robert Taylor as a witness, administering to him the usual oath. He was then examined, and his testimony was committed to writing. I identify this statement (referring to the evidence of Taylor here handed to the witness) as the evidence taken before me. In his testimony, as is shown and as was the fact, he implicated the defendants Jasper Robinson and Walter W. Motes, who were arrested then and there. The defendants Columbus W. Motes, Blankenship, and Littlejohn were represented by Mr. Cowart, and so were the defendants Walter W. Motes and Jasper Robinson as soon as they were arrested, and the trial of the four defendants then on trial, to wit, Columbus W. Motes, William Robert Taylor, John Littlejohn, and Dodge Blankenship, was proceeded with and concluded in the presence of the defendants Jasper Robinson and Walter W. Motes. Mr. Cowart, as a matter of fact, did cross-examine the witnesses, as is shown by this testimony and as I recollect it, and all of the defendants, including Walter W. Motes and Jasper Robinson, were allowed by me an opportunity to cross-examine, although no separate trial was had, and all of these were examined without bail."

The testimony or statement given by Taylor at the preliminary trial of part of the defendants was then read in evidence by the government, the accused objecting on the ground that a sufficient predicate had not been made for its introduction; but the objection was overruled and an exception taken. The defendants Walter W. Motes and Jasper Robinson severally objected to the reading of Taylor's statement against them on the ground that they were not on preliminary trial at the time the testimony was taken, were not parties to the case then being tried, and had not legally been called upon to cross-examine the witness. Those objections were also overruled, and an exception was taken.

Taylor's statement was lengthy, and showed a cross-examination, *or an opportunity for [471] the cross-examination, of Taylor by the present defendants. It was quite sufficient, if accepted by the jury as true, to establish the guilt of some if not of all of the accused. It is important to observe that at the time Taylor's statement was offered in evidence there

had been no proof whatever of the conspiracy charged. Conspiracy was the basis of the prosecution; for in the absence of a conspiracy, in the carrying out of which the alleged murder was committed, the prosecution must have failed; the crime of murder, apart from the conspiracy to deprive a citizen of a right or privilege secured by the Constitution and laws of the United States, being punishable only by the state.

We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement, or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and, strangely enough, placed him in charge, not of an officer, but of another witness for the government, with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the courthouse. When called to testify he did not appear.

In *Reynolds v. United States*, 98 U. S. 145, 158, 159, 25 L. ed. 244, 247, which was an indictment for bigamy committed in Utah,—the prosecution being under § 5352 of the Revised Statutes of the United States,—the trial court admitted proof of what a witness had stated on a former trial of the accused for the same offense, but under a different indictment. This court said: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he [472] cannot *complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." In that case reference was made to several authorities, American and English, and the court further said: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and consequently, if there has not been in legal contemplation a wrong committed, the way has not been opened for the introduction of the testimony."

In his *Treatise on Constitutional Limitations*, Cooley, after observing that the testimony for the People in criminal cases can
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only, as a general rule, be given by witnesses in court, at the trial, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party." Cooley, *Const. Lim.* (2d ed.) *318.

In *Reg. v. Scaife*, 2 Den. C. C. 281, 285, 286, S. C. 17 Q. B. 238, 5 Cox, C. C. 243, which was an indictment against three persons for a felony, it appeared that a witness had been kept out of the way by the procurement of one of the accused, and the question was whether the prosecution could use the deposition of the absent witness taken before magistrates in the mode directed by 11 & 12 Vict. chap. 42, § 17. It was held by all the judges that the deposition was not admissible against a defendant who had not caused the absence of the witness. Lord Campbell, C. J., said: "I am of opinion that the rule for a new trial must be made absolute. Evidence having been given that the defendant Smith had resorted to a contrivance to keep the *witness out of the way, the deposition [473] was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned judge, Cresswell, J., in summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant Smith alone, and not as against the others. The question then is whether such a deposition is admissible against a prisoner without proof that the deponent has been kept away by his contrivance or without proof of the death of the witness. No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury, upon every matter that may be material to his defense. I therefore think that the deposition was improperly admitted against Scaife and Rooke; and that there should be a new trial." Patteson, J.—"The deposition of the absent witness, Sarah Ann Garnett, was admissible as against the defendant Smith, by whose contrivance she was kept out of the way, but it ought to have been applied to the case against him only, and not to the case against the other prisoners. No such distinction appears to have been made at the trial, but the evidence was allowed to go to the jury generally against all the prisoners, it being assumed, without any evidence whatever to support the assumption, that they were all connected with the contrivance to keep the witness out of the way." Coleridge, J.—"Before the enactment of 11 & 12 Vict. chap. 42, I always understood the law was that if a witness were absent, either by reason of the death of the witness or by the procurement of the
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prisoner, the deposition was receivable in evidence against him. But I believe these were the only two cases where the absence of a witness let in his depositions. Absences from every other cause were within the same category, and did not render them admissible. The 17th section of the recent statute took another case—where a witness was proved to be so ill as to be unable to travel—out of one category and put it into another.”

[474] In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement, or with the assent of either of the accused. Nor, if that were material, did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the state and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution.

It is suggested that the action of the circuit court was in harmony with the decisions of the supreme court of Alabama. *Lowe v. State*, 86 Ala. 47, 5 So. 435; *Pruitt v. State*, 92 Ala. 41, 9 So. 406. We have examined the cases in that court to which attention has been called, and do not think they sustain the ruling of the court below under the circumstances disclosed by this record. But the question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the state in which the crime was committed. It must be determined with reference to the rights of the accused as secured by the Constitution of the United States. That instrument must control the action of the courts of the United States in all criminal prosecutions before them. We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness taken at an examining trial to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution. We need not decide more in the present case.

For the error referred to, the judgment of the circuit court must be reversed as to all the plaintiffs in error and a new trial awarded, except as to Columbus W. Motes. The case as to him rests upon peculiar grounds, because of his testimony on behalf of the accused at the final trial. He testified: “My name is Columbus W. Motes; I am about thirty years old. I know the defendants who are on trial for the murder of W. A. [475] Thompson; I knew Thompson, and know when and where he was killed; I also know who killed him. He was killed on March 14th last, near his home, by myself and William Robert Taylor. No other person had

anything whatever to do with it. I went to Taylor’s house on March 13th, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12th, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad. Smith, who only a few days before that time had been arrested and bound over for illicit distilling. We took my gun, a rifle, and went to the place where we knew Thompson would pass, and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, \$18. all in \$2 bills, and the next morning we hid it in a tree near Taylor’s house. Neither John Littlejohn, Dodge Blankenship, Walter Motes, or Jasper knew anything about our plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder.”

In this evidence the jury had conclusive proof of the guilt of Columbus W. Motes of the crime charged in the indictment. The admission of the statement of Taylor in evidence was therefore of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty as to him, even if the jury had disregarded Taylor’s statements *altogether. We can there-[476] fore say, upon the record before us, that the evidence furnished by Taylor’s statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him.

It is proper to say that there are other questions of a serious character raised by the assignment of errors. But as those questions may not arise upon another trial, we do not now consider them.

The judgment as to Columbus Winchester Motes is affirmed, but the judgment as to all the other plaintiffs in error is reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.

RAVAUD K. HAWLEY *et al.*, *Appts.*,
v.
L. EDGAR DILLER.

(See S. C. Reporter's ed. 476-496.)

Public lands—cancellation of entry under timber and stone act—rights of bona fide purchaser—purchase before patent—power to cancel entry—cancellation by Secretary of the Interior without act of Attorney General—power of court to review act of Land Department.

1. Purchasers from an entryman before the issue of a patent are not bona fide purchasers who are protected against the cancellation, for fraud of the entryman, of an entry made under the timber and stone act of June 3, 1878, chap. 151 (20 Stat. at L. 89).
2. The Land Department has jurisdiction to cancel an original entry for public lands at any time before a patent is issued.
3. Failure to give notice to transferees of an entryman, of an order of the Secretary of the Interior to send to him the papers in proceedings for the cancellation of the entry, is immaterial if they had an opportunity to be heard before the Secretary while the case was in his hands.
4. An order of the Land Department canceling an entry, if based upon a misconstruction of the law, can be corrected by the courts.
5. A decision by the Secretary of the Interior reversing a decision of the Commissioner of the General Land Office, and rejecting and canceling an entry under the timber and stone act for fraud, is not in excess of the jurisdiction conferred upon him by law because the Attorney General did not join in the consideration of the matter, since the requirement of U. S. Rev. Stat. §§ 2450, 2451, of the approval of a commissioner's decision by the Secretary and the Attorney General acting as a board, applies only to decisions sustaining irregular entries, and thereby divesting the United States of its title, and does not extend to decisions rejecting or canceling entries.

[No. 116.]

Submitted February 2, 1900. Decided May 28, 1900.

A PPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit reversing a decree of the Circuit Court in a suit to quiet title to land. *Affirmed.*

See same case below, 48 U. S. App. 462, 81 Fed. Rep. 651, 26 C. C. A. 514.

The facts are stated in the opinion.

Mr. Charles K. Jenner submitted the cause for appellants:

The tract of land described in the certificate became private property and private land, and was severed from the mass of the public domain, upon the delivery of the final certificate.

Carroll v. Safford, 3 How. 460, 11 L. ed.

NOTE.—As to decisions of Land Department, their conclusiveness and effect—see *Hartman v. Warren*, 22 C. C. A. 30, and note; *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 344, and note.
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680; *Simmons v. Wagner*, 101 U. S. 260, 25 L. ed. 910; *Pacific Coast Min. & Mill. Co. v. Spargo*, 16 Fed. Rep. 349; *People v. Shearer*, 30 Cal. 648; *Gwynne v. Niswanger*, 15 Ohio, 368; *Smith v. Ewing*, 23 Fed. Rep. 744; *Astrom v. Hammond*, 3 McLean, 108, Fed. Cas. No. 596; *Carroll v. Perry*, 4 McLean, 26, Fed. Cas. No. 2,456; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Union Mill. & Min. Co. v. Dangberg*, 2 Sawy. 454, Fed. Cas. No. 14,370; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339.

The land could be conveyed by the entryman by deed of warranty, and the title thereto transferred, with the same effect as if the patent had issued.

Wirth v. Branson, 98 U. S. 118, 25 L. ed. 86; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *The Yosemite Valley Case*, 15 Wall. 77, *sub nom. Hutchings v. Low*, 21 L. ed. 82; *Johnson v. Townsley*, 13 Wall. 72, 20 L. ed. 485; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562.

The Land Department of the United States is not endowed with any authority of law to institute an original proceeding before any of its officers, for the purpose of trying and determining whether or not fraud has been committed by any person in relation to any contract or any subject. The question as to the guilt or innocence of a party charged with fraud is a purely judicial question, and can be tried and determined only in the courts of the United States.

Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; *Moore v. Robbins*, 96 U. S. 532, 24 L. ed. 849.

The language used in the 3d article of the Constitution, in the distribution of powers to the legislative, executive, and judicial branches of our government, is mandatory, and it is not within the province of Congress to confer powers of the one branch upon another.

Martin v. Hunter, 1 Wheat. 327, 4 L. ed. 103.

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department must in every instance show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers.

Cooley, Const. Lim. § 436.

In order that the legal proceedings may be according to the rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights, the tribunal must have authority to issue compulsory process to secure the attendance of witnesses, and the further power to issue attachment and punish for contempt.

United States v. Williams, 4 Cranch, C. C. 385, Fed. Cas. No. 16,712.

The Land Department of the United States has no power to compel the attend-

ance of witnesses, issue attachments, or punish for contempt.

See decisions by Secretary Noble, dated July 20th, 1889; 9 Public Land Dec. pp. 133, 134.

If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instrument, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States.

United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850. No counsel for appellee.

[478] *Mr. Justice Harlan delivered the opinion of the court:

This case involves a claim to a tract of land, arising out of an entry made under the act of Congress of June 3d, 1878, chap. 151, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory," known as the timber and stone act. 20 Stat. at L. 89, chap. 151.

The act in its 1st section provided for the sale, at a named price and in quantities not exceeding 160 acres, to any person or association of persons, of surveyed public lands in the states and territory named, not included within military, Indian, and other reservations, and which were "valuable chiefly for timber, but unfit for cultivation." It also provided for the sale of lands "valuable chiefly for stone" on the same terms as timber lands.

By the 2d section of the act it was provided: "§ 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited, contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonging to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the *reg-

[479] ister or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear

falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void."

The 3d section, after making provision for the publication of the application to purchase, provides: "And upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the 12th section of the act approved May 10th, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the Land Office subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The bill of complaint presents substantially the following case under the above legislation:

On the 30th day of April, 1883, after having complied with the requirements of the above act, one Henry C. Hackley paid to the receiver of the land office in Olympia, Washington territory, the purchase price of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 13, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit, territory (now state) of Washington,—taking from the receiver what is known as the final or duplicate receipt. On the same day Hackley conveyed the tract described to Stephen S. Bailey by a sufficient deed of warranty; and on December 29th, 1887, Bailey sold, transferred, and conveyed the land to the appellants.

*On August 9th, 1888, the Commissioner [480] of the General Land Office suspended and held for cancellation the entry made by Hackley, it having been reported to that office by a special agent that the land in question was not chiefly valuable for timber, but was valuable agricultural land, and also that the entry by Hackley was made in the interest of Bailey.

On or about August 23d, 1888, the register and receiver of the local land office at Seattle caused notice of the action of the Commissioner of the General Land Office to be served upon the transferees, the notice stating in detail the fact of the entry by Hackley, and that the special agent had reported that he had made a personal examination of the land and found that it was not chiefly valuable for timber, but was valuable agricultural land, and that the entry thereof was made

in the interest of Bailey and others, and not for the benefit and use of the entryman.

Within sixty days after the above notice, the transferees made a special appearance by attorneys, and moved that the proceeding be dismissed and the entry reinstated and passed to patent, upon the ground that the action of the Commissioner was in excess of any authority possessed by him or by the Land Department. That motion was denied by the Commissioner. The bill alleges that such denial was not the result of the consideration of any fact or facts, but of an erroneous opinion of the law.

Thereupon the transferees applied for a hearing in accordance with the notice given, and they stipulated with the attorney for the government that the case be consolidated with eleven other entries owned by them, and which were suspended at or about the same time by the Commissioner.

That application was granted, and a hearing was had before the local land office.

The register and receiver being divided in opinion the matter went to the Commissioner, who decided that all the land embraced in the entries before him, including the land here in question entered by Hackley, was timber land that could be entered as such under the act of June 3d, 1878; that all of the proceedings in relation to Hackley's entry [481] were regular; that *the proof submitted on the entry was sufficient; and that the government had failed to prove that that entry was made in the interest of Bailey or of any other person than the entryman. It was therefore ordered by that officer that the entry in question be removed from suspension and remain intact upon the records of the Land Department, and that the patent of the United States issue therefor.

Subsequently, January 31st, 1891, no patent having been issued, Secretary Noble ordered the Commissioner of the General Land Office to certify and transmit all the papers and testimony in the cause to his office. "Said order," the bill alleged, "was made by the said Secretary of the Interior without any appeal being taken by the United States, and without notice to said transferees, or any of the defendants in said cause." The order was complied with, but the papers remained in the hands of Secretary Noble without any decision being made by him while in office. The case was taken up by his successor, Secretary Smith, and was decided October 19th, 1893, adversely to the transferees. *United States v. Bailey*, 17 U. S. Land Dec. 468. The bill further alleged: "Said decision of the Commissioner of the General Land Office, rendered in said cause as aforesaid, was at no time considered by the honorable Secretary of the Interior and the Attorney General of the United States, acting as a board or otherwise; nor was the testimony and proceedings in said cause by them considered or acted upon, as a board, at all; nor did the Attorney General of the United States at any time consider or act upon said decision of the Commissioner of the General Land Office, or the pretended testimony, or the papers and documents in re-

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lation to said entry, at all, either as a member of a board or in his individual capacity."

Throughout all these proceedings appellants protested that the Land Office was without jurisdiction or authority to cancel the entries of the lands that had been transferred to them.

In the course of his opinion Secretary Smith said that there was no charge, nor was there any testimony affecting the transaction between Bailey and his transferees. He also said that his interpretation of the statute did not imply that a timber-land entryman was not authorized to sell his entry at any time *that he chose after he had made his [482] proof and received a certificate. 17 U. S. Land Dec. 468, 471, 476.

In accordance with the directions of the Secretary, the Commissioner of the General Land Office, on November 21st, 1893, ordered the cancelation of the timber-land entry of Hackley upon the records of the Land Department, and the land was held subject to entry as public land of the United States.

Thereafter Diller, the present appellee, made entry of and purchased the land in question under the above act of June 3d, 1878, and a patent therefor from the United States, bearing date October 15th, 1895, was issued to him.

On February 21st, 1896, the plaintiffs, now appellants and the transferees of Bailey, brought this suit against Diller in the circuit court of the United States for the district of Washington, northern division. The bill, after setting forth the above and other facts, alleged that the action of the Land Department in regard to the entry in question was without authority of law, and that the patent to Diller was wrongfully issued.

The relief asked was a decree holding the patent of the defendant to be a cloud upon the title of the plaintiffs, adjudging that the defendant held the title in trust for them, and requiring him to convey to them whatever title he might have obtained or acquired by virtue of such patent; that the title of the plaintiffs to the land be forever quieted against the defendant; and that such further relief be granted in the premises as might be equitable.

A demurrer to the bill having been overruled, the defendant filed both a plea and an answer. After referring to the hearing before the receiver and the register, resulting in a division of opinion between those officers, the plea recited as a defense the history of the proceedings as above stated, and the entry of the land and the issue of a patent to the defendant after the cancelation of Hackley's entry. The plea was overruled. In his answer the defendant questioned the good faith and sufficiency of the conveyances from Hackley to Bailey and from Bailey to the plaintiffs. A replication was filed by the plaintiffs, in which they asserted the truth and sufficiency in law of their bill, and *made [483] a countercharge of insufficiency, untruthfulness, and uncertainty as to the defendant's answer.

Upon final hearing in the circuit court Judge Hanford held that where land had

been regularly entered under the act of June 3d, 1878, it was not subject to forfeiture after it had been conveyed to a bona fide purchaser; that the opinion of the Secretary of the Interior showed that the original entry in question was canceled solely because it was deemed fraudulent, and no consideration whatever was given to the rights of the plaintiffs as bona fide purchasers; and that the evidence clearly showed that the plaintiffs were bona fide purchasers within the meaning of the act of Congress referred to. The circuit court was also of opinion that "the case in the Land Department, after the entry had been suspended, should have been adjudicated by the board composed of the Attorney General, the Secretary of the Interior, and the Commissioner of the General Land Office, as provided by §§ 2450 and 2451, Revised Statutes, and the Secretary of the Interior, without a determination of the board, could not lawfully cancel the entry." A decree was therefore entered adjudging the plaintiffs to be the equitable owners in fee, and entitled to the lands described in the bill; that the patent issued to the defendant Diller for the land in question was issued improvidently and without authority of law, was a cloud upon the title of the plaintiffs, and should be removed; and that whatever title might have accrued under or through such patent was held by the defendant in trust for the use and benefit of the plaintiffs. It was further adjudged that the defendant should convey to the plaintiffs, by good and sufficient deed, whatever of title he might have acquired under and by virtue of the patent, free and clear of any and all encumbrance, within ten days from the filing of the decree, and the master was authorized to make the conveyance in the event of his failure or refusal so to do; and the title of the plaintiffs to the land was declared to be forever quieted as against the defendant. *Hawley v. Diller*, 75 Fed. Rep. 946.

The defendant appealed and the decree of the circuit court was reversed, with directions to dismiss the bill with costs to the defendant,—Judge Hawley delivering the [484] opinion of the *circuit court of appeals. *Diller v. Hawley*, 48 U. S. App. 462, 81 Fed. Rep. 651, 26 C. C. A. 514. From that decree the plaintiffs have appealed to this court.

As shown by the above statement of the provisions of the act of June 3d, 1878 (20 Stat. at L. 89, chap. 151), known as the timber and stone act, a purchaser of the surveyed public lands in California, Nevada, Oregon, and Washington, valuable chiefly for timber, but unfit for cultivation, or valuable chiefly for stone, was required in his sworn application to state that he did not seek to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract with any person or persons by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself; and if the applicant swore falsely in the premises, he became liable to

the penalties of perjury, and would forfeit the money he paid for the lands; and all right and title to the same and any grant or conveyance he may have made, "except in the hands of bona fide purchasers," would be null and void.

Who, within the meaning of the act, are to be deemed bona fide purchasers? Could the appellants, against whom, in respect of these lands, no charge of fraud was made, be deemed bona fide purchasers, if it appeared to the Land Department, before a patent issued, that the original entryman made the application to purchase "on speculation," and not in good faith to appropriate the lands to his own exclusive use and benefit?

The words "bona fide purchasers," as applied to purchasers of public lands, did not appear for the first time in the timber and stone act of 1878. The 1st section of the act of June 22d, 1838, granting pre-emption rights to settlers on the public lands, contains substantially the same provisions as to the effect of a false oath by the applicant and the same saving for the benefit of bona fide purchasers. 5 Stat. at L. 251, chap. 119. Like provisions were made in the act of September 4th, 1841, appropriating the proceeds of the sales of the public lands, and granting pre-emption rights. 5 Stat. at L. 453, 456, chap. 16, § 13. And the provisions of the last act were preserved in § 2262 of the Revised Statutes.

*The contention of appellants is that as be-[485] tween themselves and the United States they must be deemed to have been bona fide purchasers from the moment they bought in good faith from Bailey, the vendee of Hackley (although no patent had been issued), and that, under the act, they could not be affected by the fraud of the original entryman or his assignee.

While the mere words of the act of Congress furnish some ground for this contention, the interpretation suggested cannot be approved. In *Root v. Shields*, 1 Woolw. 340, 348, 363, Fed. Cas. No. 12,038, Mr. Justice Miller had occasion to consider who were to be regarded as bona fide purchasers under the pre-emption laws when no patent had been issued by the United States. He said: "It is further insisted on behalf of the defendants that they are bona fide purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some, at least, of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not bona fide purchasers for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons. They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the Land Office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal

title. And in order to establish in himself the character of a bona fide purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary."

[486] The rule thus laid down was followed by Secretary Teller in *Cogswell's Case*, 3 U. S. Land Dec. 23, 28. In *Chrisinger's Case*, 4 U. S. Land Dec. 347, 349, Secretary Lamar said: "It is insisted by counsel, and ably argued at length, that the assignees of Chrisinger, being bona fide purchasers after entry, are entitled to intervene and have their interests protected, as they took without notice of any defect in the final proof. This proposition is not tenable. It involves the principle that, although the claim for title while in the hands of the entryman is worthless on account of his failure to comply with the law, such claim may be strengthened and made a matter of absolute right by virtue of a transfer to an innocent purchaser. The converse of this, however, is true. Conceding the right of sale after the issuance of final certificate and prior to patent, the purchaser takes no better claim for title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department. *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562; *Margaret Kissack*, 2 C. L. L. 421. Again, the Department must deal directly with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts."

So, in *Smith v. Custer*, 8 U. S. Land Dec. 269, 278, Secretary Vilas said: "The pre-emption purchaser takes by his final proofs and payment and his certificate of purchase only a right to a patent for the public lands in case the facts shall be found by the General Land Office and the Interior Department upon appeal to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the action of the Department, and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law, and is chargeable with knowledge of the state of the title which he buys, in so far at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the Land Office and Department upon which a patent may issue. He is not, then, an 'innocent purchaser,' so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the Department. 178 U. S. U. S. Book 44.

He buys a title *sub judice*. At *the most, it is but an equitable title, the legal title being in the government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of the vendor, and has no better standing than he. *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *Root v. Shields*, 1 Woolw. 340, Fed. Cas. No. 12,038."

These principles were applied by the Land Department in *Travelers' Ins. Co.* 9 U. S. Land Dec. 316, 320, 321.

Again, in *United States v. Allard*, 14 U. S. Land Dec. 392, 405, 406, the question was fully examined by Secretary Noble in the light of the authorities, and his conclusion was thus stated: "A bona fide purchaser of land is one who is the purchaser of the legal title or estate; and a purchaser of a mere equity is not embraced in the definition. *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; 3 Ops. Atty. Gen. 664. This was the well-defined meaning of the term long before the enactment of the statute under consideration, and, under a well-established rule of construction, unless it is apparent that Congress intended it to have a different meaning, it is to be presumed to have been used in its technical sense. There is nothing in the present statute to indicate that Congress used the term in other than its technical sense. Indeed, it may properly be considered as having attained a technical meaning as used by Congress in previous legislation relating to the disposal of the public lands. As long ago as 1841, Attorney General Legare (3 Ops. Atty. Gen. 664) in considering a case which arose under the pre-emption act of 1838 (1 Lester, 49), involving the use of the term in that act, and the right of an assignee of a pre-emption claimant thereunder, held: 'The assignee took only an equity, and he took it, of course, subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration without notice, he must have a complete legal title.' After referring to *Root v. Shields*, above cited, the Secretary concluded: "It thus appears that prior to the passage of the act under consideration (June 3d, 1878) it had been determined, both by executive construction and judicial interpretation, that the term 'bona fide purchaser,' as used in the pre-emption law, was so used in its technical sense, or with reference to its previously *known and well-defined import. It is therefore to be presumed, nothing appearing to the contrary, that Congress, in making use of the term in the timber and stone act, did so in the light of such construction, and must have intended its use in the same sense as in the pre-emption law; namely, that to be a bona fide purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title." See also *Whitaker v. Southern P. R. Co.* 2 Copp's Public Lands (1882 ed.) 919, 923;

Stout v. Hyatt, 13 Kan. 243, 244; *Taylor v. Weston*, 77 Cal. 534, 540, 20 Pac. 62.

We are of opinion that the rule announced in *Root v. Shields*, above cited, and which has been steadily followed in the Land Department, is consistent with the words of the statute. If any doubt existed on the subject, the construction so long recognized by the Interior Department in its administration of the public lands should be not overthrown, unless a different one is plainly required—as it is not—by the words of the act. *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306.

The contention of appellants that they could not be affected by the fraud, if any, committed by the original entryman or his vendee, being unsound, is there any other ground upon which the court can hold that the title to these lands is held by the appellee in trust for them?

It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the timber and stone act would be of no practical value if it were true that one, having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress. *Knight v. United States Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258, and *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208, and authorities cited

[489] in each case. Of course, that *Department could not arbitrarily destroy the equitable title acquired by the entryman, and held by him or his assignee. Those who hold such title have a right to be notified of and heard in any proceeding instituted in the Land Department having for its object the cancellation of the entry upon which the equitable title depends. In the present case the appellants had full notice of the proceedings before the register and receiver and before the Commissioner of the General Land Office, which resulted in the cancellation of the original entry. And we infer from the record that they had notice of the order of the Secretary of the Interior directing the papers to be sent to him for examination. The plea, referring to the action of the Commissioner of the General Land Office and of the Secretary of the Interior, distinctly stated that Hackley “was given every opportunity to be heard before the said officers of the Land Department of the United States, likewise his said transferees, before said certificate was canceled.” The allegation in the bill on this point means only that the order of the Secretary of the Interior to send the

papers to him was made without notice to Hackley and his transferees. But that is immaterial if they had an opportunity to be heard before the Secretary while the case was in his hands. In the summary of the points relied upon by appellants, it is not claimed that they had no such opportunity. The order of cancellation by the Secretary was based upon the fact, which he ascertained from the evidence, that the original entry of the land in dispute was not in good faith, for the exclusive benefit and use of the entryman, but for the speculative purposes of others with whom the entryman was in collusion.

It is suggested that the order of the Land Department canceling the entry was based upon a misconstruction of the law. If it had been, then the error committed could be corrected by the courts; for, as said in *Sanford v. Sanford*, 139 U. S. 642, 647, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666, where the matters determined by the Land Office “are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded *to them, or where misrepresentations and fraud have been practised, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected.” See also *Quinby v. Conlan*, 104 U. S. 420, 426, 26 L. ed. 800, 802; *Baldwin v. Stark*, 107 U. S. 463, 465, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Cornelius v. Kassel*, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122. But there was no misconstruction of the law by the Land Department. Upon the facts found no other conclusion could properly be reached than the one indicated by the opinion of the Secretary of the Interior (*United States v. Bailey*, 17 U. S. Land Dec. 468), namely, that the original entry of the land was in violation of the act of Congress.

We are of opinion that the result of the decisions of this court was correctly stated by Judge Hawley, when, speaking for the United States circuit court of appeals, in *American Mortg. Co. v. Hopper*, 29 U. S. App. 12, 17, 64 Fed. Rep. 553, 555, 12 C. C. A. 293, 295, he said: “(1) That the Land Department of the government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts when the officers of the Land Department have withheld from a pre-emptioner his rights, when they have misconstrued the law,

or when any fraud or deception has been practised which affected their judgment and decision."

One other question remains to be considered. The appellants insist that the order of the Secretary of the Interior canceling the entry of these lands could be of no legal effect without being approved by the Attorney General. This question is one of no little importance in the administration of the public lands. It has never been directly determined by this court.

[491] The sections of the Revised Statutes upon the construction of which this question depends are the following: "§ 2450. The Commissioner of the General Land Office is authorized to decide upon principles of equity and justice as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the [Treasury] [Interior] the Attorney General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land claims, and to adjudge in what cases patents shall issue upon the same. § 2451. Every such adjudication shall be approved by the Secretary of the [Treasury] [Interior] and the Attorney General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants. § 2452. The Commissioner is directed to report to Congress at the first session after any such adjudications have been made a list of the same under the classes prescribed by law, with a statement of the principles upon which each class was determined. § 2453. The Commissioner shall arrange his decisions into two classes, the first class to embrace all such cases of equity as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid. § 2454. For all lands covered by claims which are placed in the first class, patents shall issue to the claimants; and all the lands embraced by claims placed in the second class shall, *ipso facto*, revert to, and become part of, the public domain. § 2455. It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner. § 2456. Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the canceling of the outstanding patent, [492] is authorized to issue a new patent, *on such confirmation, to the person who made the entry, his heirs or assigns. § 2457. The 178 U. S.

preceding provisions, from § 2450 to § 2456, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

Judge Hanford in the circuit court held, as we have seen, that the case in the Land Department after the entry had been suspended should have been adjudicated by the board composed of the Attorney General, the Secretary of the Interior, and the Commissioner of the General Land Office, as provided by §§ 2450 and 2451, and that the Secretary of the Interior, without a determination of that board, could not lawfully cancel the entry,—citing *Stimson Land Co. v. Hollister*, 75 Fed. Rep. 941. The circuit court of appeals said upon this point: "In the numerous decisions of the Supreme Court sustaining the authority of the Commissioner of the General Land Office and of the Secretary of the Interior to affirm, modify, or annul the entries of public land made in the local land offices, no reference is made to the provisions of §§ 2450 and 2451. Notwithstanding this fact, we are asked to assume that that court must have overlooked these provisions of the statute. We decline to act upon any such presumption."

The legislation embraced in the above sections is the outgrowth of the acts of August 26th, 1842 (5 Stat. at L. 534, chap. 205), August 3d, 1846 (9 Stat. at L. 51, chap. 78), July 17th, 1848 (9 Stat. at L. 246, chap. 101), March 3d, 1853 (10 Stat. at L. 258, chap. 152), and June 26th, 1856 (11 Stat. at L. 22, chap. 47). Sections 2450 to 2455, both inclusive, were taken from the act of August 3d, 1846, which was confined to "cases of suspended entries *now* existing in said land office;" and the operation of the act was limited to a period of two *years,[493] but its operation was extended to August 3d, 1849, by the act of July 17th, 1848, and by the act of March 3d, 1853, was extended for a term of ten years from March 3d, 1853, and made applicable "as well to cases which were inadvertently omitted, to be acted on under said act, as to those of a like character and description which have arisen between the date of said act and the present time." And the act of June 26th, 1856, revived and continued in force the provisions of the acts of August 3d, 1846, and March 3d, 1853, as to all cases of suspended entries and locations "where the law has been substantially complied with and the error or informality has arisen from ignorance, accident, or mistake, and is satisfactorily explained, and where the rights of no other claimant or pre-

emptor will be prejudiced, or where there is no adverse claim."

The act of June 26th, 1856, is reproduced in the Revised Statutes as § 2457.

Thus after June 26th, 1856, the statutes relating to the board were not applicable to every case of suspended entry, but to those specially mentioned in the act of that date. As carried into the Revised Statutes the purpose of this legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident, or mistake, would, in the absence of an adverse claim, be excused by the courts in administering the principles of equity and justice. The purpose of the legislation was not to limit or restrict the general or ordinary jurisdiction of the land officers. It was rather to supplement that jurisdiction by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. There was no necessity for legislation authorizing the rejection or cancellation of irregular entries, but legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

[494] Primarily the decision and adjudication of suspended entries *is, under §§ 2450 and 2451, as theretofore, left with the Commissioner of the General Land Office, except that he is to be guided by the principles of equity and justice and by the regulations settled by the Secretary of the Interior, the Attorney General, and the Commissioner, conjointly. The only question is whether all decisions of the Commissioner upon such suspended entries must be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval.

If the matter rested upon § 2450 and the first part of § 2451, it might well be contended that a decision rejecting or canceling a suspended entry should, equally with a decision sustaining such an entry, be submitted to the board for approval. But the latter part of § 2451 does not sustain that view. It is there declared that "every such adjudication," if approved by the board, "shall operate only to divest the United States of the title of the lands embraced thereby." A decision merely rejecting or canceling the entry could not, with or without the approval of the board, have the effect of divesting the United States of its title. That effect could only flow from a decision sustaining the entry, and since the effect of a decision by the Commissioner such as is required to be submitted to the board, and of an approval thereof by the board, is to divest the United States of its title, it follows that only decisions sustaining irregular entries are required to be submitted to the board for its approval. Decisions rejecting or canceling such entries have the force and effect otherwise accorded to them by the general land

laws, and are subject to the appellate or supervisory authority of the Secretary of the Interior, as in other instances.

The reasons for requiring the approval by the Secretary of the Interior and the Attorney General of decisions of the Commissioner sustaining irregular entries, under this exceptional legislation, do not apply to decisions rejecting and canceling such entries. In the one instance claims to public lands are sustained, although acquired in an irregular manner, while in the other such claims are rejected and the public title preserved.

Hackley's entry of the lands in controversy was not suspended because of any error or informality therein arising from ignorance, *accident, or mistake susceptible of explanation, but because of the charge that the same was unlawfully and speculatively made for the benefit of others, and not for his own exclusive use and benefit. The suspension was ordered with a view to an investigation and hearing upon that charge. The decision of the Commissioner sustaining the entry, following this investigation and hearing, was not therefore, rendered in pursuance of the special authority conferred upon him by §§ 2450 to 2457 of the Revised Statutes, but under the general authority given to him, in respect of the public lands, by §§ 441, 453, and 2478 of the Revised Statutes and by the act of June 3d, 1878, under which Hackley's entry was made.

We are of opinion that the Commissioner's decision, having been made under his general authority, and not under the exceptional authority given by §§ 2450 to 2457, was not required to be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval, but was subject to the appellate or supervisory authority of the Secretary of the Interior under §§ 441, 453, and 2478 of the Revised Statutes. *Knight v. United States Land Asso.* 142 U. S. 161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258. It follows that the Secretary of the Interior in reversing the decision of the Commissioner of the General Land Office, and in rejecting and canceling Hackley's entry, did not exceed the jurisdiction conferred upon him by law.

The matter determined by the decision of the Secretary was whether Hackley's entry was made in good faith, for his own exclusive use and benefit. After notice, investigation, and hearing, the Secretary of the Interior determined that question against Hackley. In the absence of a charge that this decision was fraudulently given or obtained,—and no such charge is made,—the Secretary's determination of this question of fact is conclusive upon the courts. This is established by repeated decisions. And if the charge against Hackley's entry be considered as one of fraud, involving a mixed question of fact and law, still the decision of the Secretary of the Interior canceling that entry fully states the evidence or facts from which the fraud was held by him to be deducible as a matter of law. Upon an examination of that decision and of the evidence or facts therein *recited we are not pre-

pared to hold that any error of law was committed by that officer.

This disposes of all the questions in the case that need be noticed, and *the decree below is affirmed.*

F. MAY & COMPANY, *Plffs. in Err.*,
v.
CITY OF NEW ORLEANS.

Taxes—exemption of original imported packages.

(See S. C. Reporter's ed. 496-510.)

1. Original packages of imported goods, which cannot be assessed for local taxation, consist of the boxes, cases, or bales in which the goods were shipped, and not the smaller packages therein contained, although these are the packages in which the goods are put up by the manufacturer; and when the packages in which the goods are shipped reach their destination for use or trade, and are opened and the separate packages therein exposed or offered for sale, these become subject to local taxation like other property in the state.
2. An assessment for taxation, under state authority, of the original packages in which goods are imported, before they have, by the act of the importer, become incorporated into the mass of property of the state and are held for use or sale, is void as a violation of U. S. Const. art. 1, §§ 8, 10, prohibiting the states to lay imposts or duties on imports, and giving Congress power to regulate foreign commerce.

[No. 332.]

Argued March 6, 7, 1900. Decided May 21, 1900.

IN ERROR to the Supreme Court of the State of Louisiana to review a decision reversing a judgment against the validity of a tax on imported goods. *Affirmed.*

See same case below, 51 La. Ann. 1064, 25 So. 959.

The facts are stated in the opinion.

Mr. D. C. Mellen argued the cause and, with **Mr. J. Ward Gurley**, filed a brief for plaintiffs in error:

When the importer has so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty

NOTE.—As to *original packages*—see *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616, and note; *Re Wilson* (D. C.) 12 L. R. A. 624, and note. And see note to *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to *tax on imports*—see note to *American Fertilizer Co. v. North Carolina Bd. of Agri.* (C. C. E. D. N. C.) 11 L. R. A. 179.

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on imports to escape the prohibition of the Constitution.

Brown v. Maryland, 12 Wheat. 442, 6 L. ed. 686.

The use of the expression "original package," was merely illustrative, the true test being whether the imported goods had been mixed up with the general property of the state. And this test has been applied ever since by this and other courts, although the words "original package" have been so generally used that the cases have become known as the "original package" cases.

License Cases, 5 How. 575, sub nom. *Thurlow v. Massachusetts*, 12 L. ed. 288; *Leisy v. Hardin*, 135 U. S. 113, 34 L. ed. 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Re Ware*, 53 Fed. Rep. 783; *Re Spain*, 47 Fed. Rep. 208, 14 L. R. A. 97, 3 Inters. Com. Rep. 738; *State v. Goetze*, 43 W. Va. 495, 27 S. E. 225.

The manufacturer's package is the trade package,—for that is the form in which the goods are intended for sale,—and is the original package of imports, the outer casing being used only as a protection against damage, and for the convenience of handling, and to lessen freight.

License Cases, 5 How. 575, sub nom. *Thurlow v. Massachusetts*, 12 L. ed. 288.

Mr. W. B. Sommerville argued the cause and, with **Mr. Samuel L. Gilmore**, filed a brief for defendant in error:

The original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped.

Guckenheimer v. Sellers, 81 Fed. Rep. 997; *State ex rel. Cochran v. Winters*, 44 Kan. 723, 10 L. R. A. 616, 25 Pac. 235; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430, 8 So. 353.

***Mr. Justice Harlan** delivered the opinion [497] of the court:

The plaintiffs in error, a commercial firm in New Orleans, brought this action in the civil district court, parish of Orleans, to prevent the enforcement of certain tax assessments made by the city of New Orleans in the year 1897.

The petition alleged that during the whole of the year 1897 the plaintiffs were engaged in importing for sale foreign goods, upon all of which they paid the duties and imposts levied by the United States;

That the board of assessors for the parish of Orleans assessed them for that year \$2,500 on "merchandise and stock in trade," and \$1,000 under the head of "money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description;" and—

That such assessments were void for the following reasons: 1. All merchandise and stock in trade had and carried by the plaintiffs during 1897 consisted of dry goods im-

ported by them from foreign countries upon which duties, imposts, and import taxes were levied by the United States and paid by them, and which were sold only in unbroken original packages as imported, and the assessment thereon was in violation of article 1, § 10, paragraph 2, of the Constitution of the United States. 2. All the credits and bills receivable of the firm during that year consisted wholly of sums due on the purchase price of the above merchandise sold in unbroken and original packages as imported, and the assessment thereon was in violation of the same constitutional provision. 3. The assessment of \$1,000 upon "money loaned [498] on interest" was unconstitutional, *because the plaintiffs at no time during 1897 had any money loaned on interest.

A temporary injunction having been granted against any sale of the plaintiff's property for the taxes in question, the city answered, denying each allegation of the petition.

The only evidence in the case was the testimony of one of the plaintiffs as to the manner in which the company conducted its business. That testimony, using substantially the words of the witness, may be thus summarized:

Representatives of the firm went to Europe and obtained from different manufacturers samples of goods, which were sent to New Orleans and were used by plaintiffs in obtaining what were known as import orders. Besides that method, if any article was thought good they placed what were known as stock orders; that is, they ordered the goods on their own account. But in most cases the firm sold the goods, and did not keep a stock on hand. All their goods were imported, and customs duties were paid on them. They did not handle domestic goods.

They sold the goods in the packages in which they were received, because the bulk of their business was jobbing trade. Two, three, or five hundred packages might be ordered. If the order were for 500 dozen towels, they might come packed 2, 3, or 5 dozen in a package. Such a package was never broken. If a small customer came in they might sell him one package. It had often happened that customers desired only a sample, in which case a package might be broken to get it. Upon these samples the importers obtained orders. If an order was given for 500 dozen towels, put up in packages of 5 dozen each when shipped to the firm by the manufacturer in Europe, they would be enclosed in a wooden case. Cases containing such orders might not come to the firm's store at all, but would go directly to the customer unopened. But if there were two or three orders in a case it would be brought to the store, opened, and the different orders taken out. But they never opened any of the packages in the case.

An import order was one placed on samples to be manufactured, and about 65 per cent of [499] the firm's business was *done by import orders. They would submit to the buyer a line of samples, and he would give an im-

port order, with the understanding that the goods ordered were to be manufactured, and the delivery of them not made for three or four months. If he placed a stock order it was for goods that were in the store ready for delivery.

Goods were always ordered on the firm's own account. They might receive an order for 200 dozen towels, but give an order on the manufacturer for 500 dozen, for 300 of which they had no order, but which they might sell while in process of manufacture. They were the owners of all goods that came to them upon those orders.

The lace handled by them was put up in cartons or pasteboard boxes, each box containing 12 pieces of lace, each piece 12 yards long. In filling orders a number of these cartons or boxes were put in another box or case by the manufacturer, and so received by the firm. If a case contained only one order it was sent directly to the customer. If the case happened to contain two or more orders it went to the store, where it was opened and the orders separated.

Bobbinet was received in cases containing 30, 40, or 50 packages of 2, 3, or 4 pieces each. If a customer wished to buy bobbinet, he was told that he would have to buy at least one package; that they did not sell one piece only, but in packages. The bulk of the business in bobbinet was directly on import orders. At times 6, 7, or 8 cases which did not come to the store were sold to one firm. Bobbinet was not sold by the case. If more than one order came in a case it was broken open and the orders separated.

The stock of the firm consisted mostly of bobbinet and household linens. They also kept a number of samples of dolls and toys, household linens, towels, sheets, embroideries, and laces.

We here give a part of the examination of the witness: "Q. Some of which goods were sold in these cartons as you describe, and not in the original packages? A. Some of which were sold out of stock and some on import orders. Q. Let us make that clear. I understand you to say,—let us take this case of cartons of laces. You may order such a quantity of *laces as would consist of, say [500] 50 cartons, and the factory ships them to you in a large wooden box? A. The packer does that. The manufacturer does not even put them in a case himself, but gets the packer to do that; and there are certain goods not in the lace line, but in the household linen line which do not come in cases; they come in bales. Q. I want to get a thorough explanation of the way you get at these goods. Say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience, as I understand many of those cases go direct to your customers? A. A great many. Q. And in other cases, where they contain more than one order, the cases are opened by you and the orders separated? A. Yes; but the order is generally sent in the case itself. The goods may be shipped in a wrapper by express. The case does not signify that this is the original package.

goods are put up at the factory. If a manufacturer puts up 5 dozen towels in a package, that package is the original package, and if I open that package I break the original package; but, whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade."

In reference to "money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description," in the assessment, the witness said that the only property possessed by the firm in 1897 of the kind mentioned in those items were bills receivable. Those bills consisted of money due them on sales of imported goods by customers who had given orders which had been filled, but for which they had not paid. Some of these goods were sold out of stock and some on import orders. They had no money loaned on interest in 1897. The firm was continuing to do business in 1898 in the same way as in the previous year.

[501] Upon final hearing the civil district court adjudged that the assessment in question was unconstitutional and void, and the injunction against the city was made perpetual. That judgment having been reversed upon appeal, with directions to dissolve the injunction and dismiss the petition, the contention *here is that the plaintiffs in error have been denied rights and immunities secured to them by the Constitution of the United States.

The supreme court of Louisiana, speaking by Mr. Justice Blanchard, said, among other things: "The question, then, which the case really presents is, What is the 'original package'? Is it the package in which the goods are put up for convenience by the foreign manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package in the legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package, then plaintiffs' objection to the assessment complained of is well taken. If the case or box in which the goods are placed for shipment be the original package, then their case falls." After referring to some of the adjudged cases, the court said that the authorities supported the contention of the city that the "original package" in this case must be held to be that in which the goods were shipped to and received by the plaintiffs, and not the smaller packages put up by the manufacturer and packed in the box delivered to the carrier.

If the goods of the plaintiffs were assessed for taxation before they had ceased to be imports, that is, while in the original packages and before they had, by the act of the importer, become incorporated into the mass of property of the state and were held

for use or sale, then the assessment was void under the provision of the Constitution of the United States declaring that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports except those absolutely necessary for executing its inspection laws, as well as under the provision giving Congress power to regulate commerce with foreign nations. Art. 1, §§ 8, 10. Of the correctness of this general proposition, as sustained by the adjudged cases, no doubt is entertained.

Two views of the general question are presented for our consideration.

*One is that the box, case, or bale in which [502] the plaintiffs' goods were brought from Europe was not the original package; that each separate parcel or bundle placed in such box, case, or bale was itself an original package; and that within the meaning of the Constitution no one of such separate parcels or bundles lost its distinctive character as an import and became part of the mass of property in the state, liable to local taxation, until after that separate parcel or bundle had been sold by the importers. This is substantially the proposition pressed upon our attention by the plaintiffs.

The other view is that the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer, or packer was to be regarded as the original package, and that upon the opening of such box, bale, or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle lost its distinctive character as an import and became a part of the general mass of property in the state subject to local taxation. This is the proposition advanced on behalf of the defendant.

Let us first inquire as to the consequences that may follow from the interpretation of the clause of the Constitution relating to state taxation of imports, upon which the plaintiffs rest their case. In the view taken by them it would seem to be immaterial whether the separate parcels or packages brought from Europe were left in the shipping box, case, or bale after it was opened, or were taken out and placed on the shelves or counters in the store of the importer for delivery or sale along with goods manufactured or made in this country. In other words, they argue that the importer may sell each separate package either from the box in which it was transported, after it is opened, or from the shelves or counters in his store, without being subjected to local taxation in respect of any package so brought into the country, provided such separate package be sold or offered for sale in the form in which it was when placed in the box, case, or bale by the European manufacturer or packer. This means that the power of the state to tax goods, the product of other countries, depends upon the particular form in which the European manufacturer or packer, of his own accord *or by direction of the im- [503]

porter, has put them up in order to be sent to this country. The necessary result of this position is that every merchant selling only

goods of foreign manufacture, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability whatever to state or local taxation in respect of such goods, provided he takes care to have the articles imported separately wrapped and placed in that form in a box, case, or bale for transportation to and sale in this country. In this view, if a jeweller desires to buy fifty Geneva watches for the purpose of selling them here without paying taxes upon them *as property*, he need only direct them to be placed in separate cases, however small, and then put them all together in one box. After paying the import duties on all the watches in the box, and receiving the box at his store, he may open the box, and the watches, each one being in its own separate case, may then be exposed for sale. According to the contention of the plaintiffs, each watch, in its own separate case, would be an original package, and could not be regarded as part of the mass of property of the state and subject to local taxation, so long as it remained in that form and unsold in the hands of the importer. Other illustrations arising out of the business of American merchants will readily occur to everyone. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them, no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.

[504] There are other considerations that cannot be ignored in determining the time at which goods imported from foreign countries lose their character as imports and may be properly regarded as part of the general mass of property in the state, *subject to local taxation. If, as plaintiffs insist, each parcel separately wrapped and marked and put in the shipping box, case, or bale, is an original package which, until sold, no matter when, would retain its distinctive character as an import, although the box, case, or bale containing them had been opened and the separate parcels all exposed for sale, what stands in the way of European manufacturers opening branch houses in this country, and selling all their goods put up in the form of separate parcels and packages, without paying anything whatever by way of taxation on their goods *as property protected by the laws of the state in which they do business?* Indeed, under plaintiffs' view, the Constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing

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violence to the words of the Constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not, simply by paying the duties, escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case, or bale containing them has been opened and the goods exposed to sale.

Let us see what this court has said when it has had occasion to determine the meaning and scope of the constitutional provision relating to imports.

The leading case is *Brown v. Maryland*, 12 Wheat, 419, 436, 441-444. 6 L. ed. 678, 684, 686, 687. Brown was indicted under an act of the legislature of Maryland supplementary to an act relating to duties on licenses to retailers of dry goods and for other purposes. The 2d section of the supplementary act provided "that all importers of foreign articles or commodities of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whisky, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to *sell*, take out a license as by the original act is directed, for which they shall pay \$50; and, in case of neglect or refusal to *take out such license, shall be sub-[505]ject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." Laws Md. 1821-22, p. 168. The indictment having been sustained, the case was brought to this court and was argued with great ability.

It is important to observe that the question presented was not one of ordinary taxation upon property, but it was—to use the words of Chief Justice Marshall—"whether the legislature of a state can constitutionally require the importer of foreign articles to take out a *license* from the state *before* he shall be *permitted to sell* a bale or package so imported." That question was considered with reference to the clause forbidding the states from laying imposts or duties on imports or exports, except such as were absolutely necessary for executing their inspection laws, and also with reference to the commerce clause of the Constitution. Declining to lay down any rule as universal in its application, the court said: "It is sufficient for the present to say, generally, that when the importer has *so acted upon* the thing imported that it has become incorporated and mixed up with the mass of property in the country it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer *in his warehouse, in the original form or package in which it was imported*, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." Again: "The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that

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they should be understood to confer it. . . . The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties."

[506] On behalf of the state of Maryland it was contended that if the importer acquired the right to sell by the payment of duties he might exert that right when, where, and as he pleased, and that the state could not regulate it; that he might sell by retail, by auction, or as an itinerant peddler; that he might introduce *articles, such as gunpowder, which would endanger the city, into the midst of its population, as well as articles which would endanger the public health, and thus the power of self-preservation would be denied; and that an importer might bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

To these objections the court, speaking by the Chief Justice, responded: "These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and consequently not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition. This indictment is against the importer for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages and traveling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police *power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, 178 U. S.

more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state. The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the states from doing that which it was the great object of the Constitution to prevent."

These extracts from the opinion in *Brown v. Maryland* establish the following propositions:

1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right to sell cannot be forbidden or impaired by a state.

2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, "in his warehouse, in the original form or package in which it was imported," is a duty on imports within the meaning of the Constitution; and—

3. That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the state in like condition *with other property that [508] should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.

So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had so acted upon the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation.

We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported, and put such separate parcels in the hands of agents to be sold wherever, in the state or in the country, customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the state while thus being carried around the country by the importer's agents,—no separate parcel, so long as it remained in the particular form in which it was packed in a

box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, in separate parcels, have been so acted upon by the importer that they have ceased to be imports, and have become part of the mass of the property of the state, liable to local taxation. But what is the difference in principle between the case of sales by an importer through traveling agents, and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employees sells or offers to sell the separate parcels, either from the opened box or case in his store, or from shelves or counters upon which such parcels have been placed for examination and sale?

In our judgment, the "original package" in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property [509]*subject to taxation by the state as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the state. It was not a tax on the plaintiffs' goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels, and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the state the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages,—a duty imposed for the purpose of raising money to carry on the operations of the government, and, in many instances, with the intent to protect the industries of this country against foreign competition. A different view is not justified by anything said in *Brown v. Maryland*. It was there held that the importer by paying duties acquired the right to sell in the original packages the goods imported,—the Maryland statute requiring a license from the state before any one could sell "by wholesale, bale or package, hogshead, barrel, or tierce," goods imported from other countries. But it was not held that the right to sell was attended with an immunity from all taxation upon the goods as property, after they had ceased to be im-

ports and had become by the act of the importer a part of the general mass of property in the state. The contrary was adjudged.

Without further reference to authorities we state our conclusion to be that within the decision in *Brown v. Maryland* the boxes, cases, or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them *lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, the moment the boxes, cases, or bales in which they were shipped reached their destination for use or trade, and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States.

This disposes of the only Federal question arising on this appeal.

The judgment of the Supreme Court of Louisiana is affirmed.

Mr. Chief Justice Fuller, Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham dissent.

GEORGE DEWEY, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 510-524.)

Navy—bounty money—superior or inferior force of enemy's vessel.

In determining whether vessels of the enemy sunk or destroyed were of inferior or superior force to the American vessels engaged in the battle, for the purpose of fixing the amount of bounty to be awarded under U. S. Rev. Stat. § 4635, the land batteries, mines, and torpedoes not controlled by those in charge of the enemy's vessels, but which supported those vessels, are to be excluded altogether from consideration, and the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, are alone to be regarded.

[No. 546.]

Argued April 10, 1900. Decided May 28, 1900.

APPEAL from a decision of the Court of Claims determining the amount of bounty recoverable by the commanding officer on a naval fleet for the sinking or destruction of the vessels of the enemy. *Affirmed.*

The facts are stated in the opinion.

Messrs. William B. King, Benjamin Micou, and H. A. Herbert argued the cause and filed a brief for appellant.

Assistant Attorney General Pradt argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[511] *Mr. Justice **Harlan** delivered the opinion of the court:

This was an action in the court of claims to recover bounty money earned by the plaintiff in error as the commanding officer of the American fleet at the naval battle of Manila, on the 1st day of May, 1898.

The statute under which the action was brought is as follows: "§ 4635. A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture." U. S. Rev. Stat. 902.

The mode in which bounty money earned under that section was to be divided is indicated by the following provisions relating to the distribution of prize money:

"§ 4631. All prize money adjudged to the captors shall be distributed in the following proportions:

"First. To the commanding officer of a fleet or squadron, one twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

[512] *"Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander in chief of such fleet or squadron, a sum equal to one fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, such fiftieth part to be deducted from the moiety due to the United States, if there be any such moiety, otherwise from the amount awarded to the captors; but such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

"Third. To the fleet captain, one hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel.

"Fourth. To the commander of a single vessel, one tenth part of all the prize money

awarded to the vessel under his command, if such vessel at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three twentieths if his vessel was acting independently of such superior officer.

"Fifth. After the foregoing deductions the residue shall be distributed and proportioned among all others doing duty on board, including the fleet captain, and borne upon the books of the ship in proportion to their respective rates of pay in the service." U. S. Rev. Stat. 901.

It may be here stated that the provisions for prize money and bounty to the navy were repealed by an act of Congress approved March 3, 1899, which declares that "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed." 30 Stat. at L. 1004, 1007, chap. 413, § 13.

*The American vessels taking part in the battle were the Olympia, Baltimore, Boston, Raleigh, Concord, Petrel, McCulloch, Nanshan, and Zafiro. [513]

The number of officers and men on those vessels during the battle was 1,836.

The Spanish vessels taking part in the battle were the Reina Cristina, Castilla, Don Juan de Austria, Don Antonio de Ulloa, General Lezo, Marquez del Duero, Argos, Velasco, Isla de Mindanao, Isla de Cuba, Isla de Luzon, Manila, and two torpedo boats. The Reina Cristina, Castilla, Don Juan de Ulloa, General Lezo, Marquez del Duero, Argos, Velasco, Isla de Mindanao, and the two torpedo boats were destroyed by the American vessels. The Don Juan de Austria, Isla de Cuba, and Isla de Luzon were disabled and put out of action in the battle, and were captured; but they were subsequently floated and repaired by the United States, and now constitute a part of the American navy. The Manila was captured in the same engagement.

No claim for bounty under § 4635 is made in the present action on account of the sinking of the Don Juan de Austria, Isla de Cuba, and the Isla de Luzon, because proceedings are to be begun in the supreme court of the District of Columbia to condemn those vessels as prize of war, the claimant reserving the right to make such claim hereafter, if it should be held that the vessels are not subject to condemnation in prize.

The total number of men on board the Spanish vessels during the battle of Manila was 2,973. The total number on board the Spanish vessels destroyed was, at the commencement of the action, 1,914.

The enemy's vessels were supported by land batteries and by mines and torpedoes in the entrance to Manila bay and in the bay itself, and some of those in the bay exploded during the action.

It was found as a fact by the court of claims—and this court must assume it to be

true—that, taking into consideration the guns at Corregidor, El Fraile, and other forts at the entrance of the bay, and those at Manila and Cavite, and the torpedoes and mines in the bay and the entrance to it, the enemy's force was superior to the force of the vessels of the United States; but that, excluding shore batteries and submarine defenses, the American vessels and armaments were superior in force to the Spanish vessels.

The court below—all its members concurring—was of opinion that the land batteries, mines, and torpedoes that supported the Spanish vessels during the naval engagement in Manila bay should be excluded from consideration, and that the claim of the plaintiff came within the clause of the statute allowing the sum of \$100 for each person on board of the vessels sunk or destroyed “if the enemy's vessel was of inferior force,” and not within the clause allowing the sum of \$200, “if [the enemy's vessel was] of equal or superior force.” Judgment was accordingly entered against the United States for the sum of \$9,570, upon the basis of \$100 for each person on board at the commencement of the engagement, of the enemy's vessels sunk or destroyed.

The counsel have called our attention to several cases in this and other courts. Do any of those cases constitute a direct adjudication of the question now before us?

In *The Ironclad Atlanta*, 3 Wall. 425, 432, *sub nom. Officers & Crew of the United States Ironclad Weehawken v. The Atlanta*, 18 L. ed. 253, 255, the question was whether a certain American vessel, the Nahant, was to be regarded as one of the capturing vessels in a naval engagement in Wassau sound, Georgia, in 1863. The court said: “The importance of the point is this: the Weehawken was confessedly inferior in force to the Atlanta, and if she is alone to be regarded in the comparison of forces, the whole prize money goes to the captors. On the other hand, the combined force of the two monitors was superior to that of the Atlanta, and if both are to be regarded as capturing vessels, only one half of the prize money goes to the captors, and the decree must be affirmed. The mere fact that the only shot fired and the only damage done was by the Weehawken is not decisive. Other circumstances must be taken into account in determining the matter,—such as the force, position, conduct, and intention of the Nahant. The two vessels were known to be under the same command and of nearly equal force. The Atlanta descended the sound to attack both, and governed herself with reference to their combined action.

[515] It is not reasonable to suppose that her course would have been the one pursued, had she had only the Weehawken to encounter. Besides, the fire of the Atlanta was directed entirely to the Nahant, and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the Weehawken. This diversion must be considered, in every just sense of the terms, as giving aid to her. Again, the power of the shot of the Weehawken had evidently surprised the officers of

the Atlanta, who found their vessel speedily disabled and their crew demoralized. The advance upon her, at full speed, of a second monitor, of equal force, ready to inflict similar injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the Atlanta. If the shot from the guns of one of the monitors could, in a few moments, penetrate the casement of the Atlanta, crush in the bars of her pilot-house, and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destroy his entire crew. It cannot be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did if the Nahant had not been present in the action.”

Another case referred to is that of *The Siren*, 13 Wall. 389, 395, *sub nom. Officers & Crews of United States Ships of War v. United States*, 20 L. ed. 505, 507. That was a case in prize arising out of certain captures near Charleston, South Carolina, in 1865, of rebel vessels during the late Civil War, as the result of the joint action of the land and naval forces of the United States. This court, affirming the judgment of the district court for the district of Massachusetts, held that Congress had made no provision in reference to joint captures by the army and navy, and that such captures inured exclusively to the benefit of the United States. The court said: “We have already adverted to the ingress of the navy into the harbor of Charleston on the morning of the 17th of February. At 9 o'clock that morning an officer of the land forces hoisted the national flag over the ruins of Fort Sumter. Flags were also raised over Forts Ripley and Pinckney. At 10 o'clock a military officer reached Charleston. The mayor surrendered the city to him. Four hundred and fifty pieces of artillery, military stores, and much other property were captured with it. Contemporaneously with these things was the seizure of the *Siren* by the *Gladiolus*, and the approach and arrival of the rest of the fleet. The two forces were acting under the orders of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way, both swept in without any further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defenses by the rebels, could have seized all that was taken by both. The meritorious service of the *Gladiolus* was as a salvor, and not as a captor. Precedence in the time of the arrival of the respective forces is an element of no consequence. Upon principle, reason, and authority, we think the judgment of the district court was correctly given.”

The case chiefly relied upon by the plaintiff is *United States v. Farragut*, 22 Wall. 406, 22 L. ed. 879. The question now presented might perhaps have been determined

under the pleadings in that case, if it had not been withdrawn from consideration before this court rendered its judgment. Admiral Farragut and others of the American navy filed a libel in admiralty in the supreme court of the District of Columbia on account of certain prizes taken below New Orleans in April, 1862. The plaintiff and the government referred the cause to the determination and award of certain persons, whose award was to be final upon all questions of law and facts involved,—the award to be entered as a rule and decree of court in the case, with the right also of either party to appeal to this court as from other decrees or judgments in prize cases. The arbitrators made an award, holding, among other things, that certain captures were not a conjoint operation of the army and navy of the United States. Exceptions were filed to the award as erroneous in point both of law and fact. The exceptions were overruled and a decree was entered for the claimants. After the case came to this court the Attorney General, according to the report of the case, dismissed the appeal as to certain property covering

[517] \$613,520 of the aggregate *sum allowed by the decree, and that sum was distributed among the captors. That part of the case, it is stated, raised the very question now presented, and it is contended that the action of the Attorney General should be regarded as indicating the interpretation placed upon the statute by the executive department. We cannot accept this view. It does not appear from the report of the case what reasons induced the Attorney General to dismiss the appeal of the government as to the matters referred to. It may have been because of the conviction that, under the facts disclosed by the record, the capture in question was not the result of the conjoint action of the army and navy, but of the action alone of the navy. It is sufficient to say that this court regarded the statement by the arbitrators that the capture was not the joint act of the army and navy as binding upon it, and what appears in the opinion about other points has no bearing upon the present case.

Another case referred to by counsel is *Porter v. United States*, 106 U. S. 607, 611, *sub nom. United States, Porter, v. Steam Vessels of War*, 27 L. ed. 286, 287, 1 Sup. Ct. Rep. 539, 543. But the decision there did not go beyond the point that the act of June 30, 1864 (13 Stat. at L. 306, 311, chap. 174), did not allow bounty where the vessels of the enemy during the late Rebellion, were destroyed by the combined action of the land and naval forces of the United States. The court said: "Prize money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army. To win either, the navy must achieve its success without the direct aid of the army, by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the navy when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant

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conduct of its officers and men may justly entitle them to honorable mention in the history of the country."

Nor has *The Selma*, 1 Low. Dec. 30, Fed. Cas. No. 12,647, any bearing upon the present discussion. That case arose out of certain captures made in the action of August 5th, 1864, in the bay of Mobile. It was there decided—and nothing else was decided—that, in order to entitle a vessel to participate in the distribution of a *prize, its situa-[518] tion during the naval engagement must have been such that it could have rendered assistance in the actual conflict in which the prize was taken. The court said: "Suppose it had happened in the case now before me, as once occurred on the Mississippi under the same great captain, that only a small number of vessels had made good the passage of the forts, and that they had found themselves only equal or inferior in force to the enemy within, and had then succeeded by their skill and gallantry in making this capture. It would be impossible, I think, under the case of *The Atlanta* [2 Sprague, 251, Fed. Cas. No. 619] or on principle, to hold that the vessels outside were actual takers, and to reduce the credit and reward of the conquerors to the level of a capture by superior force. And it will not be easy under our law to define actual captors in such a way as not to require of them at least the qualifications of position and power to do service, which the statute peremptorily imposes on constructive takers."

We have referred quite fully to these cases because they were made the subject of comment by counsel. But we do not think that any of them meet the precise question now presented. They throw no light on the inquiry whether, in estimating the force of the enemy's vessel, the support furnished by land batteries, mines, and torpedoes is to be taken into consideration.

The words in the existing statute relating to the distribution of prize money are not entirely new. In the act of March 2, 1799 (1 Stat. at L. 709, 715, chap. 24, § 5), relating to the navy of the United States, it was provided "that all captured national ships or vessels of war shall be the property of the United States; all other ships or vessels, being of superior force to the vessel making the capture, in men or in guns, shall be the sole property of the captors; and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture."

In the act of April 2, 1800 (2 Stat. at L. 45, 53, chap. 33, § 7), for the better government of the navy, it was provided "that a bounty shall be paid by the United States of twenty dollars for each person on board any ship of an enemy at the commencement of an engagement, which shall be sunk or destroyed by *any ship or vessel belonging to the Unit-[519] ed States of equal or inferior force, the same to be divided among the officers and crew in the same manner as prize money."

The 4th section of the act for the better government of the navy, approved July 17, 1862 (12 Stat. at L. 600, 606, chap. 204, § 4), contained this provision: "That a bounty

shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy's vessel was of inferior force; and of two hundred dollars if of equal or superior force; to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of their class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

Then came the act of June 30, 1864 (18 Stat. at L. 306, 310, chap. 174, § 11), regulating prize proceedings and the distribution of prize money. The 11th section of that act is substantially the same as the 4th section of the act of 1862, and is reproduced in § 4635 of the Revised Statutes, on which the claimant bases his action against the United States.

It thus appears that Congress, in providing for bounty to be paid by the United States on account of enemy vessels sunk or otherwise destroyed by any ship or vessel belonging to the United States, has never prescribed any other rule than to give the smaller amount when the enemy's vessel was of inferior force, and the larger amount when the enemy's vessel was of equal or superior force. We are asked to construe the words in the present statute "one hundred [520] dollars, if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force," to mean just what it would mean if the question of the inferiority or superiority of the enemy's vessel was made, by express words, to depend upon the inquiry whether it was or was not supported in the naval engagement by land batteries, mines, and torpedoes under the charge of others than those having the management of the enemy's vessel. We cannot do that without going far beyond the obvious import of the words employed by Congress. Of course, our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ, interpreting such words according to their ordinary meaning, as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with

which they were actually confronted when engaging the enemy, should be taken into consideration. But that was a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested, when it expressly declared that the amount of its bounty shall depend upon the question whether "the enemy's vessel"—not the enemy's vessel and the land batteries, mines, and torpedoes by which it was supported—was of inferior or of equal or superior force.

In our examination of this case we have not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by officers and sailors acting under his orders. All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement. But this court cannot permit considerations of that character to control its determination of a judicial question, or induce it to depart from the established rules for the interpretation of statutes. Nor can we allow our judgment to be influenced by the circumstance that Congress *has recently repealed all statutes giving bounty to officers and soldiers of the navy for the sinking or destruction hereafter, in time of war, of an enemy's vessels,—thereby, it may be assumed, indicating that in the judgment of the legislative branch of the government the policy of giving bounties to the navy was not founded in wisdom, and should be abandoned. This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the government in reference to any particular subject of legislation, this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden v. The Collector*, 5 Wall. 107, 111, *sub nom. Hadden v. Barney*, 18 L. ed. 518, 519. Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed. *United States v. Fisher*, 2 Cranch, 358, 399, 2 L. ed. 304, 317; *Lake County v. Rollins*, 130 U. S. 662, 670, 2 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

In our opinion, the court of claims did not err in holding that, in determining whether the Spanish vessels sunk or destroyed at Manila were of inferior or superior force to the American vessels engaged in that battle, the

land batteries, mines, and torpedoes not controlled by those in charge of the Spanish vessels, but which supported those vessels, were to be excluded altogether from consideration, and that the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded. In that view *the decree below was right, and it is affirmed.*

[522] *Mr. Chief Justice **Fuller**, dissenting:

Claimant in prosecuting this case, in effect, represents the claims of all the officers and men engaged in the battle of Manila bay, May 1, 1898. The question is not whether there was a grant of bounty, for that is not disputed. It is simply as to the amount of bounty, and the correct result turns upon the construction of the statute. There being no controversy in respect of the existence of the grant, I am of opinion that the rule of strict construction does not apply, and that the statute, in view of its object, should be construed liberally in favor of the beneficiaries. If so construed the judgment ought to be reversed.

The applicable statutory provision is as follows:

"A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money." [12 Stat. at L. 600, 606, chap. 204, § 4.]

The obvious object of the law was to encourage personal gallantry and enterprise. If the hostile force was equal or superior, then the bounty was to be double what it would be if the enemy's force was inferior, because the hazards to be run were so much the greater. But the bounty was limited in total amount by the number of persons on board the vessels of the enemy, which appears to have been considered to be a practicable restriction.

[523] The chief distinction, as a military achievement, of the victory of Manila bay, is that the American fleet, unaided by an army, attacked a force composed of ships supported by powerful shore defenses, together with submarine mines and torpedoes, and, in defiance of these open and hidden dangers in addition *to the power of the enemy's fleet, sailed in, and not only destroyed or captured all the opposing vessels, but captured or silenced the shore batteries. To omit consideration of these circumstances in determining pecuniary reward under the statute seems to me to be altogether unreasonable, and yet it is held that, in comparing the opposing forces, the shore batteries and submarine mines and torpedoes which our fleet was compelled to encounter should not be

taken into account, though the bounty could not rise above the number of persons on the enemy's ships.

It is my judgment that the intent plainly was that the entire opposing forces should be compared, and that the shore batteries, mines, and torpedoes protecting and defending the vessels of the enemy should be included in estimating the rate of bounty, although they were, of course, not armaments or means of attack or defense directly located on the enemy vessels themselves. Indeed, the words of the statute, if literally construed, might be limited to engagements of single vessels on each side, yet as to this the principal opinion correctly applies a liberal construction, and any other would be preposterous. But if a liberal construction be proper at all, why not altogether?

The action of the government in respect of the taking of vessels by Admiral Farragut in the capture of New Orleans has great significance. That case involved an award made by a distinguished board of arbitrators, Henry W. Paine, of Massachusetts; Thomas J. Durant, of the District of Columbia, and Gustavus V. Fox, then late Assistant Secretary of the Navy, one of whose findings was: "That in the engagement which resulted in the capture of those ships, the entire force of the enemy was superior to the force of the United States ships and vessels so engaged." This finding was conceded to have included the forts and batteries on shore, but that was not definitely stated. The executive department acquiesced in the award of the arbitrators on this branch of the case without demanding a more specific finding, and this court was not called upon to determine the precise question. [*U. S. v. Farragut*] 22 Wall. 406, 22 L. ed. 879. *The Siren*, 13 Wall. 389, *sub nom. Officers & Crews of United States Ships of War v. United States*, 20 L. ed. 505, is not to the contrary, inasmuch as that was a case of joint capture by the army and the navy, and *Con-[524]gress had made no grant in such circumstances. Here the victory was that of the navy alone, and the pecuniary fruits under this statute should not be diminished because the opposing force was partly on shore or under water.

Undoubtedly it is our duty to give effect to the will of Congress, but in ascertaining its will the object Congress manifestly sought to attain must be recognized, and should be controlling, unless positively defeated by the language used.

I am unable to concur in the opinion and judgment of the court, and am authorized to say that Mr. Justice **White** and Mr. Justice **McKenna** concur in this dissent.

FRED BARDES, Trustee of the Estate of Frank T. Walker, Bankrupt, *Appt.*,

v.

FIRST NATIONAL BANK OF HAWARDEN, IOWA, *et al.*

(See S. C. Reporter's ed. 524-539.)

Bankruptcy—jurisdiction of district court over suit to collect assets.

1. Jurisdiction of civil actions at law and plenary suits in equity to determine title to and reduce to possession alleged assets of a bankrupt is not included in the clauses of § 2 of the bankruptcy act of 1898, which confer upon district courts of the United States power to bring in and substitute additional parties in proceedings in bankruptcy, to make orders, issue process and enter judgments necessary for the enforcement of the "provisions of this act" and "to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided," since § 23 of the act is intended to define the jurisdiction of such courts over such suits.
2. United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant, such jurisdiction being denied to them by § 23 of the bankruptcy act of 1898.

[No. 503.]

Submitted January 31, 1900. Decided May 28, 1900.

APPPEAL by plaintiff from a decree of the District Court of the United States for the Northern District of Iowa dismissing suit brought to set aside an alleged fraudulent conveyance by the bankrupt and to compel an accounting for the goods or their proceeds. *Affirmed.*

The facts are stated in the opinion.

Mr. Clarence A. Brandenburg submitted the cause for appellant. *Messrs. William F. Lohr, Henry C. Gardiner, Frederick W. Lohr, Deloss C. Shull, and William Farnsworth* were with him on the brief.

The questions here presented have been considered by the district courts of the United States in the following cases, and, after a full discussion, the decision was there reached that the district court as a court of bankruptcy has jurisdiction to hear and determine cases of this character:

Re Sievers, 91 Fed. Rep. 366; *Davis v. Bohle*, 92 Fed. Rep. 325, 34 C. C. A. 372; *Re Brooks*, 91 Fed. Rep. 508; *Carter v. Hobbs*, 92 Fed. Rep. 594; *Re Newberry*, 97 Fed. Rep. 24.

The court of bankruptcy has jurisdiction to enjoin the assignee of the bankrupt from disposing of or interfering with the property transferred to him under the assignment, pending the hearing on the petition in bankruptcy.

Re Gutwillig, 90 Fed. Rep. 481.

Property conveyed by a bankrupt in fraud of creditors, prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy by force of that act and by virtue of proceedings thereunder.

Goodwin v. Sharkey, 5 Abb. Pr. N. S. 64.

Under the law of 1867 suits by an assignee in bankruptcy were excepted from the general rule that Federal courts have no jurisdiction of controversies between citizens of the same state, and this exception included a suit by such assignee against a person not a party to the proceedings in bankruptcy.

Atkinson v. Purdy, Crabbe, 551, Fed. Cas. No. 616.

A bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt is a case arising under the Constitution and laws of the United States, of which the Federal courts have jurisdiction irrespective of the citizenship of the parties.

Woolbridge v. McKenna, 8 Fed. Rep. 650.

The Federal courts have jurisdiction over a plenary suit against an assignee in bankruptcy to assert a claim of superior title to property of the bankrupt fraudulently assigned.

Olney v. Tanner, 10 Fed. Rep. 101.

The Federal court of bankruptcy has exclusive jurisdiction to adjudicate between the assignee and any person having a claim against the estate.

Re Anderson, 23 Fed. Rep. 482.

The district courts of the United States have exclusive jurisdiction of all controversies between the assignee and the bankrupt, depending on his relation as such.

Carr v. Gale, 2 Ware, 330, Fed. Cas. No. 2,434.

The district courts of the United States have original jurisdiction of all cases and controversies between third persons and an assignee in bankruptcy as such.

Bachman v. Packard, 2 Sawy. 264, Fed. Cas. No. 709.

The district court of the United States has full power as a court of equity to settle all controversies between a bankrupt and his creditors.

Fowler v. Dillon, 1 Hughes, 232, Fed. Cas. No. 5,000.

The moment that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee. From the time of the adjudication the property of the bankrupt is in the custody and under the control of the bankruptcy court. From the time such property, by the adjudication of bankruptcy, comes into the custody of the bankruptcy court, it is *in custodia legis*.

Keegan v. King, 96 Fed. Rep. 758.

A suit to set aside a contract upon grounds created and established by the bankrupt law is a suit arising under the laws of the United States, and this court has jurisdiction.

Main v. Glen, 7 Biss. 86, Fed. Cas. No. 8,973.

Under the bankrupt law of 1841 the United States district courts had jurisdiction of all matters and proceedings arising under it, and of all suits at law or in equity to be brought by the assignee or any person claiming an adverse interest.

Chemung Canal Bank v. Judson, 8 N. Y. 254.

In suits under the bankrupt law the United States courts have exclusive jurisdiction.

Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291.

The United States district court has jurisdiction of a suit brought by a trustee in

bankruptcy to obtain possession of the bankrupt's estate, to which he holds title by virtue of his selection, to which he takes title by being duly selected and qualified.

Olney v. Tanner, 19 Nat. Bankr. Rep. 178, Fed. Cas. No. 10,506.

Under the bankruptcy law of 1867 the assignee was held to be vested with the title to all property conveyed by the bankrupt in fraud of creditors, and it was held that he might recover the bankrupt's interest in the same, whether or not any creditor was in a position to attack the transfer.

Platt v. Matthews, 10 Fed. Rep. 280.

It was also held that, under the law of 1867, it was not necessary, to entitle such assignee to maintain a suit, that he have actual possession of the property.

Lehman v. La Forge, 42 Fed. Rep. 493.

And that an assignee in bankruptcy under the United States bankrupt law was not merely vested with the remedies of creditors as to property fraudulently transferred, but with the ownership of such property, and that he might bring an action as such owner to reduce the same to possession.

Mann v. Flower, 25 Minn. 500.

The assignee is an officer of the court, and his possession is the possession of the court. The rule is the same as in cases of receivers.

Re Litchfield, 13 Fed. Rep. 863.

Mr. William Milchrist submitted the cause for appellees. Mr. John Hutchinson was with him on the brief.

A suit brought by an assignee in bankruptcy to collect a debt due to the bankrupt is not a proceeding in bankruptcy within the meaning of the bankrupt act, so as to exclude the jurisdiction of the state courts.

Kidder v. Horrobin, 72 N. Y. 164.

The district court has no jurisdiction of an action between the trustee and a third party, involving the validity of a sale of property made by the bankrupt prior to the adjudication in bankruptcy.

Re Abraham, 93 Fed. Rep. 767, 35 C. C. A. 592; *Mitchell v. McClure*, 91 Fed. Rep. 621.

Controversies as to the validity of conveyances by a bankrupt must be determined in proceedings brought by the courts of the state, unless the case involves the requisite amount to give a Federal court jurisdiction, and is between citizens of different states.

Burnett v. Morris Mercantile Co. 91 Fed. Rep. 365; *Hicks v. Knost*, 94 Fed. Rep. 627; *Goodier v. Barnes*, 94 Fed. Rep. 798; *Camp v. Zellars*, 94 Fed. Rep. 799, 36 C. C. A. 501; *Re Ogles*, 93 Fed. Rep. 426; *Re Prico*, 92 Fed. Rep. 987.

[525] *Mr. Justice Gray delivered the opinion of the court:

This was a bill in equity, filed April 28, 1899, in the district court of the United States for the northern district of Iowa, sitting in bankruptcy, by Fred Bardes, a citizen of Iowa, as trustee in bankruptcy of the estate of Frank T. Walker (who had by that court been adjudged a bankrupt upon his own petition), against the First National Bank of Hawarden, Iowa, a corporation cre-

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ated and existing under the acts of Congress relating to national banks, and against citizens of Iowa and of South Dakota, to set aside a conveyance of goods, of the value of \$3,500, alleged to have been made by the bankrupt, within four months before the institution of the proceedings in bankruptcy to the defendants, and to compel them to account for the goods or their proceeds, on the ground that the conveyance was in fraud of the provisions of the bankrupt act of July 1, 1898, and in fraud of the creditors of the bankrupt. The defendants demurred to the bill upon the ground that the court could not take jurisdiction of the case. The court sustained the demurrer, and entered a final decree dismissing the bill for want of jurisdiction, but without prejudice to the plaintiff's right to institute proceedings in a court having jurisdiction. The plaintiff took an appeal directly to this court; and the district judge certified that the bill was dismissed for want of jurisdiction only, and, to the end that this court might be fully advised in the premises, stated in his certificate the following questions as having arisen before him, namely:

"1st. Do the provisions of the 2d clause of § 23 of the act of Congress known as the bankrupt act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?"

"2d. Can the district court of the United States under any circumstances entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money *or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy?"

"3d. Can this court, being the district court for the northern district of Iowa, take jurisdiction over the suit as it now stands on the record?"

The record clearly shows, with perhaps unnecessary fullness, that the case was decided upon questions of jurisdiction only, and what those questions were. *Huntington v. Laidley*, 176 U. S. 668, 676, ante, 630, 634, 20 Sup. Ct. Rep. 526, 528, and cases there cited.

At a former day of this term, a certificate made by the district judge of the same questions, on which he desired the instruction of this court for his guidance, was dismissed by this court because he was not authorized by the acts of Congress to make such a certificate before deciding the case. *Bardes v. First Nat. Bank*, 175 U. S. 526, ante, 261, 20 Sup. Ct. Rep. 196.

By the bankrupt act of July 1, 1898, chap. 541, trustees in bankruptcy appointed by the creditors of the bankrupt or by the court of bankruptcy take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the

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duties imposed upon such trustees by § 47 are to "(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court." By § 70 the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt, as of the date when he was adjudged a bankrupt, in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors. And by the 5th clause of § 67 "all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if [527] he be adjudged a bankrupt, *and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of the creditors." 30 Stat. at L. 557, 564, 565.

The present appeal from the final decree of the district court dismissing the bill for want of jurisdiction distinctly presents for the decision of this court the question whether, under the act of 1898, a district court of the United States in which proceedings in bankruptcy have been commenced and are pending under the act has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. This is a question of general importance, upon which there has been much difference of opinion in the lower courts of the United States.

Its determination depends mainly on the true construction of two sections of the bankrupt act of 1898, which it may be convenient to set forth in full, as follows:

"Sec. 2. Creation of Courts of Bankruptcy and Their Jurisdiction.—That the courts of bankruptcy, as hereinbefore defined, *viz.*, the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during

their respective terms as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, *or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts, and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue *such [529] process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of

creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and, upon complaints of creditors, remove trustees for cause, upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." 30 Stat. at L. 545, chap. 541.

"Sec. 23. Jurisdiction of United States and State Courts.—a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant..

"c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act." 30 Stat. at L. 552, chap. 541.

[530] The question of the effect of these two sections, considering the language of each and their relation to one another, may be best approached by first referring to the terms and to the judicial construction of the bankrupt act of March 2, 1867, chap. 176, *which was substantially re-enacted in the Revised Statutes, and afterwards repealed; and by then comparing the provisions of that act, as so construed, with those of the existing act.

In the act of 1867 the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows:

Sec. 1. "That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his

authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." 14 Stat. at L. 517; Rev. Stat. §§ 563, 711, 4972, 4973.

"Sec. 2. That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, *hear and [531] determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." 14 Stat. at L. 518; Rev. Stat. §§ 4979, 4986.

In *Lathrop v. Drake* (1875) 91 U. S. 516, 23 L. ed. 414, the jurisdiction conferred on the district courts and the circuit courts of the United States by the bankrupt act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of "two distinct classes: First, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." And the jurisdiction of the district and circuit courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of § 1 of that act, giving to the district court original jurisdiction of proceedings in bankruptcy, and of § 2, giving to the circuit court

supervisory jurisdiction over such proceedings; but wholly under the distinct clause of § 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

(532) In an earlier case it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from "a decree of the circuit court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction conferred by the later clause was "other and different from the special jurisdiction and superintendence described in the first clause of the section;" was "of the same character as that conferred upon the circuit courts by the 11th section of the judiciary act" of 1789, and was "the regular jurisdiction between party and party, as described in the judiciary act and the third article of the Constitution." *Morgan v. Thornhill* (1870) 11 Wall. 65, 76, 80, 20 L. ed. 60, 63, 64.

It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person who now claimed it adversely to the assignee could only be enforced by a plenary suit at law or in equity, under the 2d section of the act of 1867; and not by summary proceedings under the 1st section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters, and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. *Smith v. Mason* (1871) 14 Wall. 419, 20 L. ed. 748; *Marshall v. Knox* (1872) 16 Wall. 551, 557, 21 L. ed. 481, 484; *Eyster v. Gaff* (1875) 91 U. S. 521, 525, 23 L. ed. 403, 405.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the 2d section of the act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts. In *Eyster v. Gaff*, just cited, this court, speaking by Mr. Justice Miller, said: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent

(533) jurisdiction, and *that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a

prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts."

Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in § 2 of that act, and was not derived from the other provisions of §§ 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases.

The decisions of this court under the earlier bankrupt act of August 19, 1841, chap. 9, are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is *Ex parte City Bank* (*Ex parte Christy*) (1845) 3 How. 292, 11 L. ed. 603. But § 8 of the act of 1841 contained the provision (afterwards embodied in § 2 of the act of 1867, and above quoted) conferring on the circuit courts concurrent jurisdiction with the district courts of suits, at law or in equity, between assignees in bankruptcy and adverse claimants of property of the bankrupt. *5[534] Stat. at L. 446. And Mr. Justice Story in *City Bank's Case* (*Christy's Case*) considerably relied on that provision. 3 How. 314, 11 L. ed. 613. Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the district court sitting in bankruptcy; much of Mr. Justice Story's opinion in favor of extending the jurisdiction of that court at the expense of the state courts is contrary to the subsequent adjudication of this court in *Peck v. Jenness* (1849) 7 How. 612, 12 L. ed. 841, and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression." *Carroll v. Car-*

roll (1853) 16 How. 275, 287, 14 L. ed. 936, 941.

We now recur to the provisions of the act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating its subject-matter.

Section 2 of this act is entitled "Creation of Courts of Bankruptcy and their Jurisdiction," takes the place of § 1 of the act of 1867, and hardly differs from that section, except in the following particulars:

First. It begins by describing the jurisdiction conferred on "the courts of bankruptcy" as "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;" and it ends by declaring that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Second. It specifies in greater detail matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to "(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;" "(6) bring in and substitute additional persons or parties [535] in "proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

The general provisions at the beginning and end of this section mention "courts of bankruptcy" and "bankruptcy proceedings."

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law," in the opening sentence conferring on the courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties "in proceedings in bankruptcy," and, in

clause 15, to make orders, issue process, and enter judgments "necessary for the enforcement of the provisions of this act."

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the corresponding provisions of § 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to "determine controversies in relation thereto," it is controlled and limited by the concluding words of the clause, "except as herein otherwise provided."

These words "herein otherwise provided" evidently refer to § 23 of the act, the general scope and object of which, as *indicated by [536] its title, are to define the "Jurisdiction of United States and State Courts" in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The 1st clause provides that "the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy" (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the 2d clause applies both to the district courts and to the circuit courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States circuit courts," in the 1st and in the 3d clauses.

The 2d clause positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

*Had there been no bankruptcy proceedings [537]

the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the circuit court of the United States. Act of August 13, 1888, chap. 866 (25 Stat. at L. 434). He could not have sued in a district court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits.

It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The bankrupt acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

[538] On the contrary, Congress, by the 2d clause of § 23 *of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, "unless by consent of the proposed defendant," of which there is no pretense in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the state, to the greater economy and convenience of litigants and witnesses. See *Shoshone Min.*

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Co. v. Rutter, 177 U. S. 505, 511, 513, *ante*, 865, 866, 867, 20 Sup. Ct. Rep. 726.

Two or three minor provisions of the bankrupt act of 1898, sometimes supposed to be inconsistent with this conclusion, may be briefly noticed.

Section 26 provides that the trustee may, pursuant to the direction of the court of bankruptcy, submit to arbitration any controversy arising in the settlement of the estate, and that the award of the arbitrators "may be filed in court," evidently meaning the court of bankruptcy. But no such arbitration could be had without the consent of the adverse party to the controversy in question.

The powers conferred on the courts of bankruptcy by clause 3 of § 2, and by § 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.

The supervisory jurisdiction over proceedings in bankruptcy, conferred by the act of 1867 upon the circuit courts of the United States, and by the existing act upon the circuit courts of appeals, does not affect this case. 30 Stat. at L. 553, chap. 541.

For the reasons above stated, we are of opinion that the questions of jurisdiction certified by the district judge should be answered as follows:

*"1st. The provisions of the 2d clause of §[539] 23 of the bankrupt act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The district court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

"3d. The district court for the northern district of Iowa cannot take jurisdiction over this suit as it now stands on the record."

The result is that *the decree of the District Court, dismissing the bill for want of jurisdiction, must be affirmed.*

S. DUFFIELD MITCHELL, *Plff. in Err.*,

v.

JOHN C. McCLURE *et al.*

(See S. C. Reporter's ed. 539, 540.)

Bankruptcy—jurisdiction of district court over suit to recover assets.

178 U. S.

[No. 237.]

Submitted April 12, 1900. Decided May 28, 1900.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a judgment in favor of defendants in a proceeding to recover property alleged to have been conveyed by the bankrupt in fraudulent preference of creditors. *Affirmed.*

See same case below, 91 Fed. Rep. 621.

The facts are stated in the opinion.

McSSRS. **S. Duffield Mitchell** and **Thomas Patterson** submitted the cause for plaintiff in error.

Mr. John S. Ferguson submitted the cause for defendants in error.

[540] ***Mr. Justice Gray** delivered the opinion of the court:

This was an action of replevin in the district court of the United States for the western district of Pennsylvania by a trustee in bankruptcy, appointed by that court, a citizen of Pennsylvania, to recover a stock of goods, of the value of \$2,500, in the possession of the defendants, citizens of Pennsylvania and residents of that district, and alleged to have been conveyed to them by the bankrupt, within four months before the institution of proceedings in bankruptcy, in fraud of the bankrupt act of 1898 and of the creditors of the bankrupt. The district court, on motion of the defendant, held that it had no jurisdiction to entertain such an action, and therefore ordered it to be abated. 91 Fed. Rep. 621. The plaintiff sued out a writ of error from this court, and the district judge certified that the question of jurisdiction was the sole question in issue.

For the reason stated in *Bardes v. First Nat. Bank*, 178 U. S. 524, ante, 1175, 20 Sup. Ct. Rep. 1000, just decided, *the judgment is affirmed.*

[541] ***W. A. HICKS**, Trustee in Bankruptcy, *Appt.*,
v.

Bertha KNOT.

(See S. C. Reporter's ed. 541, 542.)

Bankruptcy—jurisdiction of district court to collect assets.

[No. 512.]

Submitted May 14, 1900. Decided May 28, 1900.

QUESTIONS CERTIFIED by the United States Circuit Court of Appeals for the Sixth Circuit as to the jurisdiction of the District Court in proceedings to recover money alleged to have been paid by the bankrupt in fraudulent preference of the creditors. Answer returned that the court had no jurisdiction.

Mr. Charles M. Peck submitted the cause for appellant.

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Mr. Frederick Hertenstein submitted the cause for appellee.

***Mr. Justice Gray** delivered the opinion of [541] the court:

This was a bill in equity in the district court of the United States for the southern district of Ohio by a trustee in bankruptcy appointed by that court, against a creditor of the bankrupts, to recover money to the amount of \$2,780, paid by the bankrupts to the defendant, with intent to prefer the defendant and to defraud the creditors of the bankrupts, within four months before the institution of the proceedings in bankruptcy. Both parties were citizens of Ohio and residents of that district. The district court dismissed the bill for want of jurisdiction. 94 Fed. Rep. 625. The plaintiff appealed to the circuit court of appeals for the sixth circuit, which certified to this court the following question:

"Has a district court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy appointed by it, against a fraudulent grantee or transferee of the bankrupt resident in its district, to recover the property belonging *to the estate [542] of the bankrupt, and by him fraudulently conveyed to defendant?"

For the reasons stated in *Bardes v. First Nat. Bank*, 178 U. S. 524, ante, 1175, 20 Sup. Ct. Rep. 1000, just decided, the answer to this question must be that the district court has such jurisdiction by the consent of the proposed defendant, but not otherwise.

Ordered accordingly.

CHARLES M. WHITE, John C. Thompson,
and Henry Eckstein,
v.

AUGUST T. SCHLOERB, Eugene B. Schickel-
dantz, and Henry Roewitz, Trustee.

(See S. C. Reporter's ed. 542-548.)

Bankruptcy—summary jurisdiction of district court to compel return of property taken under state law.

1. Goods in actual possession of a bankrupt at the time of his adjudication as such, and at the time of the reference of the case to a referee, who directs them to be locked in a store, are in custody of the United States court, from which they cannot be taken upon any process from a state court.
2. After an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun.

NOTE.—As to conflict of jurisdiction between Federal and state courts—see Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356, and note. And see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

As to jurisdiction as affected by possession of the subject-matter—see Adams v. Mercantile Trust Co. 15 C. C. A. 6, and note.

8. A Judge of a United States bankruptcy court has authority to compel persons who have forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody by summary proceedings.

[No. 530.]

Submitted April 26, 1900. Decided May 28, 1900.

QUESTIONS CERTIFIED by the United States Circuit Court of Appeals for the Seventh Circuit for the opinion of the Supreme Court as to the jurisdiction of the District Court to compel return of property taken under state replevin laws. Answers returned upholding jurisdiction.

Statement by Mr. Justice **Gray**:

[542] *This was a petition in equity to the circuit court of appeals for the seventh circuit, under the jurisdiction conferred upon that court by the 2d clause of § 24 of the bankrupt act of July 1, 1898, chap. 541, to superintend and revise in matter of law the proceedings in bankruptcy of the district courts of the United States in that circuit. 30 Stat. at L. 553. The circuit court of appeals certified to this court the following statement of the case and questions of law:

"On September 13, 1899, August T. Schloerb and Eugene B. Schickedantz, who were respectively residents and inhabitants of the eastern district of Wisconsin, and who were copartners in trade in the said district, filed their voluntary petition in bankruptcy in the district court of the United States for that district. On the same day they were [543] duly adjudged *bankrupt by that court, and the matter referred to a referee in bankruptcy for further proceedings according to law. They had at that date a stock of goods contained in a store, the entrance to which was locked by the direction of the referee.

"Thereafter, on September 21, 1899, James Cogan and Bernard Cogan, who were copartners, commenced an action of replevin against the bankrupts in the circuit court of the state of Wisconsin for the county of Winnebago, in which county the store of the bankrupts was located, to recover the possession of certain specified goods then in the store of the bankrupts, and forming part of their stock of goods. On the same day the proper undertaking and requisition to the sheriff of the county of Winnebago, according to the law of the state of Wisconsin, were delivered to the petitioner Charles M. White, who was then the sheriff of the county, who delivered it for execution to the petitioner Henry Eckstein, who was the under-sheriff of said sheriff. In pursuance of said requisition, the under-sheriff, on the same day, and before the selection and appointment of a trustee in the bankrupt proceedings, forcibly entered the store of the bankrupts, and took possession of certain goods, part of the goods specified in the writ of replevin.

"On September 23, 1899, the bankrupts

presented their petition to the district court of the United States for the eastern district of Wisconsin, setting forth the facts above recited, and also alleging that the goods so taken under the writ of replevin were part of a bill of goods purchased by them of the plaintiffs in that writ, and were their lawful property. The petition alleges that the goods were in the possession of the petitioner, the sheriff and under-sheriff mentioned, and John C. Thompson, the attorney for the plaintiffs in the writ of replevin, and asked the court that they be compelled to redeliver the goods to the district court sitting in bankruptcy, from whose possession they were taken, and that they be enjoined from any disposition thereof. Upon the filing of the petition the district court issued its mandate requiring the petitioners here, the sheriff, the under-sheriff, and the attorney mentioned, to show cause before that court, at a time and place mentioned, why the seizure of the goods under the writ of replevin should not be vacated and set aside, *and the [544] goods returned to the bankrupts, or placed in the possession of the marshal of the court, or such other person as the court should direct, and why they should not be respectively enjoined from interference with the property so seized, and in the meantime restraining them from such interference. The petitioners specially appeared upon the return day mentioned in the mandate; and moved the district court to set aside and vacate its mandate or order to show cause, for want of jurisdiction in the court of bankruptcy over the subject-matter; and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon the claim that the bankrupts had purchased the goods of them upon false and fraudulent representations upon which reliance had been placed, and that before the writ of replevin they had elected to rescind the sale, and had demanded of the bankrupts the return of the goods. The court of bankruptcy at the hearing, and on October 26, 1899, made the following order: 'It is hereby ordered that said Charles M. White, Henry Eckstein, and John C. Thompson be, and they are hereby, restrained from sale or other disposition of the property mentioned in said petition herein; and they are hereby directed to turn over and deliver the said property, so taken by them from the estate of the bankrupts, to the trustee appointed herein, within twenty days from the date of this order; and it is further ordered that the trustee, on delivery of the said property, keep the same separate and apart from other property, to abide the further order of the court; and that, in case sale of said property is hereafter ordered, the proceeds of said sale be kept separate and apart to abide such further order of the court.' The opinion of the court upon that hearing is reported *Re Schloerb*, 97 Fed. Rep. 326.

"The petitioners here, by their original petition filed in this court, have presented the matters of law raised by the order so made by the district court sitting in bankruptcy.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"First. Whether the district court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.

[545] *"Second. Whether after adjudication in bankruptcy an action in a state court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.

"Third. Whether the property of a bankrupt, upon his adjudication in bankruptcy, is *in custodia legis* of the bankruptcy court, and can be taken possession of under process of a state court."

Mr. Charles W. Felker submitted the cause for *White et al.* Mr. John C. Thompson was with him on the brief.

The right of plaintiffs in the replevin suit to the property was as great, as full and complete, and as valid against the trustee in bankruptcy as it was against the bankrupts themselves. The proper tribunals to determine controversies between the trustee and adverse claimants as to the ownership and right of possession of property are the state courts, or the circuit courts of the United States when the amount and citizenship of the parties are such as to give them jurisdiction.

Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; *Smith v. Mason*, 14 Wall. 433, 20 L. ed. 753; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. ed. 542; *Re Abraham*, 93 Fed. Rep. 767, 35 C. A. 592; *Hicks v. Knost*, 94 Fed. Rep. 625; *Re Franks*, 95 Fed. Rep. 635; *Goodier v. Barnes*, 94 Fed. Rep. 798; *Heath v. Shaffer*, 93 Fed. Rep. 647; *Re Price*, 92 Fed. Rep. 987; *Re Brodbine*, 93 Fed. Rep. 643; *Re Buntrock Clothing Co.* 92 Fed. Rep. 886; *Re Fowler*, 1 Am. Bankr. Rep. 637; *Re Carter*, 1 Am. Bankr. Rep. 160; *Mitchell v. McClure*, 91 Fed. Rep. 621; *Re Kelly*, 91 Fed. Rep. 504; *Re Rockwood*, 91 Fed. Rep. 363; *Burnett v. Morris Mercantile Co.* 91 Fed. Rep. 365; *Camp v. Zellars*, 94 Fed. Rep. 799; *Perkins v. McCauley*, 98 Fed. Rep. 286.

The district court sitting in bankruptcy had no jurisdiction in a summary proceeding to retake the property seized; and such was the rule under the bankruptcy act of 1867.

Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; *Smith v. Mason*, 14 Wall. 433, 20 L. ed. 752; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481.

Under the old bankruptcy act this court permitted the bringing of such action against the bankrupt by a third person claiming the property, after the adjudication and before the assignment by the bankrupt to the assignee.

Burbank v. Bigelow, 92 U. S. 179, 23 L. ed. 542.

Property is not *in custodia legis* until it

is in the actual possession of the officers of the court.

Freeman v. Howe, 24 How. 453, 16 L. ed. 750; *Taylor v. Carryl*, 20 How. 599, 15 L. ed. 1033; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

Until the assignee is appointed and qualified, and a conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt.

Hampton v. Rouse, 22 Wall. 275, 22 L. ed. 758.

This court, in a case somewhat similar to the case at bar, has settled that the doctrine of constructive possession can have no application.

Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

A bankruptcy court through its trustee takes only the title of the bankrupt. It can sell only his title, and a sale of property by the trustee would in no way divest the real owner of his title.

Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

Mr. Charles Barber submitted the cause for *Schloerb et al.* Mr. Carl D. Jackson was with him on the brief.

The court which has jurisdiction of the res will retain jurisdiction thereof for all purposes, and make a final adjudication among all claimants thereto.

Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Shawhan v. Wherritt*, 7 How. 627, 12 L. ed. 847; *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322; 2 Daniel, Ch. Pl. & Pr. pp. 1057-1059; *Peale v. Phipps*, 14 How. 369, 14 L. ed. 459; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Slocum v. Mayberry*, 2 Wheat. 2, 4 L. ed. 169; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Appleton Waterworks Co. v. Central Trust Co.* 93 Fed. Rep. 286, 35 C. C. A. 302; *Patterson v. Matter*, 26 Fed. Rep. 31; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

All the property in the possession of the bankrupt at the time of the adjudication, and claimed by him to be his property, comes into the custody of the bankrupt court upon the adjudication of bankruptcy.

Re Hasbrouck, 1 Ben. 402, Fed. Cas. No. 6,189; *Re Bogert*, 2 Nat. Bankr. Reg. 585, Fed. Cas. No. 1,599; *Re Shafer*, 2 Nat. Bankr. Reg. 586, Fed. Cas. No. 12,694; *Re Brinkman*, 7 Nat. Bankr. Reg. 421, Fed. Cas. No. 1,884; *Re Steadman*, 8 Nat. Bankr. Reg. 319, Fed. Cas. No. 13,330; *Phelps v.*

Sellick, 8 Nat. Bankr. Reg. 392, Fed. Cas. No. 11,079; *Re Anderson*, 2 Hughes, 378, Fed. Cas. No. 351; *Hewett v. Norton*, 1 Woods, 68 Fed. Cas. No. 6,441; *Byrd v. Harrold*, 18 Nat. Bankr. Reg. 436, Fed. Cas. No. 2,269; *Hudson v. Schwab*, 18 Nat. Bankr. Reg. 482 *et seq.*, Fed. Cas. No. 6,835; *Jones v. Leach*, 1 Nat. Bankr. Reg. 595, Fed. Cas. No. 7,475.

Actual possession of the *res* is not necessary in order to put the thing in *custodia legis*.

Gaylord v. Fort Wayne, M. & C. R. Co. 6 Biss. 286, Fed. Cas. No. 5,284; *Atlas Bank v. Nahant Bank*, 23 Pick. 481; *Bell v. Ohio Life & Trust Co.* 1 Biss. 260, Fed. Cas. No. 1,260; *Adams v. Mercantile Trust Co.* 66 Fed. Rep. 621, 30 U. S. App. 204, 15 C. C. A. 1, and cases cited.

The court first acquiring jurisdiction, its power being adequate to the administration, should retain its jurisdiction and confine the litigation to that forum.

Conover v. New York, 25 Barb. 513; *Ex parte Bushnell*, 8 Ohio St. 601.

The assets of the bankrupt are brought by the bankruptcy proceedings, within the reach and control, and subject to the orders of, the court; and no one has any right to remove or meddle with them but for their preservation, without the leave of the court, except the trustee.

Re Smith, 92 Fed. Rep. 135; *Re Etheridge Furniture Co.* 92 Fed. Rep. 329; *Re Brown*, 91 Fed. Rep. 358; *Re Francis-Valentine Co.* 93 Fed. Rep. 953; *Re Richard*, 94 Fed. Rep. 633; *Norcross v. Nathan*, 99 Fed. Rep. 417; *Re Cobb*, 96 Fed. Rep. 821; *Keegan v. King*, 96 Fed. Rep. 758; *Re Endl*, 99 Fed. Rep. 915; *Re Chambers*, 98 Fed. Rep. 865.

The assertion of any right against, or to participate in, the *res* so in *custodia legis*, must be sought in the court in whose custody it is. Any attempt to assert such right elsewhere would be regarded as a contempt.

Carter v. Hobbs, 92 Fed. Rep. 594; *Southern Loan & T. Co. v. Benbow*, 96 Fed. Rep. 514.

[545] *Mr. Justice Gray delivered the opinion of the court:

The material facts of this case may be briefly recapitulated. After the district court of the United States had adjudged Schloerb and Schickedantz bankrupts on their own petition, and had referred the case to a referee in bankruptcy, and the referee had taken possession of the bankrupts' stock of goods in their store, and had caused the entrance of the store to be locked up, and before the appointment of the trustee in bankruptcy, a writ of replevin of some of those goods was sued out by other persons against the bankrupts from an inferior court of the state of Wisconsin, and was executed by the sheriff of the county, by his deputy, by forcibly entering the store and taking possession of these goods. The bankrupts thereupon presented to the district court of the United States a petition setting forth the above

facts, and alleging that the goods replevied were their lawful property, and had been purchased by them of the plaintiffs in replevin, and were now in the possession of the sheriff and his deputy and the attorney of those plaintiffs; and praying that they might be compelled to redeliver the goods to the district court sitting in bankruptcy, and be restrained from making any disposition thereof. Upon the filing of this petition the court ordered notice thereof *to said sheriff, [546] deputy, and attorney. In answer thereto they contended that the court had no jurisdiction over the subject-matter, and offered evidence that the grounds of their action of replevin were that the bankrupts had purchased and obtained the goods from them by false and fraudulent representations on which they relied, and that, before suing out the writ of replevin, they had elected to rescind the sale, and had demanded of the bankrupts a return of the goods. The district court, upon a hearing, made an order restraining the respondents from selling or otherwise disposing of the goods replevied, and directing them to deliver the goods to the trustee in bankruptcy, and directing the trustee, on such delivery, to keep them apart from other property, to abide the further order of the court.

The questions certified concern, not the trial of the title to these goods, but only the judicial custody and lawful possession of them.

Under §§ 33-43 of the bankrupt act of 1898 and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts, each case in bankruptcy is referred by the court of bankruptcy to a referee, and he exercises much of the judicial authority of that court. 30 Stat. at L. 555-557, chap. 541, 172 U. S. 657, 43 L. ed. 1190, 18 Sup. Ct. Rep. VI.

At the date of this adjudication in bankruptcy by the district court of the United States, the goods were in the store of the bankrupts and in their actual possession, and were claimed by them as their property. On the same date that court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.

So far as regards this point, the decision of this court in *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749, more than covers the case. It was there adjudged that property taken and held by a marshal *on a writ of attach- [547] ment from a court of the United States, directing him to attach the property of one person, could not be taken from his possession on a writ of replevin from a state court in behalf of another person who claimed the

attached property as his own. See also *Peck v. Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846; *Buck v. Colbath*, 3 Wall. 334, 341, 18 L. ed. 257, 260; *Covell v. Heyman*, 111 U. S. 176, 182, 28 L. ed. 390, 392, 4 Sup. Ct. Rep. 355.

The second question certified relates to this point, although it is not so clearly expressed as it might be, and omits to mention in whose possession the property was when the writ of replevin was sued out. To that question, as explained and restricted by the facts set forth in the statement which accompanies it, our answer is: "After an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

The first question remains: "Whether the district court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized."

By § 720 of the Revised Statutes, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Among the powers specifically conferred upon the court of bankruptcy by § 2 of the bankrupt act of 1898 are to "(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." 30 Stat. at L. 546, chap. 541. And by clause 3 of the Twelfth General Order in Bankruptcy, applications to the court of bankruptcy "for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." 172 U. S. 657, 43 L. ed. 1190, 18 Sup. Ct. Rep. vi.

[548] Not going beyond what the decision of the case before us *requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: "The district court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized."

These answers to the first and second questions render any further answer to the third question unnecessary.

Ordered accordingly.

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WILLIAM S. TAYLOR and John Marshall,
Plffs. in Err.,
v.

J. C. W. BECKHAM, *Dft. in Err.*

(See S. C. Reporter's ed. 548-609.)

Error to state court—constitutional questions—right to office—guaranty of republican form of government.

1. A decision by state tribunals against a claimant to the office of governor does not deprive him of any right to property within the meaning of U. S. Const. 14th Amend., so as to give jurisdiction to the Supreme Court of the United States on writ of error.
2. The guaranty of a Republican form of government to each state, in U. S. Const. art. 4, § 4, gives no jurisdiction to the Supreme Court of the United States on writ of error under U. S. Rev. Stat. § 709, to review a decision of the highest court of a state sustaining a determination of an election contest for the office of governor made by the general assembly under authority of the state Constitution on the ground that such decision denies the right of the people to choose their own officers, where the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by its fundamental law notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests.

[No. 603.]

Argued April 30 and May 1, 1900. Decided May 21, 1900.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decision affirming a judgment of ouster in an action in the nature of quo warranto to determine the right to the offices of governor and lieutenant governor. *Dismissed.*

See same case below, 21 Ky. L. Rep. 1735, 56 S. W. 177.

Statement by Mr. Chief Justice Fuller:

*This was an action in the nature of quo warranto brought, under the statutes of Kentucky, by J. C. W. Beckham against William S. Taylor and John Marshall, for usurpation of the offices of governor and lieutenant governor of Kentucky, in the circuit court of Jefferson county, in that commonwealth.

The petition averred that at a general election held on the 7th of November, 1899, in

NOTE.—As to jurisdiction of Federal over state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Klpley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what constitutes Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to what constitutes due process of law—see *Kuntz v. Sumpton* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

the commonwealth of Kentucky, William Goebel was the Democratic candidate for governor and J. C. W. Beckham was the Democratic candidate for lieutenant governor, and that at said election William S. Taylor and John Marshall were the Republican candidates for the said offices respectively; that after said election the state board of election commissioners, whose duty it was to canvass the returns thereof, canvassed the same, and determined on the face of the returns that said Taylor and said Marshall were elected governor and lieutenant governor, respectively, for the term commencing December 12, 1899, and accordingly awarded them certificates to that effect, whereupon they were inducted into those offices.

The petition further alleged that within the time allowed by law said William Goebel and J. C. W. Beckham gave written notices to Taylor and Marshall that they would each contest the said election on numerous grounds set out at large in the respective notices; that said notices of contest were duly served on said Taylor and Marshall, filed before each house of the general assembly, and entered at large on the journals thereof; that thereafter boards of contests were duly selected by each house of the general assembly, and sworn to try said contests as required by law; that at the time appointed [550] for the hearing the said Taylor and Marshall appeared, and each filed defenses and counter notices, and the evidence of contestants and contestees was heard by the boards from January 15, 1900, until January 29, 1900, inclusive, and upon January 30, 1900, said contests were submitted without argument to the boards for decision.

That thereafter the boards, having considered the matters of law and fact involved in the contests, did each separately decide the contest submitted to it, and made out in writing its decision, and reported the same to each house of the general assembly for action thereon.

That in the contest for governor the board determined, and so reported to each house of the general assembly, that William Goebel had received the highest number of legal votes cast for governor at the election held on November 7, 1899, and that he was duly elected governor for the term beginning December 12, 1899; and that in the contest for lieutenant governor the board determined and so reported that the contestant Beckham had received the highest number of legal votes cast at said election, and was duly elected to the office of lieutenant governor for said term.

The petition also alleged that the reports and decisions of the contest boards were thereafter duly adopted and approved by both houses of the general assembly in separate and in joint sessions; that there were present in the house of representatives at said time 56 members and in the senate 19 members, which was a quorum of each house, and that there were present 75 members in joint session, and that the general assembly did then and there decide and declare that William Goebel and J. C. W. Beckham

had each received the highest number of legal votes cast at said election for the offices of, and were duly elected, governor and lieutenant governor as aforesaid. The journals of both houses of the general assembly, showing the proceedings and facts aforesaid, were referred to and made part of the petition, and attested copies thereof filed therewith.

It was further averred that, after the determination of said contest by the general assembly, the said William Goebel and *J. C. W. Beckham were duly sworn and inducted into the offices of governor and lieutenant governor of the commonwealth and at once entered upon the discharge of their respective duties. That thereafter, on the 3d of February, 1900, William Goebel died, and by law said Beckham was required to discharge the duties of the office of governor, and accordingly on that day he took the oath prescribed by law, and immediately entered on the discharge of the duties of said office.

It was further alleged that the powers of Taylor as governor and of Marshall as lieutenant governor immediately ceased on the determination of the contest by the general assembly, but that, notwithstanding the premises, the said Taylor and Marshall had usurped the said offices of governor and lieutenant governor, and had refused to surrender the records, archives, journals, and papers pertaining to the office of governor, and the possession of the executive offices in the capitol in the city of Frankfort.

The prayer of the petition was "that the defendant, William S. Taylor, be adjudged to have usurped the office of governor of this commonwealth, and that he be deprived thereof by the judgment of this court; that this plaintiff be adjudged entitled to the said office, and be placed in full possession of said office of governor, the executive offices provided by the commonwealth for the use of the governor, and that all the records, archives, books, papers, journals, and all other things pertaining to the said office be surrendered and delivered to this plaintiff by the said Taylor, and that the said Taylor be enjoined and restrained from further exercising or attempting to exercise the office of governor of this commonwealth; that the said John Marshall be adjudged to have usurped the office of lieutenant governor of the commonwealth, and that he be deprived thereof, and declared not entitled to the same by the judgment of this court, and enjoined from assuming to act as such lieutenant governor; that plaintiff, Beckham, be adjudged the lawful incumbent of said office; and, finally, the plaintiff prays for his costs in this behalf expended, and for all proper relief."

Defendants Taylor and Marshall filed answers and amended *answers and counter-claims, denying any valid proceedings in contest, and alleging in substance that the action of the boards of contests and of the general assembly in the contests was the result of a conspiracy entered into by the members of the boards and the members of the general assembly to wrongfully and unlawfully deprive contestees of their offices; that

in the execution of this design the members of said boards were fraudulently selected, and not fairly drawn by lot, as required by law, and that a majority of those selected were persons whose political beliefs and feelings, inclinations, and desires on the subject of the contests were known in advance. That the entries on the journals of the general assembly were false and fraudulent and made in pursuance of said conspiracy, and that the pretended decisions were fraudulent and utterly void. That the senate lacked a quorum at the time of the pretended adoption of the contest boards' reports; and that defendant, Taylor, as governor, on January 31, 1900, refused to permit the members of the general assembly to meet as the general assembly at Frankfort, because he had previously adjourned the general assembly to meet on February 6 at London, in Laurel county.

The notices of contest were averred to have been exactly alike, *mutatis mutandis*, and the notice in respect of the office of governor was set out as given in the margin.†

†“The contestee, William S. Taylor, is hereby notified that the contestant, William Goebel, who was more than thirty years of age, and has been a citizen and resident of Kentucky for more than six years next preceding the 7th day of November, 1899, will contest the election of the said William S. Taylor to the office of governor of this commonwealth, before the next general assembly thereof, to be convened as provided by law, in the city of Frankfort, on the 2d day of January, 1900, and before the board of contest to be organized by the said general assembly for the purpose of determining the contest for governor; and will then and there contest the right of the said William S. Taylor to the office of governor of this commonwealth by virtue of the election held herein on the 7th day of November, 1899, and the certificate of election granted unto the said William S. Taylor by the state board of election commissioners on the 9th day of December, 1899; and will ask the general assembly and said board of contest to determine that the contestant, William Goebel, was legally and rightfully elected governor aforesaid at the said election, and that William S. Taylor was not rightfully or legally elected to said office; and said contestant will then and there ask the said board of contest and the general assembly to take such proceedings and orders in the matters of said contest as is required by law for his induction into said office.

“For grounds of such contest, the contestant says:

“First. In the election held in this commonwealth on the 7th day of November, 1899, for the office of governor, the contestant, William Goebel, was the Democratic candidate, and the contestee, William S. Taylor, was the Republican candidate, for said office of governor, and were then and there voted for as such candidates; and at said election held in the counties of Knox, Jackson, Magoffin, Pike, Martin, Johnson, Owsley, Lewis, Carter, Pulaski, Bell, Clinton, Russell, Adair, Harlan, Casey, Wayne, Whitley, Todd, Caldwell, Crittenden, Perry, Muhlenburg, Monroe, Metcalf, Butler, Letcher, Leslie, Lee, Laurel, Hart, Greenup, Grayson, Estill, Edmonson, Cumberland, Clay, Breckenridge, Boyd, and Allen, and in each precinct thereof, all of the official ballots used, in all of said counties were printed upon paper so thin and transparent that the printing and the stencil marks thereon made by the voters could be

*The following are paragraphs from the answers and amended answers:

“Further answering herein, defendants, W. S. Taylor and John Marshall, say, each of them is over forty years of age, *has been a citizen and resident of the state of Kentucky all his life, and likewise a citizen and resident of the United States all his life. They say further that, as hereinafter more specifically *stated, the said Taylor was, on November 7th, 1899, duly elected governor of the state of Kentucky, and the said Marshall duly elected lieutenant governor for the state of Kentucky, by the qualified voters thereof; that each of them afterwards received *in due form a certificate to that effect from the state board of election commissioners of the commonwealth of Kentucky, and each of them thereafter duly qualified as such officers by taking the oath of office prescribed by law therefor, and thereby each of them became charged with an express public trust for the benefit of the people of the state of Kentucky. They say that the proceedings referred to in the petition herein,

distinguished from the back of said ballots; that none of the said ballots used in said counties were printed upon plain white paper sufficiently thick to prevent the printing from being distinguished from the back of the said ballots, whereby the secrecy of the said ballots were destroyed and the said election in all of the said counties rendered void, and the printed vote thereon should not be counted in ascertaining the result of the election in this commonwealth.

“Second. That the said alleged election held in the county of Jefferson and the city of Louisville on the 7th day of November, 1899, was and is void, because the contestant says that upon that day, before the said election, the governor of the commonwealth unlawfully called the military forces of the state into active service in said city, armed with rifles, bayonets, and gatling guns, for the purposes of overawing, intimidating, and keeping Democratic voters from the polls thereof, and did himself, in violation of the law of the land, go to the said city and county the day before said election, and assume direction and command of the said military forces, and ordered and directed them to go, and they did go in obedience to said order, to the polling places in said city, on the said day of said election, and thereby many thousands of voters, to wit, more than enough to have changed the result of the said election, were intimidated and alarmed, and failed and refused to go to the polls or to vote on said day; that for this cause the said election in the city of Louisville and county of Jefferson was not free and equal, but is void, and the said alleged votes cast thereat should not be counted.

“Third. The contestant says that on the day of the said election in the city of Louisville and county of Jefferson, Sterling B. Toney, one of the circuit judges of the county and city aforesaid, without authority of law, issued a mandatory injunction, by which he required the legally appointed officers of the election for the city and county aforesaid to admit in to the polling places during said election many persons who were not authorized or required by law to be in said polling places, and take part in said election and the pretended count of ballots, and were kept and maintained in the said places unlawfully and wrongfully by the said officers of said judge and the military power of the state, under the direct command of the governor, by reason of which the votes cast at said election

by which it is alleged that the contests over the offices of governor and lieutenant governor were tried and determined, and by which it is alleged that the authority of these defendants to act respectively as governor and lieutenant governor was terminated, were and are utterly void and of no effect for the reasons hereinafter stated; and if effect be given to them, and these defendants be thereby deprived of their respective offices of governor and lieutenant governor of Kentucky, and plaintiff, Beekham, be thereby installed in the office of governor or lieutenant governor of Kentucky, these defendants will be thereby deprived by the state of Kentucky of their property without due process of law, and both they and the people of Kentucky and the qualified voters thereof will be deprived of their liberty without due process of law, and will be denied the benefit of a republican form of government, all of which is contrary to the provisions of the 4th section of the 4th article of the said Constitution and to the 14th Amendment to said Constitution, the benefits of which provisions are hereby specially set up and claimed by these defendants both for themselves and for the people of Kentucky and the qualified voters thereof whose representatives and trustees these defendants are."

were not fairly counted, but the result left in doubt and uncertainty, and for this cause the said election was void, and the alleged and pretended votes cast thereat in said city should not be counted.

"Fourth. The said contestant says that at the said election held as aforesaid, on the 7th day of November, 1899, in the county of Jefferson and city of Louisville, and Warren, Hopkins, Christian, Knox, Whitley, Pulaski, Bell, and divers other counties of this commonwealth, that many thousands of the legal voters thereof, to wit, more than enough thereof to have changed the result of said election, who were in the employment of the Louisville & Nashville Railroad Company and other corporations, were intimidated by the officers and superior employees of said company and corporations by threats of less employment and discharge from the service of the said company and corporations, and were thereby forced and compelled to vote and did, for this cause, vote for the contestee for the office of governor, when in truth and in fact they desired to vote for the contestant, and would have done so but for such intimidation and duress. For this cause the said election held in said counties was and is void.

"Fifth. The contestant says that before the said election on November 7, 1899, the leaders of the Republican party in the commonwealth corruptly and fraudulently entered into an agreement and conspiracy with the said officers of the Louisville & Nashville Railroad Company and the American Book Company and other corporations and trusts, by which the said companies, corporations, and trusts agreed to furnish large sums of money to be used in defeating the contestant at said election by bribing and corrupting the voters and election officers of this commonwealth and debauching the public press thereof; and that in pursuance to the said conspiracy the said companies, corporations, and trusts did furnish large sums of money, which were so corruptly and unlawfully used in the counties of Jefferson, Warren, Fayette, Breathitt, Hopkins, Daviess, Logan, Todd, Henderson, Pulaski, Whitley, Knox, Bell, Hard-

"Defendants further say that if the state, after having furnished to its citizens and electors in a number of its counties official ballots upon which it required them to vote, or not vote *at all, in the election of a governor and lieutenant governor, shall reject their votes, and thus refuse to allow them to participate in the election of such officers, merely because they used in voting the ballots which the state required them to use, and if the state shall, thereby and on that account, refuse to allow the persons respectively chosen for the office of governor and lieutenant governor by the majority of the qualified voters of the state, including those using the ballots aforesaid, to take their seats and perform the duties of governor and lieutenant governor, and shall in lieu of them seat other persons, then the state will thereby deprive the said citizens and electors, all of whom are both citizens of Kentucky and citizens of the United States, of their political liberty, without due process of law, in violation of the Constitution of the United States, and will thereby deny to them the benefits of a republican form of government in violation of the Constitution of the United States; and will thereby also deprive these defendants of their property without due process of law, all of which is

in, and divers other counties of the commonwealth, and by which many thousands of the legal voters thereof were bribed and corrupted and thereby caused to vote for contestee. Newspapers were purchased and debauched and officers of said election bribed, and the contestant deprived of many thousand votes which he would have received but for the unlawful and corrupt conspiracy aforesaid, which votes were sufficient to have elected him.

"Sixth. The contestant further says that in the counties of Knox and Lewis, the county board of election officers, whose duty it was, by law, to correctly certify the result of the election held in their respective counties, were compelled by unlawful mandatory injunctions issued by circuit judges and clerks, to sign false returns and certificates of said election, giving to the contestee large majorities of the votes cast in said counties; and in the county of Knox the said board was compelled by duress and open threats of violence from a large body of armed citizens of said county, assembled at the county seat, to sign false and fraudulent certificates. In the county of Jefferson the officers who held said election at the voting places in the city of Louisville were compelled to sign like false and fraudulent certificates of said election, by duress and under threats of Sterling B. Toney, one of the circuit judges of the commonwealth, who announced his purpose to fine and imprison said officers if they did not sign said false certificates. By reason of the duress aforesaid and the said unlawful mandatory injunctions, the votes in the said counties and all the precincts thereof were not correctly counted or certified, and the said votes so certified should not now be counted in determining the result of said election. All of said certificates were signed and made under duress, and would not have been signed but for the facts aforesaid.

"Seventh. The contestant says that in pursuance to a conspiracy of the leaders of the Republican party in Kentucky, and the United States marshal for the district of Kentucky, to intimidate and deter the Democrats and friends of contestant from voting for him, said marshal

contrary to the provisions of the Constitution of the United States."

"And defendants further say that if any such pretended meeting of members of the general assembly was held either on January 31st or February 2d, at which any action was taken or attempted to be taken on the reports of said contest committees, the said meetings were held secretly, without any notice to any of the Republican members of the general assembly and without any notice to either of these defendants that such meeting was to be held, and without any opportunity either to the said Republican members or any of them to be present, or any opportunity for either of these defendants to be present at such meetings at which the said contests were to be heard and determined. And if any such meetings were held or attempted to be held on either of those days, and any determination of either of said contests was pretended to have been had, it was utterly void on account of lack of notice and opportunity to be present or to be heard as just herein stated, as well as for the other reasons heretofore given. And to deprive these defendants or either of them of their

[559] offices by such action would *be to deprive

them of their property without due process of law, and would be to deprive defendants and the other people of the state of Kentucky, and especially the qualified voters thereof, of their political liberty without due process of law, and to deny to them the benefits of a republican form of government. All of which is contrary to the provisions and guaranties of the Constitution of the United States as well as that of Kentucky."

"Defendants further say that both the offices of governor and lieutenant governor are offices created by the Constitution of Kentucky, and therefore not subject to abolition by the general assembly of Kentucky. And, furthermore, it is provided by the Constitution of Kentucky that 'the salaries of public officers shall not be changed during the term for which they were elected,' and defendants say they were elected, as heretofore shown, to the offices of governor and lieutenant governor, respectively, of the state of Kentucky on November 7, 1899, for a period of four years each, and then and thereby became entitled to exercise the functions of said offices and to receive the salaries and emoluments appertaining thereto, which are large and valuable, and were such when they were

and other officers and persons threatened to indict many of contestant's supporters in the United States court for the district of Kentucky for alleged violation of law in connection with said election, and, in pursuance to said conspiracy, caused their threats to be published in the daily press of the state, and in other forms, and upon the day of said election caused deputy United States marshals to be and remain at the polling places in the city of Louisville and in various other cities of the commonwealth, intermeddling with the said election, overawing, threatening, and intimidating Democratic voters and their friends and supporters of the contestant, whereby many voters, to wit, more than enough to have changed the result of said election, were prevented from voting for contestant, who otherwise would have done so.

"Eighth. The contestant says that after said election and before the meeting of the state board of election commissioners, in the city of Frankfort, a conspiracy was formed and entered into by the contestee, the Louisville & Nashville Railroad Company, John Whallen, who was its paid agent, and other persons, whose names are unknown to contestant, to bring from various sections of this commonwealth large numbers of desperate armed men, for the purpose of alarming and intimidating the members of the said election board in the discharge of their duties, and the friends and supporters of said contestant; and that in pursuance to said conspiracy the corporations and persons aforesaid did transport to the city of Frankfort at said time a large number of the militia of the state, dressed in citizens' clothing, and many hundreds of desperate armed men, and unlawfully kept and maintained said militia and armed men in and about the chamber and capitol, where said election board held its sessions, for several days; for the unlawful purpose of alarming and intimidating the members of said board and the good citizens of the commonwealth; and the said corporation and persons also caused the military forces of the commonwealth to be armed and equipped and held in readiness and the state arsenal to be guarded by armed men for the unlawful purpose aforesaid, and Democratic members of the military companies of the state mi-

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litia to be disarmed and discharged and their places to be filled with Republicans.

"Ninth. The contestant for further grounds of contest herein says that in the county of Jefferson the county board of election officers, whose duty it was to ascertain and correctly certify the result of said election held in said county, were compelled by threats of violence and death to the two Democratic members of said board to accept, and said board by reason of the duress aforesaid did accept, false, fraudulent, and illegal returns from the various precincts in the city of Louisville, which returns were prepared by the attorneys and agents of the Republican party, and were signed by the precinct officers aforesaid under duress and threats of fine and imprisonment, and said board of election officers, by reason of the duress aforesaid, based, upon their certificate as to the result of said election in said county upon the said false, fraudulent, and illegal returns made by the said precinct officers as aforesaid, and for this cause the contestant was deprived of many thousand votes cast for him at said election, and the contestee was given many thousand illegal votes to which he was not entitled, to wit, more than enough to have changed the result of the said election, and for this cause the said election was and is void, and the alleged vote of Jefferson county as certified by said county board should not be counted in ascertaining the result of said election in this commonwealth.

"Tenth. The contestant further avers that many thousand of persons who were not entitled to vote at the said election on November 7th, 1899, were unlawfully brought into this commonwealth by the agents of the Louisville & Nashville Railroad Company and others acting in contestee's behalf, and at said election were wrongfully and unlawfully voted for the contestee in said election; that the number of votes so cast were sufficient to have changed the result of said election.

"The contestant will, upon the grounds aforesaid, at the time and place and before the tribunals stated, contest the election of said William S. Taylor to the office of governor of this commonwealth."

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thus elected; the salary of the governor being then and now fixed by law at \$6,500 per annum; and to take from them their said offices and their said salaries and emoluments by the aforesaid action of said contest tribunals would be to deprive them of their property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the 14th Amendment thereof.

[560] "Defendants say that the power vested in the houses of the general assembly of Kentucky to try contests over elections of governor or lieutenant governor is judicial in its nature, and is subject to the same limitations and restrictions to which the exercise of judicial power is ordinarily subject; that by the Constitution of the state of Kentucky and also by the Constitution of the United States, especially the 5th and 14th Amendments thereof, the exercise of absolute and arbitrary power by the state or any department thereof, whereby any person shall be deprived of life, liberty, property, or the pursuit of happiness, including therein the enjoyment of honors and the occupation of positions of public trust and emolument, is forbidden. But defendants say that if effect be given to the alleged decisions by the said boards of contest or the said houses of the general assembly as to the said contested elections for governor or lieutenant governor, and these defendants be thereby deprived of the offices of governor or lieutenant governor, and the plaintiff Beckham be thereby vested with the power of governor of Kentucky, then, not only will the people of Kentucky be deprived of their political liberty without due process of law, but these defendants will also be deprived, without due process of law, of the right to hold the said offices of governor and lieutenant governor, which are both profitable and honorable, all of which is contrary to and forbidden by both the provisions of the state Constitution and of the Constitution of the United States above referred to, and defendants say that if, by a proper construction of the Constitution of Kentucky, the absolute and arbitrary power is given either to the boards of contest or the houses of the general assembly to take from these defendants the offices of honor, trust, and emolument to which they were elected by the people of the state as heretofore alleged, under the false guise of a trial of a contest over said offices, then the said Constitution of the state is itself contrary to the aforesaid provisions of the Constitution of the United States."

The prayer of the defendants was that the bill be dismissed, that J. C. W. Beckham be adjudged a usurper, and that William S. Taylor and John Marshall be, respectively, adjudged the governor and lieutenant governor of the commonwealth.

The answers were in large part disposed of on demurrer and motion to strike out, and the case was submitted to the circuit court for determination on the law and facts without the intervention of a jury, and defend-

ants "moved the court to state in writing the conclusions of fact found separately from the conclusions of law;" but it was agreed that the court might adopt its opinion on demurrer as its statement of its conclusions of law. This the court did, and found [561] the facts in its judgment, which findings included, among others, these:

"Second. William Goebel and J. C. W. Beckham inaugurated a contest for the offices of governor and lieutenant governor respectively before the general assembly of Kentucky on the 2d day of January, 1900, against William S. Taylor and John Marshall, and the said contest was finally determined by the general assembly on the 2d day of February, 1900, at which time it was adjudged and determined by each house of said general assembly, acting separately and also in joint session, that the said William Goebel was duly elected governor of the commonwealth of Kentucky for the term beginning December 13, 1899, and was entitled to said office of governor, and it was then and there in like manner determined by said general assembly and by each house, acting separately and in joint session, that the said J. C. W. Beckham was duly elected lieutenant governor of said commonwealth for the same term.

"Third. Immediately after the said determination the oath of office of governor as provided by law was administered to said Goebel, February 2, 1900, and the oath of office as lieutenant governor, as provided by law, was in like manner administered to J. C. W. Beckham.

"Fourth. Said William Goebel died on the 3d day of February, at 6.45 P. M., and shortly thereafter upon said day J. C. W. Beckham as lieutenant governor was sworn, as required by law, to discharge the duties of the office of governor of the commonwealth."

Judgment of ouster was rendered in favor of plaintiff and against defendants.

The case was then carried on appeal to the court of appeals of Kentucky and the judgment affirmed (21 Ky. L. Rep. 1735, 56 S. W. 177); whereupon a writ of error from this court was allowed by the chief justice of that court.

The journals of the two houses, attached to the petition as part thereof, showed that the general assembly convened on January 2, 1900, and that on the third day after its organization boards of contest were appointed pursuant to the statute; that on February 2, 1900, the board in each of the contests reported to the two houses that they had [562] heard all the evidence offered by the parties, and that William Goebel had received the highest number of legal votes cast for governor; that J. C. W. Beckham had received the highest number of legal votes cast for lieutenant governor; and that they were duly elected and entitled to those offices. The journals further showed that on the same day both houses, with a quorum present, approved and adopted, separately and in joint session, the reports of the contest boards, and declared that William Goebel and J. C.

W. Beckham were duly elected governor and lieutenant governor, respectively.

It appeared that thereupon said Goebel and Beckham on that day, February 2, took the oath of office; that on January 30 William Goebel was shot by an assassin, receiving a wound from which he afterward died on February 3; and that on January 31 defendant Taylor as governor issued a proclamation declaring that a state of insurrection existed at Frankfort, Kentucky, adjourning the general assembly until February 6, and ordering it then to assemble at the town of London, in Laurel county.

The sessions of the general assembly on February 2 were not held at the state house, for the reason, as recited in the journals, that it was occupied by a military force which would not allow the general assembly to meet there, and thereupon the general assembly met on that day in the Capitol Hotel, in the city of Frankfort. On February 19 the general assembly met at the state house, and the senate on that day adopted the following resolution:

"Whereas, on the 31st day of January, 1900, the acting governor of the commonwealth of Kentucky, by the use of armed force, dispersed the general assembly, and has until recently prevented the senate and house from assembling at their regular rooms and places of meeting; and,

[563] "Whereas, the general assembly and each house thereof, after public notice, met in joint and separate sessions in the city of Frankfort, a full quorum of such bodies being present, and adopted the majority reports and resolutions of the board of contest for governor and lieutenant governor of the commonwealth *of Kentucky, unseating the contestees, W. S. Taylor and John Marshall, as governor and lieutenant governor, and seating the contestants, William Goebel and J. C. W. Beckham, as governor and lieutenant governor, respectively; all of which proceedings, reports, and resolutions are set out in the journals of the two houses of the general assembly; and,

"Whereas, this joint assembly is now enabled to meet in its regular place of meeting, and, whilst it adheres to the belief beyond doubt that the action of the general assembly therefore taken in reference to said contests is valid, final, and conclusive, to remove any doubt that may exist in the minds of any of the people of the commonwealth; now, be it

"Resolved, By the general assembly of the commonwealth of Kentucky, in joint session assembled, to the end that all doubt may be removed, if any exists, as to the validity and regularity of the action and proceedings at the times and places shown by the journals of the two houses, other than its regular rooms provided by law, that all the acts, proceedings, and resolutions of the senate and house and of the joint assembly of the two houses upon or touching the report of the majority of the boards of contest for the offices of governor and lieutenant governor, unseating the contestees and seating William Goebel
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and J. C. W. Beckham, and declaring them to have been elected governor and lieutenant governor, respectively, on the 7th day of November, 1899, is hereby re-enacted, readopted, and reaffirmed and ratified at this, the regular place of meeting provided by law, at the seat of government in Frankfort, Ky."

The same resolution was adopted by the house, and on February 20 by both houses in joint session.

The court of appeals regarded the disposal of the following contentions of Taylor and Marshall as decisive of the case, namely:

(1) That the proceedings of the legislature of February 2 were void, because the legislature had then been adjourned by the governor until February 6, and no legal session could be held in the meantime. (2) That William Goebel having died on February 3, the contest for the office of governor thereby abated, and the action of the legislature on February 19 and 20 was therefore void. (3) That the legislature *took no action on February 2, and that the journals of these meetings were fraudulently made by the clerk in pursuance of an alleged conspiracy between certain members of the assembly and contestants. (4) That the general assembly acted without evidence and arbitrarily.

The court of appeals held that the governor had no power to adjourn the legislature, and that his attempt to do so was wholly void, and did not interfere with the right of the legislature to proceed with its sessions at Frankfort. The only authority relied on to sustain his action was § 36 of the Constitution of Kentucky, as follows: "The first general assembly, the members of which shall be elected under this Constitution, shall meet on the 1st Tuesday after the 1st Monday in January, 1894, and thereafter the general assembly shall meet on the same day every second year, and its sessions shall be held at the seat of government, except in case of war, insurrection, or pestilence, when it may, by proclamation of the governor, assemble, for the time being, elsewhere."

This, the court held, did not provide for the adjournment of the general assembly by the governor after it had assembled, but for the designation of another place at which it might assemble for the time being and organize, when prevented by the causes named from doing so at the capital; and that it was not intended to authorize such action as was taken was clear from § 80, which provided, among other things: "In case of disagreement between the two houses with respect to the time of adjournment, he [the governor] may adjourn them to such time as he shall think proper, not exceeding four months." This showed that the governor had no power over the time of adjournment of the two houses, except in cases of disagreement as to that matter between them, and no such disagreement existed here. And even then it did not confer upon him power to name any other place than that in which the legislature might be sitting.

Section 41 also provided: "Neither house, during the session of the general assembly, shall, without the consent of the other, ad-

[565] journal for more than three days, nor to any other place *than that in which it may be sitting." By this section either house might, with the consent of the other, adjourn for more than three days, or to any other place than that in which it was sitting; but it could not have been intended that the governor should have like power. On the contrary, the powers of the state government were divided into three distinct and independent departments, and the state Constitution was intended to maintain the absolute independence of each.

The court further decided that the death of William Goebel on February 3d did not affect the right of Beckham. If Goebel was elected governor, and Beckham, lieutenant governor, Beckham on February 3d became entitled to the office of governor, and had the right to continue the contest to secure what the Constitution guaranteed him, so that, if the legislature had not acted until February 19, it had a right then to act on the contest, and its action would be none the less valid because not taken in Goebel's lifetime.

As to the validity of the entries in the journals and the effect to be given them, the court ruled, citing many authorities,† that evidence *aliunde* could not be received to impeach the validity of the record prescribed by the Constitution as evidence of the proceedings of the general assembly, and that the court was without jurisdiction to go behind the record thereby made. Among other things the court said:

"There is no conflict between the action of the state canvassing board and that of the legislature in these cases. The state canvassing board were without power to go behind the returns. They were not authorized to hear evidence and determine who was in truth elected, but were required to give a certificate of election to those who on the face of the returns had received the highest number of votes. For the state board to have received evidence to impeach the returns before them *would have been for them, in effect, to act as a board for trying a contested election, and if they had done this they would have usurped the power vested in the general assembly by the Constitution; for by its express terms only the general assembly can determine a contested election for governor and lieutenant governor.

[566] "But the certificate of the state board of canvassers is no evidence as to who was in truth elected. Their certificate entitles the recipient to exercise the office until the regular constitutional authority shall determine who is the *de jure* officer. The rights of the *de jure* officer attached when he was elected,

although the result was unknown until it was declared by the proper constitutional authority. When it was so declared it was simply the ascertainment of a fact hitherto in doubt, or unsettled. The rights of the *de facto* officer, under his certificate from the canvassing board, were provisional or temporary until the determination of the result of the election as provided in the Constitution, and upon that determination, if adverse to him, they ceased altogether. Such a determination of the result of the election, by the proper tribunal, did not take from him any pre-existing right; for if not in fact elected he had only a right to act until the result of the election could be determined."

In respect of the allegation that the action of the general assembly was void because without evidence and arbitrary, the court held that it must be presumed that the legislature did its duty in the premises; and, further, that the objections that the notices of contest were insufficient and that the evidence was equally insufficient, that the contest boards were not fairly drawn by lot, and that certain members of the boards were liable to objection on the ground of partiality, were all in respect of matters confided to the general assembly to deal with as made by the Constitution the sole tribunal to determine such contests.

To the argument that, if all the specifications of contestants were true, the election was wholly void and no one elected, the court replied that it had no means of knowing the grounds on which the general assembly reached its conclusion; that the *presump-[567] tions were in favor of their judgment, and that "when they found as a fact that the contestants received the highest number of legal votes cast in the election in controversy, we are not at liberty to go behind their findings."

The court further held that the proceedings were not in violation of the 14th Amendment, and said:

"The office of governor being created by the Constitution of this state, the instrument creating it might properly provide how the officer was to be elected and how the result of this election should be determined. The provisions of the Constitution on this subject do not abridge the privileges or immunities of citizens of the United States. Such an office is not property, and in determining merely the result of the election, according to its own laws, the state deprives no one of life, liberty, or property. In creating this office the state had a right to provide such agencies as it saw fit to determine the result of the election, and it had a right to provide such a mode of procedure as it saw fit. It is wholly a matter of state policy. The people of the state might, by an amendment to their Constitution, abolish the office altogether. The determination of the result of an election is purely a political question, and if such suits as this may be maintained the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary

†Cooley, Const. Lim. (5th ed.) 222; Wright v. DeFreese, 8 Ind. 298; McCulloch v. State, 11 Ind. 424; State *ex rel.* Loomis v. Moffitt, 5 Ohio, 358; Wise v. Bligger, 79 Va. 269; Sunbury & E. R. Co. v. Cooper, 33 Pa. 283; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Ex parte* McCordle, 7 Wall. 506, 19 L. ed. 264; United States v. Des Moines, Nav. & R. Co. 142 U. S. 544, 35 L. ed. 1109, 12 Sup. Ct. Rep. 309; United States v. Old Settlers, 148 U. S. 466, 37 L. ed. 523, 13 Sup. Ct. Rep. 650.

process for the settlement of such contests, to the end that public business shall not be interrupted; but if such a suit as this may be maintained, where will such a contest end?"

Of the seven members of the tribunal, Hazelrigg, C. J., Paynter, Hobson, and White, JJ., concurred in the principal opinion by Hobson, J.; and Burnam and Guffy, JJ., in the result, in a separate opinion by Burnam, J., on the ground "that there is no power in the courts of the state to review the finding of the general assembly in a contested election for the offices of governor and lieutenant governor as shown by its duly authenticated records." Du Relle, J., dissented, holding that the boards of contest had no jurisdiction in the matter which they undertook to try, and that the demurrer should have been carried back to the petition and sustained.

[568] *The present Constitution of the state of Kentucky of 1891 provides, § 90: "Contested elections for governor and lieutenant governor shall be determined by both houses of the general assembly, according to such regulations as may be established by law." This was taken verbatim from the 24th section of article 3 of the Constitution of 1850.

Section 27 of article 3 of the Constitution of 1799 provided: "Contested elections for a governor and lieutenant governor shall be determined by a committee, to be selected from both houses of the general assembly, and formed and regulated in such manner as shall be directed by law."

The statutes of Kentucky provide:

"Sec. 1535. No application to contest the election of an officer shall be heard, unless notice thereof, in writing, signed by the party contesting, is given.

"1. The notice shall state the grounds of the contest, and none other shall afterward be heard as coming from such party; but the contestee may make defense without giving counter notice.

"2. In the case of an officer elective by the voters of the whole state, or any judicial district, the notice must be given within thirty days after the final action of the board of canvassers."

"Sec. 1596 A, . . .

"8. CONTESTED ELECTION OF GOVERNOR AND LIEUTENANT GOVERNOR. When the election of a governor or lieutenant governor is contested, a board for determining the contest shall be formed in the manner following:

"First. On the third day after the organization of the general assembly which meets next after the election, the senate shall select by lot three of its members, and the house of representatives shall select by lot eight of its members, and the eleven so selected shall constitute a board, seven of whom shall have power to act.

"Second. In making the selection by lot, the name of each member present shall be written on a separate piece of paper, every such piece being as nearly similar to the [569] other as may be. *Each piece shall be rolled up so that the name thereon cannot be seen, 178 U. S.

nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and after it has been well shaken up and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the board.

"Third. The members of the board so chosen by the two houses shall be sworn by the speaker of the house of representatives to try the contested election, and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

"Fourth. The board shall, within twenty-four hours after its election, meet, appoint its chairman, and assign a day for hearing the contest, and adjourn from day to day as its business may require.

"Fifth. If any person so selected shall swear that he cannot, without great personal inconvenience, serve on the board, or that he feels an undue bias for or against either of the parties, he may be excused by the house from which he was chosen from serving on the board, and if it appears that the person so selected is related to either party, or is liable to any other proper objection on the score of its partiality, he shall be excused.

"Sixth. Any deficiency in the proper number so created shall be supplied by another draw from the box.

"Seventh. The board shall have power to send for persons, papers, and records, to issue attachments therefor signed by its chairman or clerk, and issue commissions for taking proof.

"Eighth. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election a new election shall be ordered to fill the vacancy; *Provided*, the first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given, *such [570] other shall be adjudged to be the person elected and entitled to the office.

"Ninth. No decision shall be made but by the vote of six members. The decision of the board shall not be final nor conclusive. Such decision shall be reported to the two houses of the general assembly, for the future action of the general assembly. And the general assembly shall then determine such contest.

"Tenth. If a new election is required it shall be immediately ordered by proclamation of the speaker of the house of representatives to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

"Eleventh. When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, 1195

and, if the office is not adjudged to another, it shall be deemed to be vacant.

"Twelfth. If any member of the board wilfully fails to attend its sessions, he shall be reported to the house to which he belongs, and thereupon such house shall, in its discretion, punish him by fine or imprisonment or both.

"Thirteenth. If no decision of the board is given during the then session of the general assembly, it shall be dissolved unless by joint resolution of the two houses it is empowered to continue longer."

Mr. **Helm Bruce** argued the cause and, with Messrs. *James P. Helm* and *Kennedy Helm*, filed a brief for plaintiffs in error.

Messrs. *W. O. Bradley*, *W. H. Yost*, *A. E. Willson*, *D. W. Fairleigh*, *W. C. P. Breckinridge*, and *John Shelby* were with them on the brief.

Unless the court shall be of opinion that all the questions presented are frivolous and wholly without substance, the jurisdiction of this court in the case at bar is beyond question.

Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

Whether or not the answer stated facts sufficient to show that the right claimed was one protected by the Federal Constitution, and whether the legislative proceedings relied on by plaintiff were not due process of law are Federal questions for this court to determine.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The right to such an office as is here involved is one which is protected by the Constitution of the United States.

Marbury v. Madison, 1 Craneh, 137, 2 L. ed. 60; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478; *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

The case of *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, has no application to the case at bar. In that case the statute provided that if certain charges were made against a public official the government might, without a hearing or trial, suspend him until there could be a trial.

There is no suggestion in *Re Sawyer*, 124 U. S. 219, 31 L. ed. 408, 8 Sup. Ct. Rep. 482, that the right to an office is not protected by the Federal Constitution against arbitrary deprivation. It simply holds that a court of equity of the United States cannot interfere with the matter of the appointment or removal of public officers, as this is purely a matter of legal cognizance.

The right of the people to choose their officers who should represent them in state affairs was the essential right which was guaranteed by U. S. Const. art. 4, § 4, in ex-

change and as an equivalent for their surrender of the right of revolution.

Re Duncan, 139 U. S. 449, sub nom. *Duncan v. McCall*, 35 L. ed. 219, 11 Sup. Ct. Rep. 573.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person who is himself in the first instance liable to such payment or performance.

14 Am. & Eng. Enc. Law, p. 1128.

The constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law is a protection to the individual and every right he has, against arbitrary spoliation by a state.

Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Slaughter-House Cases*, 16 Wall. 36, sub nom. *Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.* 21 L. ed. 394; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Brown v. Hummel*, 6 Pa. 86; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

This court can enforce the provisions of the Federal Constitution by declaring null and void an alleged arbitrary action of the general assembly of Kentucky denying those rights, when such action is sought to be judicially enforced.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Story, Miscellaneous Writings, 619, 621; The Federalist, Nos. 16, 80; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Tindal v. Wesley*, 167 U. S. 217, 42 L. ed. 141, 17 Sup. Ct. Rep. 770; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The right to vote, if given by the state law, is protected by the 14th Amendment against arbitrary deprivation by the state.

Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627.

The prohibition of the 14th Amendment against any state depriving any person of life, liberty, or property applies equally to all the departments of state government.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 531; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618.

Mr. **W. O. Bradley** also argued the cause and, with Messrs. *Helm*, *Bruce*, & *Helm*, *W. H. Yost*, *D. W. Fairleigh*, *Augustus E. Willson*, *Breckinridge & Shelby*, *T. L. Edelen* and *W. H. Sweeney* filed a further brief for plaintiff in error:

An office is certainly both a right and a privilege of citizenship.

Page v. Hardin, 8 B. Mon. 672; *Com. v. Jones*, 10 Bush. 735; *Cummings v. Missouri*, 4 Wall. 321, 18 L. ed. 362.

The legislative department is affected by the provisions of the 14th Amendment.

Scott v. McNeal, 154 U. S. 45, 38 L. ed. 178 U. S.

901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581.

The legislature is not above judicial review.

Cohen v. Virginia, 6 Wheat. 381, 5 L. ed. 285; *Newcum v. Kirtley*, 13 B. Mon. 524; *Batman v. Megowan*, 1 Met. (Ky.) 533; *Stine v. Berry*, 96 Ky. 63, 27 S. W. 809; *Anderson v. Likens*, 20 Ky. L. Rep. 1001, 47 S. W. 867; *Booe v. Kenner*, 20 Ky. L. Rep. 1343, 49 S. W. 330; *Com. v. Jones*, 10 Bush, 743; *Jones v. Jones*, 12 Pa. 350, 51 Am. Dec. 611; *Cronise v. Cronise*, 54 Pa. 262; *Cooley*, Const. Lim. pp. 261, 262, 407; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 971, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Story*, Const. §§ 531, 532; *De Lome*, Eng. Consts. chap. 3, book 2; *Newcomb v. Newcomb*, 13 Bush, 544.

To say that this unwarranted action of a legislative body is above and beyond control is to say that the citizen has no rights which it is bound to respect.

Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542.

Mr. Lewis McQuown argued the cause and, with *Messrs. Lawrence Maxwell, Jr., W. S. Pryor, Aaron Kohn, and Zack Phelps*, filed a brief for defendant in error:

The provisions of the Constitution of Kentucky and the laws made in pursuance thereof, regulating the trial of contested elections for governor and lieutenant governor, afford due process of law within the meaning of the 14th Amendment to the United States Constitution.

Foster v. Kansas ex rel. Johnston, 112 U. S. 206, 28 L. ed. 697, 5 Sup. Ct. Rep. 8, 97; *Walker v. Sawinet*, 92 U. S. 90, 23 L. ed. 678; *Iowa C. R. Co. v. Iowa*, 160 U. S. 392, 40 L. ed. 468, 16 Sup. Ct. Rep. 344.

Errors or mistakes of judgment by the officers charged with the administration of the law do not authorize this court to assume jurisdiction upon the ground of failure of due process.

Tucker, Const. § 390; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

The deprivation of an office or property by the judgment of a tribunal created to determine a contest is not within the inhibition of the 14th Amendment.

Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 866, 18 Sup. Ct. Rep. 435.

There is no property in an office: hence the deprivation of an office without due process does not fall within the inhibition of the Constitution.

Smith v. New York, 37 N. Y. 520; *Standford v. Wingate*, 2 Duv. 443. *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 109, 5 N. E. 228; *State ex rel. Atty. Gen. v. Davis*, 44 Mo. 129; *Conner v. New York*, 5 N. Y. 296; *State v. Douglas*, 26 Wis. 431, 7 Am. Rep. 87; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 866, 18 Sup. Ct. Rep. 435.

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The judgment of the general assembly is conclusive.

Batman v. Megowan, 1 Met. (Ky.) 533; *Stine v. Berry*, 96 Ky. 63, 27 S. W. 809; *Newcum v. Kirtley*, 13 B. Mon. 517; *State ex rel. Grisell v. Marlow*, 15 Ohio St. 114; *Stearns v. Wyoming*, 53 Ohio St. 352, 41 N. E. 578; *Reynolds & H. Constr. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. 236; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537.

The legislative journals import verity.

Tameling v. United States Freehold & Emigration Co. 93 U. S. 644, 23 L. ed. 998; *United States v. Old Settlers*, 148 U. S. 466, 37 L. ed. 523, 13 Sup. Ct. Rep. 650; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 544, 35 L. ed. 1109, 12 Sup. Ct. Rep. 308; *McCulloch v. State*, 11 Ind. 425; *Wright v. Defrees*, 8 Ind. 298; *State ex rel. Loomis v. Moffitt*, 5 Ohio, 363; *Sunbury & E. R. Co. v. Cooper*, 33 Pa. 283; *Wise v. Bigger*, 79 Va. 269; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *State ex rel. Pangborn v. Young*, 32 N. J. L. 40; *Cohn v. Kingsley* (Idaho) 38 L. R. A. 78, 49 Pac. 985; *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 737, 22 S. E. 16; *Blaine County v. Heard* (Idaho) 45 Pac. 890; *State v. Cardozo*, 5 S. C. N. S. 312; *Humboldt County v. Churchill County Comrs.* 6 Nev. 39; *Speer v. Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802; *State ex rel. Grisell v. Marlow*, 15 Ohio St. 114.

For protection against abuses by legislatures the people must resort to the polls, not to the courts.

Munn v. Illinois, 94 U. S. 134, 24 L. ed. 87.

Mr. Lawrence Maxwell, Jr., also argued the cause and, with *Messrs. W. S. Pryor* and *Lewis McQuown* filed a brief for defendant in error:

Where a specific mode of contesting elections is provided by the constitution or laws of a state, that mode is exclusive; and where the power is lodged in the legislature its decision is final, and not subject to judicial revision or annulment on any ground whatever.

State ex rel. Grisell v. Marlow, 15 Ohio St. 114; *State v. Harmon*, 31 Ohio St. 250; *State v. Berry*, 47 Ohio St. 232, 24 N. E. 266; *Stearns v. Wyoming*, 53 Ohio St. 352, 41 N. E. 578; *State ex rel. Brooks v. Baxter*, 28 Ark. 129; *Corbitt v. McDaniel*, 77 Ga. 544, 2 S. E. 692; *People ex rel. Royce v. Goodwin*, 22 Mich. 496; *Hipp v. Charlevoix County Supers*, 62 Mich. 456, 29 N. W. 77; *Com. ex rel. McCurdy v. Leech*, 44 Pa. 332; *State ex rel. Atty. Gen. v. Mason*, 77 Mo. 189; *State ex rel. Ewing v. Francis*, 88 Mo. 557; *Garrard v. Gallagher*, 11 Nev. 382; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *Selleck v. South Norwalk*, 40 Conn. 359; *Wright v. Fawcett*, 42 Tex. 203; *Rogers v. Johns*, 42 Tex. 339; *State ex rel. Bonner v. Lynch*, 25 La. Ann. 267.

The Constitution of the United States does not guarantee that the parties to a suit in a state court, in which an act of the legislature of the state is in issue, shall have the right to impeach it for fraud by parol testimony.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Cooley, Const. Lim.* 220, 222; *United States v. Old Settlers*, 143 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650, and cases cited.

[570] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is obviously essential to the independence of the states, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers, the [571] tenure of their offices, *the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

And where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state Constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked.

In *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 155, 36 L. ed. 108, 12 Sup. Ct. Rep. 375, which was a proceeding in quo warranto, in which the supreme court of Nebraska had held that James E. Boyd had not been for two years preceding his election a citizen of the United States, and hence that under the Constitution of the state he was not eligible to the office of governor, this court took jurisdiction because the conclusion of the state court involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and therefore jurisdiction to review a decision against such right or privilege necessarily existed in this tribunal. *Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385. And we said: "Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen and the title to offices shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts, it is a 'case,' and if a defense is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of a state, this court has jurisdiction by writ of error."

So in *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478, concerning the right of Kennard to the office of associate justice of the supreme court of Louisiana, jurisdiction was taken on the ground that the constitutionality of the statute under which the disputed title to office was tried was drawn in question. The court, speaking by Mr. Chief Justice Waite, said: "The

question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether *the law, if followed, would have furnished [572] Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

The writ in *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97, rested on the same ground.

In each of the foregoing cases the determination of the right to the offices in dispute was reposed in the judicial courts, and no question was expressly considered by this court as to whether the right to a public office of a state was or was not protected by the 14th Amendment.

In *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, the governor of North Carolina had suspended plaintiff in error as railroad commissioner under a statute of that state, and the state supreme court had held the action of the governor a valid exercise of the power conferred upon him, and that it was due process of law within the meaning of the Constitution. A writ of error from this court to review that judgment was granted, and on hearing was dismissed. Mr. Justice Peckham, in delivering the opinion, said: "The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution. Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of a state this court follows the construction given to those instruments by the highest court of the state. The exceptions to this rule do not embrace the case now before us. We are therefore concluded by the decision of the supreme court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the Constitution of the state. The only question for us to review is whether the state, through the action of its governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws. We are of opinion *that the plaintiff [573] in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the governor under the statute above mentioned, and resulting in his suspension from office. The procedure was in accordance with the Constitution and laws of the state. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, hav-

ing regard to the Constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not, in general, involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of the state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise, in a case of this nature, to a Federal question. . . . In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court. . . . Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law, or by denying him the equal protection of the laws."

The grounds on which our jurisdiction is sought to be maintained in the present case are set forth in the errors assigned, to the effect, in substance: (1) That the action of the general assembly in the matter of these [574] contests deprived plaintiffs in "error of their offices without due process of law. (2) That the action of the general assembly deprived the people of Kentucky of the right to choose their own representatives, secured by the guarantee of the Federal Constitution of a republican form of government to every state, and deprived them of their political liberty without due process of law.

For more than a hundred years the Constitution of Kentucky has provided that contested elections for governor and lieutenant governor shall be determined by the general assembly. In 1799, by a committee, "to be selected from both houses of the general assembly, and formed and regulated in such manner as shall be directed by law" [Const. art. 3, § 27]; since 1850, "by both houses of the general assembly, according to such regulations as may be established by law" [Const. art. 3, § 24].

The highest court of the state has often held, and, in the present case has again declared, that under these constitutional provisions the power of the general assembly to determine the result is exclusive, and that its decision is not open to judicial review. *Bat-*
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man v. Megowan, 1 Met. (Ky.) 533; *Stine v. Berry*, 96 Ky. 63, 27 S. W. 809.†

The statute enacted for the purpose of carrying the provisions of the Constitution into effect has been in existence in substance since 1799, 1 Morehead, and Brown, 593-4; Rev. Stat. Ky. 1852, chap. 32, art. 7, § 1, p. 294. Many of the states have similar constitutional provisions and similar statutes.

We do not understand this statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the general assembly under the statute and of the judgment of the state courts declining to disturb that action.

It was earnestly pressed at the bar that all the proceedings were void for want of jurisdiction apparent on the face of the record; that under the Constitution and statute, as there was no question of an equal number of votes or of the legal qualifications *of the [575] candidates, the action of the general assembly could only be invoked by a contest as to which of the parties had received the highest number of legal votes; but that the notices put forward a case, not of the election of the contestants, but of no election at all, which the contest boards and the general assembly had no jurisdiction to deal with. The notices were, however, exceedingly broad, and set up a variety of grounds, and specifically stated that the contestants would ask the boards of contest and the general assembly to determine that they were legally and rightfully elected governor and lieutenant governor at the said election and that the contestees were not. And the determination of the boards and of the general assembly was that contestants had received the highest number of legal votes cast for any candidate for said offices at said election, and were duly and legally elected governor and lieutenant governor,—a determination which adjudged the notices to be sufficient, and which did not include any matter not within the jurisdiction of the tribunal.

We repeat, then, that the contention is that, although the statute furnished due process of law, the general assembly in administering the statute denied it; and that the court of appeals in holding to the rule that where a mode of contesting elections is specifically provided by the Constitution or laws of a state, that mode is exclusive, and in holding that, as the power to determine was vested in the general assembly of Kentucky, the decision of that body was not subject to judicial revision, denied a right claimed under the Federal Constitution. The court of appeals did, indeed, adjudge that the case did not come within the 14th Amendment, because the right to hold the office of governor or lieutenant governor of Kentucky was not property in itself, and, being created

†And see *State ex rel. Grisell v. Marlow*, 15 Ohio St. 115, 134; *State v. Harmon*, 31 Ohio St. 250; *Com. ex rel. Atty. Gen. v. Garrigues*, 28 Pa. 9, 70 Am. Dec. 103; *Com. ex rel. McCurdy v. Leech*, 44 Pa. 332; *People ex rel. Royce v. Goodwin*, 22 Mich. 496; *Baxter v. Brooks*, 29 Ark. 173; *State v. Lewis*, 51 Conn. 113.

by the state Constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that, in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by that amendment.

[576] *The view that public office is not property has been generally entertained in this country.

In *Butler v. Pennsylvania*, 10 How. 402, 416. 13 L. ed. 472, 478, Butler and others by virtue of a statute of the state of Pennsylvania had been appointed canal commissioners for a term of one year with a compensation of \$4 *per diem*, but during their incumbency another statute was passed whereby the compensation was reduced to \$3, and it was claimed that their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract by which "perfect rights, certain definite, fixed private rights of property, are vested;" and said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well being of the public. . . . It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or Constitution of the state, as is the case in some instances in the state Constitutions."

In *Crenshaw v. United States*, 134 U. S. 99, 104, 33 L. ed. 825, 827, 10 Sup. Ct. Rep. 431, 432, Mr. Justice Lamar stated the primary question in the case to be "whether an officer appointed for a definite time or during good behavior had any vested interest or [577] contract right in his office of *which Congress could not deprive him." And he said, speaking for the court: "The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right." *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. 1200

ed. 710; *Blake v. United States*, 103 U. S. 227, 26 L. ed. 462; and many other cases.

The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.†

The court of appeals not only held that the office of governor or of lieutenant governor was not property under the Constitution of Kentucky; but, moreover, that court was of opinion that the decision of these contested elections did not deprive plaintiffs in error of any pre-existing right.

Our system of elections was unknown to the common law, and the whole subject is regulated by constitutions and statutes passed thereunder. In the view of the court of appeals the mode of contesting elections was part of the machinery for ascertaining the result of the election, and hence the rights of the officer who held the certificate of the state board of canvassers "were provisional or temporary until the determination of the result of the election as provided in the Constitution, *and upon that determi-[578] nation, if adverse to him, they ceased altogether." In fact, the statute provided that when the "incumbent is adjudged not to be entitled his powers shall immediately cease," and under the Constitution the holder of the certificate manifestly held it for the time being subject to the issue of a contest if initiated.

It is clear that the judgment of the court of appeals, in declining to go behind the decision of the tribunal vested by the state Constitution and laws with the ultimate determination of the right to these offices, denied no right secured by the 14th Amendment.

But it is said that the 14th Amendment must be read with § 4 of article 4 of the Constitution, providing that: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the

†*Sweeny v. Foyntz*, Clr. Ct. U. S. Dist. Ky. not yet reported, Taft, J.; *Standeford v. Wingate*, 2 Duv. 440, 443; *Conner v. New York*, 5 N. Y. 285; *Donahue v. Will County*, 100 Ill. 94; *Atty. Gen. ex rel. Rieh v. Jochim*, 99 Mich. 358, 58 N. W. 611; *Smith v. New York*, 37 N. Y. 520; *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *State ex rel. Atty. Gen. v. Davls*, 44 Mo. 129; *State v. Douglas*, 26 Wis. 428; *Prince v. Skillin*, 71 Me. 361; *Douglas County v. Timme*, 32 Neb. 272, 49 N. W. 268; *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169.

executive (when the legislature cannot be convened), against domestic violence." It is argued that when the state of Kentucky entered the Union, the people "surrendered their right of forcible revolution in state affairs," and received in lieu thereof a distinct pledge to the people of the state of the guaranty of a republican form of government, and of protection against invasion and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guaranty, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

[579] It was long ago settled that the enforcement of this guaranty belonged to the political department. *Luther v. Borden*, 7 How. 1, 12 L. ed. 581. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary *convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the supreme court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the state courts on questions which concern merely the Constitution and laws of the state.

We had occasion to refer to *Luther v. Borden* in *Re Duncan*, 139 U. S. 449, 461, 35 L. ed. 219, 224, 11 Sup. Ct. Rep. 573, and we there observed: "Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government as recognizing that the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the Constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution

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or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions. Webster's Works, vol. 6, p. 217. . . . The state of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force it is for the state to determine, and that determination *in itself involves no [580] infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction."

These observations are applicable here. The commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the general government to enforce the guaranties of the Constitution, or to repel invasion, or to put down domestic violence. In the eye of the Constitution, the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests. This very case shows that this is so, for those who assert that they were aggrieved by the action of the general assembly properly accepted the only appropriate remedy which, under the law, was within the reach of the parties. That this proved ineffectual as to them, even though their grounds of complaint may have been in fact well founded, was the result of the Constitution and laws under which they lived and by which they were bound. Any remedy beside that is to be found in the august tribunal of the people, which is continually sitting, and over whose judgments on the conduct of public functionaries the courts exercise no control.

We must decline to take jurisdiction on the ground of deprivation of rights embraced by the 14th Amendment, without due process of law, or of the violation of the guaranty of a republican form of government by reason of similar deprivation.

As remarked by Chief Justice Taney in *Luther v. Borden*: "The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided *to it by the Constitution, it is [581] equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."

Writ of error dismissed.

Mr. Justice **Brewer** dissenting:

I am unable to concur in all that is said by the Chief Justice in the opinion just announced, and will state briefly wherein I dissent.

An office to which a salary is attached, in a case in which the controversy is only as to which of two parties is entitled thereto, has been adjudged by this court, and rightfully, to be property within the scope of that clause of the 14th Amendment, which forbids a state to "deprive any person of life, liberty, or property without due process of law." In *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478, Kennard was appointed a justice of the supreme court of Louisiana. Morgan claimed to be entitled thereto, and brought suit to settle the title to the office. The supreme court of the state decided in favor of Morgan, and Kennard sued out a writ of error from this court on the ground that the judgment had deprived him of his office without due process of law, in violation of the foregoing provision of the 14th Amendment. Of course, neither life nor liberty were involved, and the jurisdiction of this court could be sustained only on the ground that the property of Kennard was taken from him, as alleged, without due process of law. This court unanimously sustained the jurisdiction, but, on examination of the proceedings, found that there had been due process of law, and therefore affirmed the judgment of the supreme court of Louisiana. In *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97, the supreme court of Kansas had, in quo warranto proceedings, ousted Foster from the office of county attorney of Saline county, and there was presented a motion to dismiss as well as one to affirm. This court unanimously held that the motion to dismiss must be overruled, saying (p. 206, L. ed. p. 697, Sup. Ct. Rep. p. 98):

"As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, and the motion to dismiss must be overruled."

At the same time it affirmed the decision of the supreme court of the state on the ground that the proceedings showed due process of law. In *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375, the supreme court of Nebraska had, in an appropriate action, rendered judgment ousting Boyd from the office of governor of the state, and placing Thayer in possession. On error to this court we took jurisdiction of the case, and reversed the judgment of the supreme court of Nebraska, thus restoring Boyd to the office from which he had been ousted by the judgment of that court. In that case there was a dissenting opinion by Mr. Justice Field on the ground of jurisdiction, he saying (p. 182, L. ed. p. 116, Sup. Ct. Rep. p. 389):

"I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship

of a state, however that question may be decided by its authorities."

In the late case of *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, in which the judgment of the supreme court of the state confirming the action of governor in suspending a railroad commissioner was sustained and the writ of error dismissed, the dismissal was not placed on the ground that the office, with its salary, was not property to be protected by the 14th Amendment, but, as said Mr. Justice Peckham, speaking for the court (p. 595, L. ed. p. 871, Sup. Ct. Rep. p. 439):

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law, or by denying him the equal protection of the laws."

We have thus, in four cases, coming at successive times through a period of twenty-five years, had before us the question of the validity of judgments of the highest courts of separate states taking office from one person and giving it to another, in three of which we unhesitatingly sustained our jurisdiction to review such judgments, two of which we affirmed on the ground that the proceedings in the state court disclosed due process of law, and that, therefore, the rights of the plaintiff in error were not infringed; in the third of which we held that the proceedings could not be sustained, and reversed the judgment of the state court ousting one person from the high office of governor of the state and giving it to another; and in the fourth of which, while we dismissed the writ of error, it was not on the ground that there was no property involved, but because the reasons assigned for a review were so frivolous as not to call for consideration. Such a series of decisions should not now be disturbed, except upon very cogent and satisfactory reasons. And this case, it must be borne in mind, is exactly like the others,—a proceeding in error to review the judgment of the highest court of a state in an action to remove an incumbent from his office.

Aside from these adjudications, I am clear, as a matter of principle, that an office to which a salary is attached is, as between two contestants for such office, to be considered a matter of property. I agree fully with those decisions which are referred to, and which hold that as between the state and the officeholder there is no contract right either to the term of office or the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary. But when the office is not disturbed, when the salary is not changed, and when under the Constitution of the state neither can be by the legislature, and the question is simply whether one shall be deprived of that office and its salary, and both given to another, a very different question is presented, and in

such a case to hold that the incumbent has no property in the office, with its accompanying salary, does not commend itself to my judgment.

[584] While not concurring in the order of dismissal, I am of opinion that the judgment of the court of appeals of Kentucky should be affirmed. The state of Kentucky has provided that *contests in respect to the office of governor and lieutenant governor shall be decided by the general assembly. Such provision is not uncommon, is appropriate, and reasonable. The contestants, William Goebel and J. C. W. Beckham, filed with the general assembly within due time their notices of contest. Those notices were broad enough to justify action by the general assembly and a decision setting aside the award of the canvassing board and giving to the contestants their offices. The prescribed procedure was followed, the committee authorized by statute was selected, its report made, and upon that a decision awarding to the contestant the offices. It is true that the first decision of the general assembly was made at a secret session outside its ordinary place of meeting, and without notice except to those who were supposed to be willing to concur in the report of the committee. If that ended the proceedings I should be strongly inclined to hold that the decision thus rendered could not be sustained. For when a tribunal is constituted of several members I understand that all have a right to be present, and, if any session is held elsewhere than at the appointed time and place, each one must be notified in order that he may have the opportunity of being present and contributing by his advice and opinion to the final judgment. But the record does not stop with this award of a part of the assembly in secret session, for subsequently when the general assembly was in session at its regular place of meeting, in the discharge of its ordinary duties, and at a time prescribed for its meeting, the action taken on February 2 was ratified and confirmed, both in single and joint session. Now, I agree with those members of the court of appeals of Kentucky who hold that this final action of the general assembly is conclusive. I do not ignore the many allegations of wrong, such as that the selection of the committee was not by lot, as prescribed by the laws, but was a trick on the part of the clerks of the assembly, and it must be conceded that the outcome of that drawing lends support to this allegation. Curious results sometimes happen by chance, but when those results happen so largely along the lines of the purposes of those who have control of the supposed chance, it is not strange that outsiders are apt to feel that purpose, and [585] not *chance, determined the result. Be all these things as they may, the general assembly was constituted as the tribunal to conduct and supervise the contest. It approved what took place, and it is familiar law that no question can be raised in the courts as to the honesty or integrity of the members of the legislature in the discharge of their duties. Whatever of purity or honesty may be in
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fact lacking in the conduct of any one of them is a matter to be inquired into between his constituents and himself, and it is no part of the province of the judiciary to challenge or question the integrity of his action. So we have the case of a committee apparently selected by lot, the propriety of whose action was approved by the tribunal having charge of the controversy, the report of that committee in favor of the contestants, and the judgment of the assembly, not merely at the secret session, but later, when all were present, or were called upon to be present, approving such report. This, in my opinion, constitutes due process of law within the meaning of the 14th Amendment, and I agree with the court of appeals of Kentucky that upon that award thus made by the proper tribunal, no other judgment can be entered than that which sustains it. But because, as I understand the law, this court has jurisdiction to review a judgment of the highest court of a state ousting one from his office and giving it to another, and a right to inquire whether that judgment is right or wrong in respect to any Federal question, such as due process of law, I think the writ of error should not be dismissed, but that the judgment of the court of appeals of Kentucky should be affirmed.

Mr. Justice **Brown** concurs.

Mr. Justice **Harlan**, dissenting:

At the regular election held in Kentucky on the 7th day of November, 1899, William S. Taylor and William Goebel were, respectively, the Republican and Democratic candidates for governor of that commonwealth.

As required by law, the returns of the election were made to the secretary of state.

Upon examining and canvassing the returns, the officers charged with the duty of ascertaining the result of the election *certified, as to the office of governor, that Taylor [586] "received the highest number of votes given for that office, as certified to the secretary of state, and is therefore duly and regularly elected for the term prescribed by the Constitution." According to the returns upon which that certificate was based Taylor received 193,714 votes and Goebel 191,331.

It cannot be doubted that the certificate awarded to Taylor established at least his prima facie right to the governorship, and that he could not be deprived of that right except upon a contest in the mode prescribed by law, and upon proof showing that Goebel was legally entitled to the office. To deprive him of that right illegally was an injury both to him and to the people of the state. "The very essence of civil liberty," it was said in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, "is the right of every individual to claim the protection of the laws, whenever he receives an injury."

The Constitution of Kentucky provides that the governor "shall be elected for the term of four years by the qualified voters of the state. The person having the highest

number of votes shall be governor; but if two or more shall be equal and highest in votes, the election shall be determined by lot, in such manner as the general assembly may direct;" and that the governor "shall at stated times receive for his services a compensation to be fixed by law." Ky. Const. §§ 70, 74. That instrument further provides that "contested elections for governor and lieutenant governor shall be determined by both houses of the general assembly, according to such regulations as may be established by law." § 90.

Taylor, having received his certificate of election based upon the returns to the secretary of state, took the oath of office as governor on December 12th, 1899,—the oath being administered by the chief justice of the court of appeals of Kentucky,—and entered at once upon the discharge of his duties, taking possession of the public buildings provided for the governor, as well as of the books, archives, and papers committed by law to the custody of that officer. After that and until he was lawfully ousted, his acts, as governor, in conformity to law, were binding upon every branch of the state government and upon the people.

[587] *Within thirty days after the certificate of election was awarded to Taylor he was served by Goebel with notice of contest for the office of governor.

By the statutes of Kentucky relating to contested elections for governor and lieutenant governor it is provided:

"When the election of a governor or lieutenant governor is contested a board for determining the contest shall be formed in the manner following:

"First. On the third day after the organization of the general assembly which meets next after the election, the senate shall select by lot three of its members, and the house of representatives shall select by lot eight of its members, and the eleven so selected shall constitute a board, seven of whom shall have power to act.

"Second. In making the selection by lot the name of each member present shall be written on a separate piece of paper, every such piece being as nearly similar to the other as may be. Each piece shall be rolled up so that the name thereon cannot be seen, nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and, after it has been well shaken and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the board.

"Third. The members of the board so chosen by the two houses shall be sworn by the speaker of the house of representatives to try the contested election, and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

"Fourth. The board shall, within twenty-four hours after its election, meet, appoint

its chairman, and assign a day for hearing the contest, and adjourn from day to day as its business may require.

"Fifth. If any person so selected shall swear that he cannot, without great personal inconvenience, serve on the board, or that he feels an undue bias for or against either of the parties, *he may be excused by the house [588] from which he was chosen from serving on the board; and if it appears that the person so selected is related to either party, or is liable to any other proper objection on the score of his partiality, he shall be excused.

"Sixth. Any deficiency in the proper number so created shall be supplied by another draw from the box.

"Seventh. The board shall have power to send for persons, papers, and records, to issue attachments therefor, signed by its chairman or clerk, and issue commissions for taking proof.

"Eighth. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered to fill the vacancy: *Provided*, The first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office.

"Ninth. No decision shall be made but by the vote of six members. The decision of the board shall not be final nor conclusive. Such decision shall be reported to the two houses of the general assembly, for the future action of the general assembly. And the general assembly shall then determine such contest.

"Tenth. If a new election is required it shall be immediately ordered by proclamation of the speaker of the house of representatives, to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

"Eleventh. When a new election is ordered or the incumbent adjudged not to be entitled, his power shall immediately cease, and, if the office is not adjudged to another, it shall be deemed to be vacant.

"Twelfth. If any member of the board wilfully fails to attend its sessions, he shall be reported to the house to which he belongs, and thereupon such house shall, in its discretion, punish him by fine and imprisonment, or both.

*"Thirteenth. If no decision of the board [589] is given during the then session of the general assembly, it shall be dissolved, unless by joint resolution of the two houses it is empowered to continue longer." Ky. Rev. Stat. § 1596 A.

It may be here observed that the jurisdiction conferred by the statute upon the board of contest appointed by the legislature is not without limit. The power given to determine contested elections for governor

and lieutenant governor is attended by the condition that the determination of the contest shall be according to such regulations as may be established by law. In words too clear to require construction the powers of a board of contest are restricted so that (1) if the votes were not accurately summed up, the error might be corrected; (2) if illegal votes were cast they might be thrown out; (3) in the event "the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot;" (4) if the person returned as elected was not legally qualified to receive the office at the time of the election, a new election must be ordered to fill the vacancy; (5) if another than the person returned is found "to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office." The statute has been so construed by the highest court of Kentucky in *Leeman v. Hinton*, 1 Duv. 38. That was a common-law action involving the title to an office. The defendant relied upon the decision of a board of contest to the effect that Leeman's claim to the office rested upon an election held in each precinct under the supervision of military officers who overawed the majority of the voters in the county. The court of appeals of Kentucky decided in favor of Leeman, saying: "But the authority to decide as to the freedom and equality of elections has not been conferred by the legislature upon the board for trying contested elections, but forms a part of the general jurisdiction of the circuit courts." In the previous case of *Neueum v. Kirtley*, 13 B. Mon. 522—which was a contested election case in which the board assumed to count votes *not cast*, but which *would have been cast* if the polls had not been closed too soon—the court said that

[590] "the necessary and certain import of *the provision is that the contestant shall not be adjudged to be entitled to the office unless the board find that he has *received* the highest number of legal votes *given*."

Let it also be observed that the board of contest in this case was not given jurisdiction to throw out all the votes cast in a particular city, county, or section of the state because, in its judgment, the freedom of the election in such city, county, or section was destroyed by military or other interference. In other words, the board was without jurisdiction to throw out legal votes actually given, and was bound to respect the mandate of the Constitution that "the person *having* the highest number of votes *shall* be governor," as well as the mandate of the statute that the person "found to have *received* the highest number of votes . . . *shall* be adjudged to be the person elected and entitled to the office."

I remark further that the members elected to try the contested election were required by the statute "to give true judgment *according to the evidence*."

As to the legislature, it was made its duty by express words to determine the contest, without regarding the decision of the board

as final or conclusive. But, as already suggested, its jurisdiction to act was not without limit; for, in addition to the restriction above referred to, by the statute under which it proceeded no application to contest the election of an officer could be heard unless notice thereof in writing, signed by the party contesting, had been given; and "the notice shall state the grounds of the contest, and none other shall afterward be heard as coming from such party, but the contestee may make defense without giving counter notice." Ky. Rev. Stat. § 1535. The board of contest, as the court below has said, "was only a preliminary agent to *take evidence and report the facts* to the general assembly. The assembly itself finally determined the contest." As the general assembly could determine the contest only upon the grounds set forth in the contestant's notice, it had no authority or jurisdiction to oust the incumbent unless those grounds or some of them were sustained by proof laid before it. If no proof was laid before it, then the prima facie right of the incumbent, based upon the certificate awarded to him, must prevail.

*With these preliminary observations as to [591] the trial by a board of contest of a contested election for governor, and as to the powers of the legislature in determining such contest finally as between the parties, I come to the consideration of the grounds upon which the majority of the court have dismissed the present writ of error.

The board of contest in their report of January 30th, 1900, say: "In our opinion William Goebel was elected governor of the commonwealth of Kentucky on the 7th day of November, 1899, and that he then and there received the highest number of legal votes cast for anyone for the office of governor at said election, and we therefore respectfully suggest that this report be approved, and a resolution adopted by the general assembly declaring the said William Goebel governor elect of the commonwealth of Kentucky for the term commencing the 12th day of December, 1899. We decide that said William Goebel has received the highest number of legal votes, and is adjudged to be the person elected to said office of governor for the term prescribed by law."

The report was not accompanied either by any abstract of the evidence or any recital of the grounds upon which it based the statement that Goebel had received the highest number of legal votes. Nor was the evidence itself transmitted to the legislature,—not a line nor a word of it. According to the uncontradicted statement made by counsel at the argument, the proof made nearly two thousand pages of typewriting. The report simply followed the words of the statute and stated that Goebel had received "the highest number of legal votes," giving no basis, not the slightest, upon which the legislature could determine the correctness of that statement.

Immediately after the board's report reached the body claiming to be the lawful legislature of the state, that body—of course without reading the evidence, or causing it

to be read, for it had no evidence before it—approved the report, and declared Goebel to have been legally elected governor. Upon that action alone the present suit was based, and by the judgment of the highest court of Kentucky such action was declared to be conclusive upon the judiciary.

[592] “The first question to be considered is whether Taylor has been denied by the judgment of the state court any right or privilege secured to him by the Constitution of the United States. The appellant invokes the clause of the 14th Amendment declaring that “no state shall deprive any person of life, liberty, or property, without due process of law.” There ought not, at this day, to be any doubt as to the objects which were intended to be attained by the requirement of due process of law. “They were intended,” this court has said, “to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” *Bank of Columbia v. Okely*, 4 Wheat. 244, 4 L. ed. 561.

The majority of this court decide that an office held under the authority of a state cannot in any case be deemed property within the meaning of the 14th Amendment, and hence, it is now adjudged, the action of a state legislature or state tribunal depriving one of a state office—under whatever circumstances or by whatever mode that result is accomplished—cannot be regarded as inconsistent with the Constitution of the United States. Upon that ground the court declines to take jurisdiction of this writ of error. If the court had dismissed the writ or affirmed the judgment upon the ground that there had been no violation of the principles constituting due process of law, its action would not have been followed by the evil results which, I think, must inevitably follow from the decision now rendered.

Let us see whether, in dismissing the writ of error for want of jurisdiction, the majority have not departed from the rulings of this court in former cases. This question, it cannot be doubted, is one of serious moment. But what was said by Chief Justice Marshall, speaking for this court in *Cohen v. Virginia*, 6 Wheat. 404, 5 L. ed. 291, may well be repeated: “It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because

[593] it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them.”

The first case in this court relating to this subject is *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478. That was a writ of error brought by Kennard to

review the final judgment of the supreme court of Louisiana declaring that he was not a member of that court. “The case,” the report states, “was then brought here upon the ground that the state of Louisiana acting under this law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the 14th Amendment of the Constitution of the United States which prohibits any state from depriving any person of life, liberty, or property ‘without due process of law.’” Looking also into the printed arguments filed in that case, on behalf of the respective parties, I find that the attorney for the plaintiff in error, a lawyer of distinction, insisted that the sole question presented for determination by this court was whether the final judgment of the state court deprived Kennard of his office in violation of the above clause of the 14th Amendment. And this view was not controverted by the attorney for the defendant, also an able lawyer. The latter contended that the 14th Amendment had no application because in what was done no departure from the principles of due process of law had occurred. The opinion of Chief Justice Waite delivering the judgment of this court thus opens: “The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is whether the state of Louisiana, acting under the statute of January 15th, 1873, through her judiciary, has deprived Kennard of his office without due process of law.” Of course, this court had no jurisdiction to inquire whether there had been due process of law in the proceedings in the state court, unless the office in dispute or the right to hold it was property within the meaning of the 14th Amendment, or unless *Kennard’s liberty was involved in his[594] holding and discharging the duties of the office to which, as he insisted, he had been lawfully elected. But this court took jurisdiction of the case and affirmed the judgment of the supreme court of Louisiana upon the ground that the requirement in the 14th Amendment of due process of law had not been violated. If, in the judgment of this court, as constituted when the *Kennard Case* was decided, an office held under the authority of a state was not “property” within the meaning of the 14th Amendment, the case would have been disposed of upon the ground that no Federal right had been or could have been violated, and the court would not have entered upon the inquiry as to what, under the 14th Amendment, constituted due process of law in a case of which—according to the principles this day announced—it had no jurisdiction.

In *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97,—which was a writ of error to review the final judgment of the supreme court of Kansas,—the sole issue was as to the right of Foster to hold the office of county attorney. The defendant in error moved to dismiss the writ for want of jurisdiction in this court, and accompanied the motion with a motion to affirm. This court refused to dismiss the

case, and, referring to *Kennard v. Louisiana*, affirmed the judgment upon the ground that there had been, in its opinion, no departure from due process of law in the proceedings to remove Foster. It never occurred to the court, nor to any attorney in the case, that the 14th Amendment did not embrace the case of a state office from which the incumbent was removed without due process of law. If such an office was not deemed property within the meaning of that Amendment, that was an end of the case here. But this court took jurisdiction and disposed of the case upon the ground that the requirement in the Federal Constitution of due process of law had been observed.

In *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375, which came here upon writ of error to review the final judgment of the supreme court of Nebraska ousting Boyd from the office of governor, and putting Thayer into that position, all the justices, except Mr. Justice Field, concurred in holding that this court [595] had jurisdiction of the case. In his dissenting opinion Mr. Justice Field observed: "I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a state, however that question may be decided by its authorities." He continued, quoting the language of Mr. Justice Nelson in another case: "The former [general government] in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states. *The Collector v. Day*, 11 Wall. 113, 124, *sub nom. Buffington v. Day*, 20 L. ed. 122, 125." In no respect is this independence of the states more marked, or more essential to their peace and tranquillity, than in their absolute power to prescribe the qualifications of all their state officers, from their chief magistrate to the lowest official employed in the administration of their local government; to determine the manner of their election, whether by open or secret ballot, and whether by local bodies or by general suffrage; the tenure by which they shall hold their respective offices; the grounds on which their election may be contested, the tribunals before which such contest shall be made, the manner in which it shall be conducted, and the effect to be given to the decision rendered. With none of these things can the government of the United States interfere. In all these particulars the states, to use the language of Mr. Justice Nelson, are as independent of the general government as that government within its sphere is independent of the states. Its power of interference with the administration of the affairs of the state and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened.

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Const. art. 4, § 4. Except as required for these purposes, it can no more interfere with the qualifications, election, and installation of the state officers than a foreign government. And all attempts at interference with them in those respects by the executive, legislative, or judicial departments of the general government are in my judgment so [596] many invasions upon the reserved rights of the states and assaults upon their constitutional autonomy. No clause of the Constitution can be named which in any respect gives countenance to such invasion. The fact that one of the qualifications prescribed by the state for its officers can only be ascertained and established by considering the provisions of a law of the United States in no respect authorizes an interference by the general government with the state action."

This court has a different view of these questions, and, taking jurisdiction, considered the merits of the case, so far as it involved Federal questions, and rendered a judgment which, by its necessary operation, put into the office of governor of Nebraska one whom the highest court of that state had adjudged not to be the lawful incumbent.

The latest case involving the present question is *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435. That was an action in the nature of quo warranto to test the title to a state office. Judgment was rendered for the plaintiff. The defendant claimed that the state statute and the action taken under it not only deprived him of his office without due process of law, but denied to him the equal protection of the laws, both in violation of the 14th Amendment. In this court a motion to dismiss the writ of error was sustained upon the ground that, looking at what occurred in the state court, there was "no fair color for claiming that his [the plaintiff's] rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws." After observing that this court would be very reluctant to decide that we had jurisdiction in the case presented, and could supervise and review the political administration of a state government by its own officials and through its own courts, great care was taken to say: "The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty, or [597] property in violation of the provisions of the Federal Constitution." Here, as I think, is a distinct declaration that this court has jurisdiction to review the final judgment of a state court, involving the title to a state office, where there has been a plain and substantial departure from the principles that underlie the requirement of due process of law. The opinion in *Wilson v. North Carolina* shows a deliberate consideration of the

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scope of the 14th Amendment, and a refusal to hold, as is now held, that a contest about a state office could not, under any circumstances, involve rights secured by that Amendment. We there substantially declared that the constitutional requirement of due process of law could be enforced by this court where, in depriving a party of a state office, there had been a plain and substantial departure from the fundamental principles upon which our government is based.

It thus appears that in four cases, heretofore decided, this court has proceeded upon the ground that to deprive one without due process of law of an office created under the laws of a state, presented a case under the 14th Amendment to the Constitution of the United States of which we could take cognizance and inquire whether there had been due process of law.

Nothing to the contrary was decided in the *Sawyer Case*, 124 U. S. 220, 31 L. ed. 409, 8 Sup. Ct. Rep. 482. That case contains no suggestion that an office is not property. The only point there in judgment was that a court of equity could not control the appointment or removal of public officers. The court said: "The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a state." But care was taken further to say: "If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings, or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court." So that the *Sawyer Case* directly supports [598] the proposition that the judgment *of the highest court of a state depriving one of a state office may be re-examined here, if the incumbent has specially claimed that he has been deprived of it without due process of law. That the point adjudged in *Sawyer's Case* was as I have stated is seen from the opinion in *White v. Berry*, 171 U. S. 366, 43 L. ed. 199, 18 Sup. Ct. Rep. 917, in which it was said: "But the court in its opinion in that case observed that under the Constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, had been maintained although both jurisdictions were vested in the same courts, and held that a court of equity had no jurisdiction over the appointment and removal of public officers, and that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the government."

Notwithstanding the above adjudications, the decision to-day is that this court has no jurisdiction, under any circumstances, to inquire whether a citizen has been deprived,

without due process of law, of an office held by him under the Constitution and laws of his state. If the contest between the one holding the office and the person seeking to hold it is determinable by the legislature in a prescribed mode, this court, it appears, cannot inquire whether that mode was pursued nor interfere for the protection of the incumbent, even where the final action of the legislature was confessedly capricious and arbitrary, inconsistent with the fundamental doctrines upon which our government is based and the recognized principles that belong to due process of law, and not resting, in any degree, on evidence. If the Kentucky legislature had wholly disregarded the mode prescribed by the statutes of that commonwealth, and without appointing a board of contest composed of its own members, had, by joint resolution simply—without any evidence whatever or without notice to Taylor and without giving him an opportunity to be heard—declared Goebel to be governor, this court, as we are informed by the decision just rendered, would be without jurisdiction to protect the incumbent, *for the [599] reason, as is now adjudged, that the office in dispute is not "property" within the meaning of the 14th Amendment. So that while we may inquire whether a citizen's land, worth \$100, or his mules, have been taken from him by the legislative or judicial authorities of his state without due process of law, we may not inquire whether the legislative or judicial authorities of a state have, without due process of law, ousted one lawfully elected and holding the office of governor for a fixed term, with a salary payable at stated times, and put into his place one whom the people had said should not exercise the authority appertaining to that high position. It was long ago adjudged by the court of appeals of Kentucky that an office was "a valuable right and interest." *Page v. Hardin*, 8 B. Mon. 672. In *Com. v. Jones*, 10 Bush, 735, the same court, referring to the provision in the Constitution of Kentucky depriving any person who fought a duel of the right to hold an office, said: It "is, in effect, to dispossess him of a right which the Supreme Court of the United States terms 'inalienable' ([*Cummings v. Missouri*], 4 Wall. 321, 18 L. ed. 362), to take from him 'rights, privileges, and immunities' to which he had been entitled, . . . and to strip him of one of the highest and most valued attributes of citizenship. . . . The word 'deprived' is used in this section in the same sense in which it is used in section 12 of the Bill of Rights and in the 5th Article of Amendment to the Federal Constitution."

When the 14th Amendment forbade any state from depriving any person of life, liberty, or property without due process of law, I had supposed that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibitions of that Amendment, as we have often said, apply to all the instrumentalities of the state, to its legislative, executive, and judicial authori-

ties; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that "whoever by virtue of public position under a state government deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional *inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or [as we have often said] the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108. Alluding to a contention that the party—a railroad company—which invoked the 14th Amendment for the protection of its property, had the benefit of due process of law in the proceedings against it, because it had due notice of those proceedings and was admitted to appear and make defense, this court has also said: "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, and not to form." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. Again, in another case: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand . . . it is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064. See also *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

It is said that the courts cannot, in any case, go behind the final action of the legislature to ascertain whether that which was done was consistent with rights claimed under the Federal Constitution. If this be true then it is in the power of the state legislature to override the supreme law of the land. As long ago as *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618, this court, speaking by Mr. Justice Miller, said: "Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no [601] avail, or has no application *where the invasion of private rights is effected under the forms of state legislation." More recently we have said: "The idea that any legislature, state or Federal, can conclusively de-

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termine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. The function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

I had supposed that the principles announced in the cases above cited were firmly established in the jurisprudence of this court, and that, if applied, they would serve to protect every right that could be brought within judicial cognizance against deprivation in violation of due process of law.

It seems, however,—if I do not misapprehend the scope of the decision now rendered,—that under our system of government the right of a person to exercise a state office to which he has been lawfully chosen by popular vote may, so far as the Constitution of the United States is concerned, be taken from him by the arbitrary action of a state legislature, in utter disregard of the principle that Anglo-Saxon freemen have for centuries deemed to be essential in the requirement of due process of law—a principle reaffirmed in the Kentucky Bill of Rights, which declares that "absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic, not even in the largest majority." § 2. I cannot assent to the interpretation now given to the 14th Amendment.

Let us look at the question from another standpoint. The requirement of due process of law is applicable to the United States as well as to the states; for the 5th Amendment—which all agree is a limitation on the authority of Federal agencies—*declares that [602] "no person shall . . . be deprived of life, liberty, or property without due process of law." If Congress by some enactment should attempt, in violation of due process of law, to deprive one of an office held by him under the United States, will not the decision this day rendered compel this court to declare that such office is not property within the meaning of the 5th Amendment, and therefore the incumbent would be without remedy unless he could invoke the protection of some other clause of the Constitution than the one in the Amendment relating to due process of law? Or, would the court hold that while a Federal office is property within the meaning of the clause in the 5th Amendment declaring that "no person shall . . . be deprived of life, liberty, or property without due process of law," a state office is not property within the meaning of the clause in

the 14th Amendment declaring, "nor shall any state deprive any person of life, liberty, or property without due process of law?" Can it be that Congress may not deprive one of a Federal office without due process of law, but that a state may deprive one of a state office without due process of law?

I stand by the former rulings of this court in the cases above cited. I am of opinion that, equally with tangible property that may be bought and sold in the market, an office—certainly one established by the Constitution of a state, to which office a salary is attached, and which cannot be abolished at the will of the legislature—is, in the highest sense, property of which the incumbent cannot be deprived arbitrarily in disregard of due process of law; that is, as this court said in *Kennard v. Louisiana*, in disregard of the "rules and forms which have been established for the protection of private rights." Apart from every other consideration, the right to receive and enjoy the salary attached to such an office is a right of property. And a right of property should be deemed property, unless we mean to play with words, and regard form rather than substance.

[603] I go farther. The liberty of which the 14th Amendment forbids a state from depriving anyone without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the *words "life, liberty, or property" in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of "due process of law."

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, this court unanimously held that the liberty mentioned in the 14th Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Cooley, speaking for the supreme court of Michigan in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, after observing that some things were too plain to be written, said: "Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured, and guarded; in one's liberties, as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his conscience, his equality with all others who are his fellow citizens; all these guarded and protected

and not held at the mercy and discretion of any one man or of any popular majority. Story, *Miscellaneous Writings*, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it."

The doctrine that liberty means something more than freedom from physical restraint is well illustrated in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, in which it was said that although the right of suffrage comes from the state, yet when granted it will be protected, and he "who has it can only be deprived of it by due process of law."

What more directly involves the liberty of the citizen than *to be able to enter upon the [604] discharge of the duties of an office to which he has been lawfully elected by his fellow citizens? What more certainly infringes upon his liberty than for the legislature of the state, by merely arbitrary action, in violation of the rules and forms required by due process of law, to take from him the right to discharge the public duties imposed upon him by his fellow citizens in accordance with law? Can it be that the right to pursue a lawful calling is a part of one's liberty secured by the 14th Amendment against illegal deprivation; and yet the right to exercise an office to which one has been elected and into which he has been lawfully inducted is no part of the incumbent's liberty, and may be disregarded by the mere edict of a legislative body, sitting under a Constitution which declares that absolute arbitrary power exists nowhere in a Republic? Can it be that the right to vote, once given, cannot, under the 14th Amendment, be taken away except by due process of law,—and it was so decided in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627,—and yet that the right of the person voted for to hold and exercise the functions of the office to which he was elected can, without violating that Amendment, be taken away without due process of law? Does the liberty of an American embrace his right to vote without discrimination against him on account of race, color, or previous condition of servitude, and yet not embrace his right to serve in a position of public trust to which he has been lawfully called by his fellow citizens who voted for him? The liberty of which I am speaking is that which exists, and which can exist, only under a republican form of government. "The United States," the supreme law of the land declares, "shall guarantee to every state in this Union a republican form of government." And "the distinguishing feature of that form," this court has said, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Re Duncan*, 139 U. S. 461, *sub nom. Duncan v. McCall*, 35 L. ed. 224, 11 Sup. Ct. Rep. 573. But of what value is that right if the person selected by

[605] the people at the polls for an office provided for by the Constitution, and holding a certificate *of election, may be deprived of that office by the arbitrary action of the legislature proceeding altogether without evidence?

I grant that it is competent for a state to provide for the determination of contested election cases by the legislature. All that I now seek to maintain is the proposition that when a state legislature deals with a matter within its jurisdiction, and which involves the life, liberty, or property of the citizen, it cannot ignore the requirement of due process of law. What due process of law may require in particular cases may not be applicable in other cases. The essential principle is that the state shall not by any of its agencies destroy or impair any right appertaining to life, liberty, or property in violation of the principles upon which the requirement of due process of law rests. That requirement is "a restraint on the legislative as well as on the executive and judicial powers of the government." *Den ex dem. Murray v. Hoboken Land & Imp. Co.* 18 How. 272, 276, 15 L. ed. 372, 374; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. "That government can scarcely be deemed to be free," this court has said, "where the rights of property are left solely dependent upon the will of a legislative body without any restraint." *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542.

It is to be regretted that it should be deemed necessary in a case like this to depart from the principles heretofore announced and acted upon by this court.

Looking into the record before us, I find such action taken by the body claiming to be organized as the lawful legislature of Kentucky as was discreditable in the last degree and unworthy of the free people whom it professed to represent. The statute required the board of contest to give "true judgment" on the case, "according to the evidence." And when the statute further declared that the decision of the board should be reported to the two houses "for the future action of the general assembly," that such decision should not be "final and conclusive," and that the general assembly should determine the contest, it meant, of course, that such determination should rest upon the issues made by the parties and upon the evidence adduced before the board of contest. If the evidence had been before the legislature it would have been physically im-
[606] possible *to have examined it; for, as we have seen, its final action was taken immediately after the board of contest reported its decision. But, as heretofore stated, the evidence before the board was not transmitted to the legislature, nor were the grounds upon which the board proceeded disclosed. Yet the body which assumed to determine who had been elected governor, without having before it one particle of the proof taken upon the issues made by the notice of contest, "adjudged" that Goebel had been legally elected
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governor of Kentucky. No such farce under the guise of formal proceedings was ever enacted in the presence of a free people who take pride in the fact that our American governments are governments of laws and not of men. That which was done was not equivalent to a decision or judgment or determination by the legislature of a matter committed to it by law. It should be regarded merely as an exercise of arbitrary power by a given number of men who defied the law. It is not a pleasant thing to say—but after a thorough examination of the record a sense of duty constrains me to say—that the declaration by that body of men that Goebel was legally elected ought not to be respected in any court as a determination of the question in issue, but should be regarded only as action taken outside of law, in utter contempt of the constitutional right of freemen to select their rulers. They had no *jurisdiction to determine* the contest for governor *except upon the evidence introduced before the board of contest*, and in the absence of such evidence they were without authority to declare anything except that Taylor's right to the office of governor, based upon the certificate awarded him, had not been impaired. Their determination of the contest without having the evidence before them could have no greater effect in law than if the issue had been determined simply by a joint resolution, without taking proof or without notifying or hearing the parties interested.

It is to be also said that a fair interpretation of the record leads irresistibly to the conclusion that the body of men referred to were wholly indifferent as to the nature of the evidence adduced before the board of contest, and that there was a fixed purpose on their part, whatever the facts might be, to *put Goebel into office and to oust Taylor. [607] Under the evidence in the case no result favorable to Goebel could have been reached on any ground upon which the board of contest or the legislature had jurisdiction to act. The Constitution of Kentucky, as we have seen, declares that "the person *having* the highest number of votes shall be governor." And the statute provides that the person returned having *received* the highest number of legal votes given "shall be adjudged to be the person elected and entitled to the office." With the Constitution and the statutes of the state before him when preparing his notice to Taylor of contest, Goebel, it is true, did claim in very general terms that he was legally and rightfully elected; but he took care not to say—there is reason to believe that he purposely avoided saying—that he had *received* the highest number of legal votes case for governor. The evidence renders it clear that the declaration that he had received the highest number of legal votes cast was in total disregard of the facts—a declaration as extravagant as one adjudging that white was black, or that black was white. But such a declaration made by the body to which the board of contest reported should not surprise anyone when it is remembered that it came from those who did

not have before them any of the proof taken in the case and were willing to act without proof. Those who composed that body seemed to have shut their eyes against the proof for fear that it would compel them to respect the popular will as expressed at the polls. Indignant, as naturally they were and should have been, at the assassination of their leader, they proceeded in defiance of all the forms of law and in contempt of the principles upon which free governments rest, to avenge that terrible crime by committing another crime, namely, the destruction by arbitrary methods of the right of the people to choose their chief magistrate. The former crime, if the offender be discovered, can be punished as directed by law. The latter should not be rewarded by a declaration of the inability of the judiciary to protect public and private rights, and thereby the rights of voters, against the wilful, arbitrary action of a legislative tribunal which, we must assume from the record, deliberately acted upon a contested election case involving the [608] rights *of the people and of their chosen representative in the office of governor without looking into the evidence upon which alone any lawful determination of the case could be made. The assassination of an individual demands the severest punishment which it is competent for human laws in a free land to prescribe. But the overturning of the public will, as expressed at the ballot box, without evidence or against evidence, in order to accomplish partisan ends, is a crime against free government, and deserves the execration of all lovers of liberty. Judge Burnam, speaking for himself and Judge Guffy in the court of appeals of Kentucky, although compelled, in his view of the law, to hold the action of the legislature to be conclusive, said: "It is hard to imagine a more flagrant and partisan disregard of the modes of procedure which should govern a judicial tribunal in the determination of a great and important issue than is made manifest by the facts alleged and relied on by the contestees, and admitted by the demurrer filed in this action to be true, and I am firmly convinced, both from these admitted facts and from knowledge of the current history of these transactions, that the general assembly, in the heat of anger, engendered by the intense partisan excitement which was at the time prevailing, have done two faithful, conscientious, and able public servants an irreparable injury in depriving them of the offices to which they were elected by the people of this commonwealth, and a still greater wrong has been done a large majority of the electors of this commonwealth, who voted under difficult circumstances to elect these gentlemen to act as their servants in the discharge of the duties of these great offices." I cannot believe that the judiciary is helpless in the presence of such a crime. The person elected, as well as the people who elected him, have rights that the courts may protect. To say that in such an emergency the judiciary cannot interfere is to subordinate right to mere power, and to recognize the legislature of a state as above the su-

preme law of the land. The Constitution of Kentucky expressly forbids the exercise of absolute and arbitrary power over the lives, liberty, or property of freemen. And that principle is at the very foundation of the government of the Union. Indeed, to sustain that principle our *fathers waged the war for independence and established the Constitution of the United States. Yet by the decision this day rendered, no redress can be had in the courts when a legislative body, or one recognized as such by the courts, without due process of law, by the exercise of absolute, arbitrary power, and without evidence, takes an office having a fixed salary attached thereto from one who has been lawfully elected to such office by the voters of the state at a regular election. The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law.

Other grounds are disclosed by the record which support the general proposition that the declaration by the body referred to, that Goebel received the highest number of legal votes cast and was entitled to the office of governor, ought not to be regarded as valid, much less conclusive, upon the courts. But as those grounds have not been discussed by this court, and as it declines to determine the case upon the merits as disclosed by the evidence, I will not extend this opinion by commenting on them.

What has been said in this opinion as to the contest for governor applies to the contest for lieutenant governor.

I am of opinion that the writ of error should not have been dismissed, and that the court should have adjudged that the decree below took from Taylor and Marshall rights protected by the 14th Amendment of the Constitution of the United States.

*WILLIAM S. TAYLOR and John Marshall, [610]
Plffs. in Err.,
v.

J. C. W. BECKHAM.

(See S. C. Reporter's ed. 610.)

[No. 604.]

[N ERROR to the Court of Appeals of the State of Kentucky.

Mr. Chief Justice **Fuller**: These were suits in equity brought by Taylor and Marshall against Beckham, and one Carter, asserting himself to be the president *pro tempore* of the senate of Kentucky, with the right to preside over that body though Marshall was present, in which complainants prayed for injunctions restraining defendants from interfering with complainants in their offices. These suits were heard with the case of *Taylor v. Beckham*, just decided. 178 U. S. 548, *ante*, 1187, 20 Sup. Ct. Rep. 890. When the circuit court of Jefferson

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county reached the conclusion that Beckham was entitled to the office of governor and entered judgment of ouster, it dismissed the suits. From the decrees appeals were taken to the court of appeals of Kentucky, where they were affirmed, and thereafter a writ of error from this court was allowed. It results from the conclusions announced in the preceding case that the *writ of error must be dismissed, and it is so ordered.*

Mr. Justice **McKenna** concurs in the result.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[611]*WILLIAM BOYLE, *Plaintiff in Error*, v. BARTLETT SINCLAIR. [No. 402.]

In Error to the Supreme Court of the State of Idaho.

Mr. William A. Maury for plaintiff in error. Mr. Samuel H. Hays for defendant in error.

May 14, 1900. Dismissed with costs, on the authority of *Wales v. Whitney*, 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050.

PIN KWAN, *Petitioner*, v. UNITED STATES. [No. 609.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

April 30, 1900. Granted.

PING YIK, *Petitioner*, v. UNITED STATES. [No. 610.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

April 30, 1900. Granted.

CENTRAL TRUST COMPANY OF NEW YORK, *Petitioner*, v. INDIANA & LAKE MICHIGAN RAILWAY COMPANY *et al.* [No. 594.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. A. L. Mason, A. H. Joline, and Henry Crawford for petitioner. Messrs. Lawrence Maxwell, Jr., and S. O. Pickens for respondents.

April 30, 1900. Denied.

MICHAEL O'BRIEN *et al.*, Executors, etc., *Petitioners*, v. JOHN G. WHELOCK *et al.* [No. 588.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

May 14, 1900. Granted.

NATIONAL BANK OF BALTIMORE, *Petitioner*, v. BRUNSWICK TERMINAL COMPANY *et al.* [No. 571.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. William A. Fisher and Allan M. Lane for petitioner. Mr. Henry W. Williams for respondents.

May 14, 1900. Denied.

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*GUARANTEE COMPANY OF NORTH AMERICA, [612] *Petitioner*, v. MECHANICS' SAVINGS BANK & TRUST COMPANY, ETC. [No. 617.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

May 14, 1900. Granted.

SUN PRINTING & PUBLISHING ASSOCIATION, *Petitioner*, v. WILLIAM L. MOORE. [No. 618.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

May 14, 1900. Granted.

MELLE S. T. WERNER, *Petitioner*, v. WILLIAM R. HEARST. [No. 619.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Roger M. Sherman for petitioner. Mr. Frederic D. McKenney for respondent.

May 14, 1900. Denied.

CITY OF LAMPASAS, *Petitioner*, v. JAMES TALCOTT. [No. 591.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Clarence H. Miller for petitioner. No opposition.

May 14, 1900. Denied.

MARY B. HOOK, *Petitioner*, v. MERCANTILE TRUST COMPANY OF NEW YORK *et al.* [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. William Brown, S. P. Wheeler, and E. P. Kirby for petitioner. Messrs. Bluford Wilson and Philip Barton Warren for respondents.

May 21, 1900. Denied.

ISABELLA BENZ, *Petitioner*, v. ILLINOIS CENTRAL RAILROAD COMPANY. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Don M. Dickinson and T. B. Turley for petitioner. Mr. J. M. Dickinson for respondent.

May 21, 1900. Denied.

HOLZAPFELS COMPOSITIONS COMPANY, LIMITED, *Petitioner, v. RAHTJENS AMERICAN COMPOSITIONS COMPANY.* [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

May 21, 1900. Granted.

CHARLES M. OWEN *et al.*, *Petitioners, v. EUGENE E. JONES, Receiver, etc.* [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[613] *Messrs. J. J. Darlington and Charles A. Douglass for petitioners. Mr. Alex. C. King for respondent.

May 21, 1900. Denied.

JACOB P. SMITH, *Petitioner, v. ANDREW J. PACKARD.* [No. 630.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. A. B. Browne, and Frank F. Reed for petitioner. Mr. Leroy D. Thoman for respondent.

May 21, 1900. Denied.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLO., *Petitioner, v. JAMES R. SUTLIFF.* [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

May 21, 1900. Granted.

CITY OF NEW YORK *et al.*, *Petitioners, v. JAMES C. E. D'ESTERRE.* [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. George L. Sterling for petitioners. Mr. Henry B. B. Stapler for respondent.

May 21, 1900. Denied.

NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO., *Petitioner, v. EDWARD A. HOBBS.* [No. 638.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Omar Powell and Elijah Robinson for petitioner. Messrs. Charles E. Patterson and Alpheus T. Bulkeley for respondent.

May 21, 1900. Denied.

NORTHERN ASSURANCE COMPANY, OF LONDON, ENGLAND, *Petitioner, v. GRAND VIEW BUILDING ASSOCIATION.* [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

May 21, 1900. Granted.

FRANK M. DORSEY, *Petitioner, v. UNITED STATES.* [No. 640.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. J. M. Wilson and A. A. Hoehling, Jr., for petitioner. Solicitor General Richards for respondent.

May 21, 1900. Denied.

THOMAS ROY, Master, etc., *Petitioner, v. SHIPS WATERLOO AND GLENALVON.* [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. John F. Lewis and Horace L. Cheyney for petitioner. Mr. J. Rodman Paul for respondent.

May 21, 1900. Denied.

THOMAS ROY, Master, etc., *Petitioner, v. GIRARD POINT STORAGE COMPANY.* [No. 642.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. John F. Lewis and Horace L. Cheyney for petitioner. Mr. John Hampton Barnes for respondent.

May 21, 1900. Denied.

UNITED STATES REPAIR & GUARANTY COMPANY, *Petitioner, v. ASSYRIAN ASPHALT COMPANY.* [No. 643.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

May 21, 1900. Granted.

SARAH R. ANGLE, Administratrix, etc., *et al.*, *Petitioners, v. CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY et al.* [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Milton I. Southard, F. J. Lamb, and Burr W. Jones for petitioners.

Messrs. Thomas Wilson and S. A. Lynde for respondents.

May 21, 1900. Denied.

LAKE STREET ELEVATED RAILROAD COMPANY, *Petitioner, v. FARMERS' LOAN & TRUST COMPANY et al.* [No. 648.]

Petition for a Writ of Certiorari to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Clarence Knight for petitioner. Messrs. Herbert B. Turner, William Burry, John J. Herrick, and Monroe L. Willard for respondents.

May 21, 1900. Denied.

UNITED STATES, *Petitioner, v. AMERICAN STEAMSHIP LAURADA, ETC.* [No. 650.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

May 21, 1900. Granted. Mr. Justice McKenna took no part in the consideration or decision of this application.

CITY OF NEW ORLEANS, *Petitioner, v. ANN WARNER et al.* [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

May 28, 1900. Granted.

[615]*LEWIS J. YEAGER, *Petitioner, v. UNITED STATES.* [No. 655.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. H. J. May and F. Edward Mitchell for petitioner. Solicitor General Richards for respondent.

May 28, 1900. Denied.

WALTER BIRD, *Petitioner, v. STEPHEN P. HALSEY.* [No. 656.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. F. S. Kirkpatrick for petitioner. Mr. John W. Daniel for respondent.

May 28, 1900. Denied.

AMERICAN SUGAR REFINING COMPANY, *Petitioner, v. UNITED STATES.* [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

May 28, 1900. Granted.

TENTH RULE.

TOWNSHIP OF GARFIELD *et al., Plaintiffs in Error, v. LEWIS A. RILEY.* [No. 75.]

In Error to the Supreme Court of the State of Kansas.

Mr. W. Littlefield for plaintiffs in error. No counsel for defendant in error.

October 24, 1899. Dismissed with costs, pursuant to the 10th Rule.

GEORGE WEBSTER, *Appellant, v. R. D. SPECK, Sheriff, etc.* [No. 443.]

Appeal from the Circuit Court of the United States for the District of Washington.

Mr. James Hamilton Lewis for appellant. No counsel opposed.

January 8, 1900. Dismissed with costs, pursuant to the 10th Rule.

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TOWNSHIP OF GARFIELD, FINNEY COUNTY, KANSAS, *et al., Plaintiffs in Error and Appellants, v. C. H. POTTER & Co.* [No. 111.]

In Error to and Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. W. Littlefield for plaintiffs in error and appellants. No counsel for defendants in error and appellees.

January 17, 1900. Dismissed with costs, pursuant to the 10th Rule.

G. W. BOYD *et al., Appellants, v. J. L. SWEET, County Treasurer, et al.* [No. 133.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. Horace Speed for appellants. Messrs. Harper S. Cunningham, Charles Dick, and F. C. Bryan for appellees.

January 29, 1900. Dismissed with costs, pursuant to the 10th Rule.

BESSIE BARNETT, *Appellant, v. JOSEPH BARNETT.* [No. 144.]

Appeal from the Supreme Court of the Territory of New Mexico.

Messrs. F. W. Clancy and Thomas A. Finical for appellant. Mr. W. B. Childers for appellee.

January 31, 1900. Dismissed with costs, pursuant to the 10th Rule.

JOHANNA QUIRK, *Appellant, v. WILLIAM W. LIEBERT.* [No. 146.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Robert Andrews and J. Miller Kenyon for appellant. Messrs. F. L. Williams, James S. Edwards, and Job Barnard for appellee.

February 1, 1900. Dismissed with costs, pursuant to the 10th Rule.

BENJAMIN LOMBARD, JR., *Plaintiff in Error, v. B. F. McMILLAN et al.* [No. 147.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. Louis A. Pradt for plaintiff in error. Messrs. T. C. Ryan, M. A. Hurley, and W. H. Mylrea for defendants in error.

February 1, 1900. Dismissed with costs, pursuant to the 10th Rule.

WAPLES PLATTER CO. *et al., Plaintiffs in Error, v. C. W. TURNER.* [No. 151.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Arthur G. Moseley for plaintiffs in error. Mr. Wm. T. Hutchings for defendant in error.

February 1, 1900. Dismissed with costs, pursuant to the 10th Rule.

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D. L. BOYD et al., Appellants, v. United STATES. [No. 161.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. R. R. McMahon for appellants. *The Attorney General* for appellee.

February 2, 1900. Dismissed, pursuant to the 10th Rule.

ANNIE R. KEAN, Plaintiff in Error, v. EDWARD ROBY et al. [No. 98.]

In Error to the Supreme Court of the State of Indiana.

Mr. William P. Fennell for plaintiff in error. *Messrs. Edward Roby, W. H. H. Miller, and J. B. Elam* for defendants in error.

February 26, 1900. Dismissed with costs, pursuant to the 10th Rule.

FRED MILLER BREWING COMPANY, Plaintiff in Error, v. W. M. STEVENS et al. [No. 173.]

In Error to the Supreme Court of the State of Iowa.

Mr. Henry J. Taylor for plaintiff in error. No counsel for defendants in error.

March 2, 1900. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM PELZER, Petitioner, v. HORN & BRANNEN MANUFACTURING COMPANY. [No. 196.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Richard N. Dyer for petitioner. *Mr. Hector T. Fenton* for respondent.

March 14, 1900. Dismissed with costs, pursuant to the 10th Rule.

J. H. HAMPSON, Appellant, v. FRANK DY-SART. [No. 205.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. W. H. Barnes for appellant. No counsel for appellee.

March 19, 1900. Dismissed with costs, pursuant to the 10th Rule.

A. H. BISHOP, etc., Appellant, v. EXCELSIOR NEEDLE COMPANY et al. [No. 221.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Joseph V. Graff for appellant. *Messrs. J. M. Flower, F. J. Smith, and Harrison Musgrave* for appellees.

March 21, 1900. Dismissed with costs, pursuant to the 10th Rule.

J. W. GOODSON, Appellant, v. J. S. RALEY et al. [No. 224.]

Appeal from the District Court of the United States for the Southern District of Georgia.

Mr. Clifford Anderson for appellant. No counsel for appellees.

March 22, 1900. Dismissed with costs, pursuant to the 10th Rule.

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JOSEPH B. GLENN et al., Appellants, v. CHOCTAW NATION. [No. 226.]

Appeal from the United States Court in the Indian Territory.

Messrs. Yancey Lewis, W. W. Dudley, and L. T. Michener for appellants. No counsel for appellee.

March 22, 1900. Dismissed with costs, pursuant to the 10th Rule.

HAZEN S. PINGREE, Plaintiff in Error, v. MICHIGAN CENTRAL RAILROAD COMPANY. [No. 230.]

In Error to the Supreme Court of the State of Michigan.

Mr. Fred A. Maynard for plaintiff in error. No counsel for defendant in error.

March 23, 1900. Dismissed with costs, pursuant to the 10th Rule.

GLENN TUCKER et al., Appellants, v. CHOCTAW NATION. [No. 231.]

Appeal from the United States Court in the Indian Territory.

Mr. J. C. Hodges for appellants. No counsel for appellee.

March 23, 1900. Dismissed with costs, pursuant to the 10th Rule.

BLANCHE I. HARRISON et al., Plaintiffs in Error, v. FRANKLIN J. MORTON. [No. 223.]

In Error to the Court of Appeals of the State of Maryland.

Mr. R. H. Spencer for plaintiffs in error. *Mr. Edgar H. Gans* for defendant in error.

April 16, 1900. Dismissed with costs, pursuant to the 10th Rule.

JAMES C. BERRYHILL et al., Appellants, v. MUSKOGEE NATION. [No. 252.]

Appeal from the United States Court in the Indian Territory.

Mr. George P. M. Turner for appellants. No counsel for appellee.

April 17, 1900. Dismissed with costs, pursuant to the 10th Rule.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. IRA STEINBERGER. [No. 254.]

In Error to the Supreme Court of the State of Kansas.

Messrs. James Hagerman and T. N. Sedgwick for plaintiff in error. No counsel for defendant in error.

April 17, 1900. Dismissed with costs, pursuant to the 10th Rule.

RACHEL GARDINER et al., Appellants, v. CREEK NATION. [No. 282.]

Appeal from the United States Court in the Indian Territory.

Mr. Napoleon B. Maxcey for appellants. No counsel for appellee.

April 27, 1900. Dismissed with costs, pursuant to the 10th Rule.

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NINETEENTH RULE.

JOHN A. GORDON, *Appellant*, v. UNITED STATES. [No. 25.]

Appeal from the Court of Claims.

Messrs. John Paul Jones and F. P. Dewees for appellant. The Attorney General for appellee.

October 11, 1899. Dismissed, pursuant to the 19th Rule.

TWENTY-EIGHTH RULE.

GEORGE DEER IN WATER, *Appellant*, v. LEO E. BENNETT, U. S. Marshal. [No. 159.]

Appeal from the United States Court in the Indian Territory.

Messrs. Wm. T. Hutchings, Wm. P. Thompson, and Yancey Lewis for appellant. Solicitor General Richards for appellee.

June 22, 1899. Dismissed, pursuant to the 28th Rule.

MISCELLANEOUS.

ST. LOUIS, ALTON, & SPRINGFIELD R. Co. *et al.*, *Plaintiffs in Error*, v. SETH F. CREWS *et al.* [No. 321.]

In Error to the Supreme Court of the State of Illinois.

Mr. Eleneious Smith for plaintiffs in error. Mr. Frederic D. McKenney for defendants in error.

June 2, 1899. Docketed and dismissed.

BARK "LORENZO" AND CARGO v. UNITED STATES. [No. 323.]

Appeal from the Circuit Court of the United States for the Southern District of Florida.

No counsel for appellant. The Attorney General for appellee.

June 5, 1899. Docketed and dismissed.

UNITED STATES, *Appellant*, v. THOMAS B. CATRON *et al.* [No. 34.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellant. Mr. T. B. Catron for appellees.

October 10, 1899. Dismissed, per stipulation, on motion of Assistant Attorney General Hoyt for the appellant.

ANDREW B. BAIRD *et al.*, *Appellants*, v. UNITED STATES. [No. 418.]

Appeal from the Court of Private Land Claims.

No counsel for appellants. The Attorney General for appellee.

October 10, 1899. Docketed and dismissed, on motion of Assistant Attorney General Hoyt for the appellee.

HARPER S. CUNNINGHAM, *Appellant*, v. UNITED STATES NATIONAL BANK *et al.* [No. 154.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. Harper S. Cunningham for appellant. Mr. Horace Speed for appellees.

October 11, 1899. Dismissed with costs, on motion of the appellant.

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SIMON F. MACKIE, *Appellant*, v. BRICKYARD GOLD MINING COMPANY *et al.* [No. 416.]

Appeal from the Circuit Court of the United States for the District of Utah.

Mr. A. T. Schroeder for appellant. Mr. S. M. Stockslager for appellees.

October 30, 1899. Dismissed, each party to pay its own costs, on motion of Mr. S. M. Stockslager for the appellees.

ROBERT L. TAYLOR *et al.*, *Appellants*, v. NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY. [No. 179.]

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Messrs. G. W. Pickle and Wm. L. Granbury for appellants. Mr. J. M. Dickinson for appellee.

October 30, 1899. Dismissed, per stipulation, on motion of Mr. J. M. Dickinson for the appellee.

DAYTON TRACTION COMPANY, *Plaintiff in Error*, v. AMY R. CAMPBELL. [No. 129.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. E. W. Kittredge for plaintiff in error. Mr. Charles W. Baker for defendant in error.

November 1, 1899. Dismissed with costs, on motion of counsel for plaintiff in error.

THOMAS G. HARDIE *et al.*, *Appellants*, v. EQUITABLE SECURITIES COMPANY. [No. 163.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. S. R. Cockrill for appellants. No counsel for appellee.

November 10, 1899. Dismissed with costs, on the authority of counsel for the appellants.

PATRICK CAHILL *et al.*, *Plaintiffs in Error*, v. C. H. BENSON *et al.* [No. 112.]

In Error to the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas.

Mr. F. M. Etheridge for plaintiffs in error. No counsel for defendants in error.

December 4, 1899. Dismissed with costs, on authority of counsel for plaintiffs in error.

JOHN A. POST *et al.*, *Plaintiffs in Error*, v. SOUTHERN RAILWAY COMPANY. [No. 358.]

In Error to the Supreme Court of the State of Tennessee.

Mr. Wm. H. Carroll for plaintiffs in error. No counsel for defendant in error.

December 4, 1899. Dismissed with costs, on authority of counsel for plaintiffs in error.

LOGANSPOUT & WABASH VALLEY GAS COMPANY, *Appellant*, v. CITY OF PERU. [No. 175.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Ferd. Winter for appellant. *Mr. W. H. H. Miller* for appellee.

December 11, 1899. Decree reversed, at the cost of the appellant, and cause remanded for further proceedings, per stipulation of counsel, on motion of *Mr. W. H. H. Miller* for the appellee.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, *Plaintiff in Error*, v. STATE OF INDIANA *ex rel.* WILLIAM A. KETCHAM, Attorney General. [No. 437.]

In Error to the Supreme Court of the State of Indiana.

Mr. W. H. Lyford for plaintiff in error. *Mr. W. L. Taylor* for defendant in error.

January 8, 1900. Dismissed, per stipulation of counsel.

HELEN DOUGLASS, *Appellant*, v. LEWIS H. DOUGLAS *et al.* [No. 99.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. B. F. Leighton, George Frances Williams, and W. H. H. Hart for appellant. *Messrs. John Ridout, E. H. Thomas, and E. M. Hewlett* for appellees.

January 8, 1900. Dismissed with costs, per stipulation of counsel, on motion of *Mr. B. F. Leighton* for the appellant.

NANCY B. HARGROVE *et al.*, *Appellants*, v. CHEROKEE NATION. [No. 239.]

Appeal from the United States Court in the Indian Territory.

Mr. Heber J. May for appellants. No counsel for appellee.

January 15, 1900. Dismissed with costs, on motion of *Mr. Heber J. May* for the appellants.

THOMAS L. CLINKENBEARD *et al.*, *Appellants*, v. CHEROKEE NATION. [No. 240.]

Appeal from the United States Court in the Indian Territory.

Mr. Heber J. May for appellants. No counsel for appellee.

January 15, 1900. Dismissed with costs, on motion of *Mr. Heber J. May* for the appellants.

BOARD OF SUPERVISORS OF PRESQUE ISLE COUNTY, *Plaintiff in Error*, v. WILLIAM J. ASHLEY. [No. 197.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Mr. Henry M. Duffield for plaintiff in error. *Mr. C. E. Warner* for defendant in error.

January 17, 1900. Dismissed, per stipulation.

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S. DUFFIELD MITCHELL, Trustee, etc., *Plaintiff in Error*, v. J. McD. SCOTT, Bankrupt. [No. 236.]

In Error to the District Court of the United States for the Western District of Pennsylvania.

Mr. Thomas Patterson and *S. D. Mitchell* for plaintiff in error. No counsel for defendant in error.

January 22, 1900. Dismissed with costs, on authority of counsel for the plaintiff in error.

S. R. PHELPS *et al.*, *Plaintiffs in Error*, v. S. J. JOHNSON, as Administrator, etc., *et al.* [No. 162.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. John P. Kellas and J. H. Ralston for plaintiffs in error. *Messrs. U. M. Rose and G. B. Rose* for defendants in error.

January 26, 1900. Dismissed with costs, on the authority of counsel for the plaintiffs in error.

ROBERT BERGER, *Appellant*, v. JAMES PEASE, Sheriff, etc. [No. 118.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Levy Mayer for appellant. *Charles S. Dcneen* for appellee.

January 29, 1900. Order affirmed with costs, on the authority of *Markuson v. Boucher*, 175 U. S. 184, *ante*, 124, 20 Sup. Ct. Rep. 76; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805, and cases cited.

JOSEPHINE BURNETT *et al.* *Plaintiffs in Error*, v. COMMONWEALTH OF MASSACHUSETTS. [No. 140.]

In Error to the Superior Court of the State of Massachusetts.

Messrs. W. S. B. Hopkins and William Warren Vaughan for plaintiffs in error. *Mr. Hosea M. Knowlton* for defendant in error.

January 30, 1900. Dismissed, per stipulation.

CROWN CORK & SEAL COMPANY OF BALTIMORE CITY, *Plaintiff in Error*, v. JOHN F. PARLETT, City Collector. [No. 136.]

In Error to the Court of Appeals of the State of Maryland.

Mr. William A. Fisher for plaintiff in error. *Mr. J. V. S. Findlay* for defendant in error.

January 31, 1900. Dismissed with costs, on authority of counsel for plaintiff in error.

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CROWN CORK & SEAL COMPANY OF BALTIMORE CITY, *Plaintiff in Error*, v. STATE OF MARYLAND. [No. 137.]

In Error to the Court of Appeals of the State of Maryland.

Mr. William A. Fisher for plaintiff in error. Mr. J. Alexander Preston for defendant in error.

January 31, 1900. Dismissed with costs, on authority of counsel for the plaintiff in error.

KNOXVILLE & OHIO RAILROAD COMPANY, *Plaintiff in Error*, v. JAMES A. HARRIS, Comptroller, etc. [No. 171.]

In Error to the Supreme Court of the State of Tennessee.

Mr. W. A. Henderson for plaintiff in error. Mr. G. W. Pickle for defendant in error.

February 1, 1900. Dismissed with costs, on the authority of counsel for the plaintiff in error.

UNION & PLANTERS' BANK, *Plaintiff in Error*, v. CITY OF MEMPHIS. [No. 125.]

In Error to the Supreme Court of the State of Tennessee.

Mr. William H. Carroll for plaintiff in error. Messrs. C. W. Metcalf and W. P. Metcalf for defendant in error.

February 2, 1900. Dismissed, per stipulation, on motion of Mr. William P. Metcalf for the defendant in error.

MANUELA VILLAESCUSA DE MARQUEZ *et al.*, *Appellants*, v. UNITED STATES. [No. 521.]

Appeal from the Court of Private Land Claims.

No counsel for appellants. *The Attorney General* for appellee.

February 2, 1900. Docketed and dismissed, on motion of *Solicitor General Richards* for the appellee.

FRANCIS E. SPENCER *et al.*, *Appellants*, v. UNITED STATES *et al.* [No. 520.]

Appeal from the Court of Private Land Claims.

No counsel for appellants. *The Attorney General* for appellees.

February 5, 1900. Docketed and dismissed, on motion of *Solicitor General Richards* for the appellees.

UNITED STATES, *Appellant*, v. BARTOLOME SANCHEZ *et al.* [No. 190.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellant. No counsel for appellees.

March 5, 1900. Dismissed, on motion of *Solicitor General Richards* for the appellant.

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NEW LINCOLN HOTEL COMPANY, *Plaintiff in Error*, v. PENN MUTUAL LIFE INSURANCE COMPANY. [No. 498.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Messrs. L. C. and C. L. Burr for plaintiff in error. Mr. C. S. Montgomery for defendant in error.

March 5, 1900. Dismissed with costs, per stipulation.

CANAL & CLAIBORNE RAILROAD COMPANY, *ETC.*, *et al.*, *Plaintiffs in Error*, v. STATE OF LOUISIANA *et al.* [No. 185.]

In Error to the Supreme Court of the State of Louisiana.

Mr. A. O. Bacon for plaintiffs in error. Mr. J. J. McLoughlin and S. L. Gilmore for defendants in error.

March 13, 1900. Dismissed with costs, on motion of Mr. A. O. Bacon for the plaintiffs in error.

ANTONIO GRIEGO *et al.*, *Appellants*, v. UNITED STATES. [No. 563.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellee. No counsel for appellants.

March 19, 1900. Docketed and dismissed on motion of *Solicitor General Richards* for the appellee.

JOSEPH H. GURULE *et al.*, *Appellants*, v. UNITED STATES *et al.* [No. 564.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellees. No counsel for appellants.

March 19, 1900. Docketed and dismissed, on motion of *Solicitor General Richards* for the appellees.

FLORENCIO SANDOVAL *et al.*, *Appellants*, v. UNITED STATES. [No. 565.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellee. No counsel for appellants.

March 19, 1900. Docketed and dismissed, on motion of *Solicitor General Richards* for the appellee.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, v. MATTIE WAGLEY *et al.* [No. 255.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, W. S. Pierce, and D. D. Duncan for plaintiff in error. No counsel for defendants in error.

March 19, 1900. Dismissed with costs, on motion of Mr. John F. Dillon for the plaintiff in error.

LIZZIE MANOQUE *et al.*, *Plaintiffs in Error*,
v. J. E. HERRELL *et al.* [No. 228.]
In Error to the Court of Appeals of the
District of Columbia.

Messrs. H. E. Davis, J. E. Padgett, and
Edwin Forrest for plaintiffs in error. Mr.
O. B. Hallam for defendants in error.

April 9, 1900. Dismissed with costs, on
authority of counsel for plaintiffs in error.

FRANK A. MAGOWAN, *Plaintiff in Error*, v.
MARY E. MAGOWAN. [No. 165.]

In Error to the Court of Errors and Ap-
peals of the State of New Jersey.

Messrs. Henry W. Scott, Joseph S. Clark,
and John B. Larner for plaintiff in error.
Mr. Francis C. Lowthorp for defendant in
error.

April 16, 1900. Dismissed with costs, on
motion of Mr. John B. Larner for the plain-
tiff in error.

JOHN W. SCHOFIELD, Receiver, etc., *et al.*,
Plaintiffs in Error, v. TERRITORY OF NEW
MEXICO *ex rel.* AMERICAN VALLEY COM-
PANY. [No. 315.]

In Error to the Supreme Court of the Ter-
ritory of New Mexico.

Mr. William B. Childers for plaintiffs in
error. Messrs. Neill B. Field and F. W.
Clancy for defendant in error.

April 26, 1900. Dismissed, on motion of
Mr. Neill B. Field for the defendant in error.

NEW YORK, PENNSYLVANIA, & OHIO RAIL-
ROAD COMPANY, *Plaintiff in Error*, v. COM-
MONWEALTH OF PENNSYLVANIA. [No.
294.]

In Error to the Supreme Court of the
State of Pennsylvania.

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Mr. Marlin E. Olmsted for plaintiff in
error. No counsel for defendant in error.

May 21, 1900. Dismissed with costs, on
motion of Mr. Marlin E. Olmsted for the
plaintiff in error.

FRED A. MAYNARD, Attorney General of
Michigan, *Petitioner*, v. GRANITE STATE
PROVIDENT ASSOCIATION *et al.* [No.
510.]

On Writ of Certiorari to the United States
Circuit Court of Appeals for the Sixth Cir-
cuit.

Mr. Fred. A. Maynard for petitioner. Mr.
Moses Taggart for respondents.

May 21, 1900. Dismissed with costs, per
stipulation.

BURTON S. BARNES *et al.*, *Plaintiffs in Error*
and *Appellants*, v. J. W. LYNCH *et al.*
[No. 553.]

In Error to and Appeal from the Supreme
Court of the Territory of Oklahoma.

Mr. John W. Shartel for plaintiffs in error
and appellants. Messrs. John C. Pollock,
Charles Dick, and F. C. Bryan for defendants
in error and appellees.

May 21, 1900. Dismissed with costs, per
stipulation.

FRANKLIN B. HAM, *Plaintiff in Error*, v.
BANQUE VILLE MARIE. [No. 666.]

In Error to the Supreme Court of the
State of Rhode Island.

No counsel for plaintiff in error. Mr.
William Fitch for defendant in error.

May 28, 1900. Docketed and dismissed
with costs, on motion of Mr. William Fitch
for the defendant in error.

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APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ORDER.

Ordered, that an amendment be made of rule 31 of this court, to take effect at the commencement of the October term, 1900, so that the rule, as amended, shall read as follows:

31.

Form of printed records and briefs: All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein and the covers thereof, must be printed in clear type (never smaller than small pica), and on unglazed paper.

Promulgated May 14, 1900.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ORDER.

The reporter having represented that, owing to the number of decisions at the term, it will be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

February 26, 1900.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of by the court, be, and the same are hereby, continued until the next term of the court.

May 28, 1900

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Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

PHILLIPS ACADEMY



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